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A TREATISE

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ON THE LAW OF

CORPORATIONS

HAVING A

CAPITAL STOCK

BY

WILLIAM W. COOK

OF THE NEW YORK BAR

FOURTH EDITION

VOL. II

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CONTENTS OF VOLUME II.

PART III.

MISCELLANEOUS RIGHTS OF STOCKHOLDERS.

CHAPTER XXV.

Stock-brokers and Their Contracts . . . . . § 445

CHAPTER XXVI.

Pledges and Mortgages of Stock 463

CHAPTER XXVII.

Levy of Attachment and Execution Upon Shares of Stock . 480

CHAPTER XXVIII.

Constitutionality of Amendments to Charters — Right of a Stockholder to Object 492

CHAPTER XXIX.

"Trusts" and Unincorporated Joint-Stock Associations . . 503a
A. "Trusts."
B. Unincorporated Joint-Stock Associations.

CHAPTER XXX.

Stockholders' Right to Inspect the Books of the Corporation 511

CHAPTER XXXI.

Liens of the Corporation on Stock for the Stockholders' Debts to the Corporation 520

CHAPTER XXXII.

Dividends 534

CHAPTER XXXIII.

Life Estates and Remainders in Shares of Stock . . . 552

Gift of
E. A. Hawkins, Jr.

CHAPTER XXXIV.

TAXATION OF SHARES OF STOCK AND OF CORPORATIONS . . . § 561
A. Taxation of Shares of Stock.
B. Taxation of National Bank Stock.
C. Other Methods of Taxing Corporations.

CHAPTER XXXV.

FORMS OF ACTIONS AND MEASURE OF DAMAGES WHERE A STOCKHOLDER HAS BEEN DEPRIVED OF HIS STOCK 573

CHAPTER XXXVI.

STOCKHOLDERS' MEETINGS — CALLS, TIME, PLACE, AND CLASSES OF MEETINGS 588

CHAPTER XXXVII.

ELECTIONS AND OTHER CORPORATE MEETINGS 602

CHAPTER XXXVIII.

DISSOLUTION, FORFEITURE, AND IRREGULAR INCORPORATION . . 628

PART IV.

FRAUDS — ULTRA VIRES ACTS — INTRA VIRES ACTS — NEGLIGENCE AND IRREGULAR CONTRACTS OF DIRECTORS, STOCKHOLDERS, PROMOTERS, AND AGENTS.

CHAPTER XXXIX.

FRAUDULENT ACTS OF DIRECTORS, MAJORITY OF STOCKHOLDERS, AND THIRD PERSONS . . . . . § 643
A. The Occasion, Scope, and Purpose of the Subject Herein.
B. Frauds of Corporate Directors, of a Majority of the Stockholders, or of Third Persons, to Remedy Which a Stockholder May Bring Suit.

CHAPTER XL.

ULTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS . . 667

CHAPTER XLI.

INTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS . . . . . § 683

CHAPTER XLII.

STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES 701

CHAPTER XLIII.

THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS — ADMISSIONS AND NOTICE 704

A. Power of Promoters, Stockholders, Directors, Executive Committee, President, Secretary, Treasurer, Cashier, General Manager, and Miscellaneous Agents to Contract for a Corporation.

B. The Form of Corporate Contracts — Corporate Seal — Drafting, Signing, and Sealing — Liability of Officers on Contracts Irregularly Executed.

C. Admissions of Officers and Notice to Officers.

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN 728

CHAPTER XLV.

PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION — SUITS BY OR AGAINST THE CORPORATION IN GENERAL 734

A. Suits by Stockholders in Behalf of the Corporation.

B. Suits by or Against the Corporation in General.

PART V.

BONDS, MORTGAGES, FORECLOSURES, RECEIVERS, AND REORGANIZATIONS.

CHAPTER XLVI.

BONDS, NOTES, ETC., OF A CORPORATION — GUARANTIES AND ACCOMMODATION PAPER . . . . . § 760

PART III.

MISCELLANEOUS RIGHTS OF STOCKHOLDERS.

CHAPTER XXV.

STOCK-BROKERS AND THEIR CONTRACTS.

§ 445. Definitions and scope of the subject.
446. Who may be a broker and customer.
447. Facts making person a broker or customer unintentionally.
448. Broker must obey specific orders of customer.
449. Must act in good faith and in reasonable time.
450. Cannot purchase from or sell to himself.
451. Duties and liabilities of customer towards broker.
452. Duties and liabilities of a broker towards customer.
453. Method of completing a broker's contract.
§ 454. Privity of contract between broker and opposite parties.
455. Privity of contract between the opposite customers.
456. Intervening sub-brokers and sub-customers.
457. Purchases or sales on margins — Broker as a pledgee.
458. Broker's rights and duties on failure of margin.
459. What will excuse notice and demand for more margin.
460. Customer's remedies and damages herein.
461. Broker's remedies and damages herein.
462. Broker's customs and usages.

§ 445. *Definitions and scope of the subject.*— By far the greater part of purchases and sales of stock is made, both in this country and in England, through organizations specially formed for that purpose and called stock exchanges. A stock exchange is a place of business where those who make up the membership of the exchange buy and sell stocks and bonds. These persons are called stock-brokers. A stock-broker is one who buys and sells stock as the agent of another, the latter being called a customer of the stock-broker.[1] Accordingly, in an ordinary

[1] In Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881), Finch, J., favors the definition from Pott *v.* Turner, 6 Bing. 702, 706 (1830), where a broker is defined as "one who makes bargains for another and receives a commission for so doing." Story on Agency, § 28 (9th ed.), says: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called brokerage." For a valuable article on the status, rights, duties, and liabilities

purchase of stock through stock-brokers, there are generally at least four persons involved — the two brokers and their respective customers. Stock-brokers have a language of their own. They have coined and put into general circulation certain phrases and terms descriptive of their business. These terms have become so closely identified with the subject of stock and transactions in stock that the courts have defined their meaning and explained their application.[1]

of a broker, by Eliot Norton, Esq., see Harvard L. Review, vol. VIII.

[1] A "bull" is a dealer who endeavors to make the price of stocks go higher. A "bear" is a dealer who endeavors to make the price of stocks go lower. A "short" sale is a sale of stocks which the seller does not possess, but which he expects to purchase later on at a lower figure, thus fulfilling his contract and making profit by the decline. In the meantime the broker generally borrows the stock from other parties to deliver to the vendee, and to be returned to the person loaning the stock at the end of the transaction. The customer deposits with the broker a small amount of money as security, called a "margin," and he is bound to keep the margin good. Hess *v.* Rau, 95 N. Y. 359 (1884); White *v.* Smith, 54 N. Y. 522 (1874); Knowlton *v.* Fitch, 52 N. Y. 288 (1873); Appleman *v.* Fisher, 34 Md. 540 (1871); Sistare *v.* Best, 88 N. Y. 527, 533 (1882). A "long" purchase of stock is a purchase in the expectation that the stock will rise in value.

Stock options are of three kinds — puts, calls, and straddles. A "put" is a contract whereby a person has the privilege of requiring another person to take from the former certain specified stock at a specified price at any time within a specified period of time, the former not being bound to sell. See Bigelow *v.* Benedict, 70 N. Y. 202 (1877). A "call" is a contract whereby a person has the privilege of requiring another person to sell or deliver to the former certain specified stock at a specified price at any time within a certain specified period, the former not being bound to purchase. A "straddle" or "spread-eagle" is a combination of a put and a call. It gives a person the double privilege of delivering to or demanding from another person certain stock at a certain price within a specified time. Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Story *v.* Salomon, 71 N. Y. 420 (1877). A "corner" exists where the "bears" have sold a large quantity of stock "short," and cannot borrow the stock to fill their contracts, but must buy it from those who have cornered the market on that stock. See Cameron *v.* Durkheim, 55 N. Y. 425, 438 (1874). As to the legality of these various transactions, see §§ 341–348, *supra*, especially § 344, n. It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscription and purchased the greater part himself. Salaman *v.* Warner, 64 L. T. Rep. 598 (1891).

A "loan" of stock is still another

This chapter treats of the rights, duties, and liabilities of stock-brokers.[1] There are various incidental subjects, however, which enter largely into brokers' contracts, such as pledges of stock[2] and gambling sales of stock.[3] These subjects are fully treated elsewhere.

§ 446. *Who may be a broker and customer.*— Any person may be a stock-broker who may make a contract, but it is beyond the power of a national bank to act as a broker.[4] Strict rules prevail as to who may be a customer. An infant is not bound by his contracts with or through a stock-broker, any more than he is bound by his other contracts. Moreover, if the broker carries on stock transactions for an infant he is liable to the latter for all moneys lost thereby.[5] Again, a broker who sells or buys stock in the name of an infant is himself liable to the other party in case the contract is not completed by reason of such infancy.[6] On the other hand, if the broker's customer hands in the name of a third person, an infant, as the

transaction. When a man sells stock on the exchange he must deliver it, and if he does not own any he must borrow it of some one who does. When he borrows the stock, he advances the market price of it to the lender, who pays interest on this money. The transaction is really a call loan. The lender of the stock can call for his stock at any time, and the borrower can call for his money. When a strong bearish feeling is running, and too much short selling has been indulged in, stocks become scarce, and those who have them will only lend at a concession, either at less than current interest rates; or "flat," that is, without interest; or actually at a premium, according to the urgency of the demand.

[1] See also, on this subject, Lindley on Companies, 5th ed., pp. 500–516.

[2] Ch. XXVI, *infra*.

[3] See ch. XX, *supra*.

[4] First Nat. Bank *v.* Hoch, 89 Pa. St. 324 (1879); Weckler *v.* First Nat. Bank, 42 Md. 581 (1875). But Williamson *v.* Mason, 12 Hun, 97 (1877), holds that a bank has power to take stock from a customer and agree to sell it and credit the customer with the proceeds, and that the bank is liable for the conversion of such stock by its cashier.

[5] Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881). The transactions in this case were held to be gambling contracts. Heath *v.* Mahoney, 12 Week. Dig. 404 (1881). The broker himself may be an infant and may repudiate his obligations. See 4 Law Notes, 314.

[6] Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875); Heritage *v.* Paine, L. R. 2 Ch. D. 594 (1876). The first case holds him liable although ignorant of the infancy of his customer. See same case, Merry *v.* Nickalls, L. R. 7 Ch. App. 733 (1872). The broker is liable although the name of the infant was passed to him by another broker. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873). It is no defense to the broker that the infant's father was the real customer. Nickalls *v.* Eaton, 23 L. T. Rep. 689 (1871). See also § 250, *supra*, as to liability to the corporation.

seller or purchaser, such customer is liable to the broker for liabilities thereby incurred by the latter.[1]

§ 447. *Facts making person a broker or customer unintentionally.*— The relationship of broker and customer may be established and exist although one of the parties is personally ignorant of such a relationship.[2] A broker also may be liable as such in transactions where he had no intention of incurring any liability.[3] A broker is nothing more nor less than an agent for a special purpose. The agency may arise by the acts of the parties without any specific agreement.

§ 448. *Broker must obey specific orders of customer.*— A broker is bound to obey and carry out strictly the orders of his customer in the purchase or sale of stock. This rule is rigidly insisted upon by the courts. The orders of the customer may be such as he wishes to give, and when given they must be obeyed, or liability will be incurred by the broker.[4] When the customer fixes a limit at which the broker may purchase, the latter cannot bind the customer by a purchase at a higher fig-

[1] Peppercorne *v.* Clench, 26 L. T. Rep. 656 (1872).

[2] Thus, the customer may be bound by the acts of his clerk. Webb *v.* Challoner, 2 Fost. & F. 120 (1860). As to dealings with a stock-broker's clerk, see Spooner *v.* Browning, 78 L. T. Rep. 98 (1898). So also, where the firm does a broker business through its agents, the transactions by the agents on their own private accounts, but ostensibly for the firm, will bind the firm. Wells, etc. Co. *v.* Welter, 15 Nev. 276 (1880). *Cf.* Masterton *v.* Boyce, 6 N. Y. Supp. 65 (1889). A customer's statement that he would like to make a dollar if he could is not sufficient authority for a broker to buy stocks for him. Hopkins *v.* Clark, 7 N. Y. App. Div. 207 (1896).

[3] As where he continues to allow his name to remain in the firm name after its dissolution. Hixon *v.* Pixley, 15 Nev. 475 (1880). Also where one of the firm is a trustee and defaults therein, the firm having charge of the trust estate's stocks. De Ribeyre *v.* Barclay, 23 Beav. 107 (1857). As a silent partner he cannot prevent a customer from setting off against a liability a debt personal to the ostensibly sole broker. Read *v.* Jaudon, 35 How. Pr. 303 (1868). A stock-broker is bound to obey orders promptly. Galigher *v.* Jones, 129 U. S. 193 (1889).

[4] Parsons *v.* Martin, 77 Mass. 111 (1858). Thus, where the customer authorizes a sale if the stock goes down to 51, but the broker sells when it goes down to 52, he is liable for an unauthorized sale. Clarke *v.* Meigs, 10 Bosw. 337 (1863). *Cf.* Whelan *v.* Lynch, 60 N. Y. 469 (1875); Jones *v.* Marks, 40 Ill. 313 (1866). But the broker may correct a palpable error in the order given him by his customer. Luffman *v.* Hoy, 13 N. Y. Week. Dig. 324 (1881). Where the customer tells the broker that unless he sells at once he must bear any further loss, the customer is not liable for further losses. Zimmerman *v.* Heil, 86 Hun, 114 (1895).

ure.[1] Frequently the customer gives to the broker a "stop order," which is an order to sell or buy, as the case may be, at a certain specified figure, or upon a specified contingency. Under this order the broker must sell or buy when the price or contingency occurs, but not until after it occurs. If the market changes too quickly for him, he must sell or buy at the market price immediately after the fixed price or contingency arises.[2] The customer may leave it in the discretion of the broker as to the best time for buying or selling.[3] When this is done the broker must exercise such discretion in good faith and with reasonably good judgment and care.[4] A stock-broker is not liable for contracts which he knew nothing about, and which were agreed to in his name by an assistant of one of his employees, especially where the customer knew such to be the fact.[5]

§ 449. *Must act in good faith and in reasonable time.*— The broker must make the purchase or sale in good faith on the best terms possible, and must give the customer the advantage of the transaction as actually made. Any material failure to do this, or to make the sale or purchase as directed, will release the customer from the transaction, although it was reported to

[1] Whether a limit was fixed is a question for the jury, if the facts are disputed. *Cf.* Smith *v.* Bouvier, 70 Pa. St. 325 (1872). The customer may ratify the unauthorized purchase. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (1848). If the power to sell depends on the construction of writings, it is a question of law only. Davis *v.* Gwynne, 57 N. Y. 676 (1874); S. C., 4 Daly, 218 (1871). But the written order may be subsequently modified by parol. Burkitt *v.* Taylor, 13 N. Y. Week. Dig. 75 (1881); Clarke *v.* Meigs, 10 Bosw. 337 (1863). Or be waived. Hope *v.* Lawrence, 50 Barb. 258 (1867).

[2] Porter *v.* Wormser, 94 N. Y. 431 (1884); Bertram *v.* Godfray, 1 Knapp P. C. 381 (1830). The latter case involved an absolute order to sell should the stock reach a certain price. Where a broker is carrying a "short" sale on a "stop order," and purchases before the price of the "stop order" is reached, and the customer, a week later, then orders the broker to purchase, the purchaser may recover the profit that a purchase at the latter date would have netted. Campbell *v.* Wright, 118 N. Y. 594 (1890). Brokers cannot disregard a "stop order," and act before that price is reached, even though prices are fluctuating rapidly. Campbell *v.* Wright, 118 N. Y. 594 (1890). See also § 459, *infra.*

[3] Such discretion, when given, is revoked only by clear notice of revocation. Davis *v.* Gwynne, 4 Daly, 218 (1871).

[4] Harris *v.* Tumbridge, 83 N. Y. 92 (1880).

[5] Timpson *v.* Allen, 149 N. Y. 513 (1896). *Cf.* note 2, p. 794.

him as made in accordance with orders.[1] The broker is allowed a reasonable time within which to make the sale or purchase.[2]

§ 450. *Cannot purchase from or sell to himself.*— A broker cannot, in behalf of his customer, buy or sell with himself as the other principal. The law will not allow him to act both

[1] Where the broker buys in his own name at a price less than the price reported to the customer, sells without notice, and subsequently pretends to sell again, the whole transaction is void as to the customer. Levy *v.* Loeb, 85 N. Y. 365 (1881); 89 N. Y. 386. So, likewise, where he purchases an option instead of cash purchase, and reports a higher price than that paid. Voris *v.* McCredy, 16 How. Pr. 87 (1856). So, likewise, where the broker varies the order from a cash purchase to an option, he himself taking the risk of the option. Day *v.* Holmes, 103 Mass. 306 (1869); Pickering *v.* Demerritt, 100 Mass. 416 (1868). A broker who sells bonds and then reports no sale, but loans money to the customer on the bonds as collateral, may be held liable to account for the sale. Bischoffsheim *v.* Brown, 34 Fed. Rep. 156 (1888). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892).

[2] Fletcher *v.* Marshall, 15 M. & W. 755 (1846). *Cf.* Dickenson *v.* Lilwal, 1 Starkie, 128 (1815), which holds that the transaction must be carried out on the day of the order. The broker is entitled to his commission although his customer fails before the transaction is made. Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). The contract is to be carried out within a reasonable time. A broker's custom is evidence as to what is reasonable time. Stewart *v.* Cauty, 8 M. & W. 160 (1841). A few hours' notice held insufficient. Johnson *v.* Mulvy, 51 N. Y. 634 (1872). "Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith and as a mere device to escape the payment of the broker's commissions." Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 384 (1881). A customer is under no obligation, when he learns that his broker has not sold stock as ordered, to notify the broker that he abandoned any claim to the stock and held the broker responsible for their value. Nor is he obliged to redeem the stock from the sub-broker. Allen *v.* McConihe, 124 N. Y. 342 (1890). In this case the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made. Where for four years both the broker and the customer have apparently abandoned an alleged purchase of stock on a margin, it is a question for the jury whether there was an abandonment or whether the customer continued to be liable. Seligman *v.* Rogers, 113 Mo. 642 (1893). A broker ordered to purchase stock on a margin need not actually purchase at once. It is sufficient if he is ready to fulfill when called upon so to do at the price on the day of the giving of the order. Ingraham *v.* Taylor, 58 Conn. 503 (1889).

as agent and as principal at the same time. Such an act is a constructive fraud on account of his fiduciary relation, and will be set aside.[1] Custom or usage cannot legalize such a transaction.[2] The broker may, however, show by parol evidence that he did not deal with himself, though writings indicate otherwise.[3] And there is no rule which prevents the broker from acting as agent both for the selling and the buying customer.[4] Where the broker turns over his own stock to the client's account instead of buying, and sells the client's stocks without orders so to do, and afterwards buys them back, all without his client's knowledge, he cannot recover commissions.[5]

§ 451. *Duties and liabilities of customer towards broker.*— A stock-broker is but the agent of his customer. As such he

[1] Mayo *v.* Knowlton, 134 N. Y. 250 (1892); Conkey *v.* Bond, 36 N. Y. 427 (1867); Brookman *v.* Rothschild, 3 Sim. 153 (1829); Marye *v.* Strouse, 5 Fed. Rep. 483 (1880); Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875). Even though the purchase was in good faith and at a lower figure than the market price. Taussig *v.* Hart, 58 N. Y. 425 (1874); Gillett *v.* Peppercorne, 3 Beav. 78 (1840). In Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court said: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. Story on Bailments, § 319; Torrey *v.* Bank of Orleans, 9 Paige, 649 (1842); Hawley *v.* Cramer, 4 Cow. 717, 736 (1825). This sale to the plaintiff was not void, but voidable at the election of the defendant. Edwards on Bailments, 260, 261. The defendant was at liberty to ratify the sale, and had he done so it would have been valid for all purposes. The ratification would have made it lawful, and relieved it from any imputation of being tortious as to him. . . . But the defendant has not done this, but has elected to treat the purchase by the plaintiff as illegal. This avoids the sale, and, that being avoided by the defendant, the parties are remitted to their rights the same as though no sale had been attempted." It seems that where a broker has an order to sell from one customer and an order to buy from another, he may employ a fellow-broker to purchase on the exchange when the sale is made. Terry *v.* Birmingham, etc. Bank, 99 Ala. 566 (1893).

[2] Commonwealth *v.* Cooper, 130 Mass. 285 (1881). The custom of brokers to buy in large quantities and sell in small quantities is illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802 (1875).

[3] Porter *v.* Wormser, 94 N. Y. 431 (1884).

[4] Knowlton *v.* Fitch, 52 N. Y. 288 (1873).

[5] Skelton *v.* Wood, 71 L. T. Rep. 616 (1894). Where a broker, instead of selling directly to a purchaser, sells through another person at a less figure in order to cheat his customer, he cannot collect commissions unless the customer knew of the fraud at the time he closed the transaction. Hafner *v.* Herron, 46 N. E. Rep. 211 (Ill., 1896).

may bind his customer by acts within the scope of his authority, and compel the customer to respond to his liability. Thus, the broker may proceed to close the transaction, paying out his own money as though it was his own business, and may then compel the customer to repay to him the money so expended in the customer's behalf.[1] Or, if his customer refuses to carry out the transaction, the broker may settle with the opposite party by paying the loss incurred by buying or selling the stock elsewhere, and may then sue his customer for the differences thus paid.[2] He may also recover his disbursements, commissions, and interest.[3] The customer is liable to the broker for stock purchased, although the stock turns out to be spurious or unauthorized.[4] If the broker, however, seeks to recover the full value of the stock, he must first tender the stock to the customer,[5] or he must sell it after due notice to the customer, and thus accurately ascertain the loss.[6] If he is seeking to re-

[1] Bayley *v.* Wilkins, 7 C. B. 886 (1849); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861); Dails *v.* Lloyd, 12 Q. B. 531 (1848). *Cf. Ex parte* Neilson, 3 De G., M. & G. 556 (1853). See also § 461, *infra*.

[2] Durant *v.* Burt, 98 Mass. 161 (1867); Bayliffe *v.* Butterworth, 5 Railw. Cas. 283, per Parke, B. (1847); Marten *v.* Gibbon, 33 L. T. Rep. 561 (1876); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867).

[3] Where the commissions and interest were paid to other brokers, it may be charged to the customer. Robinson *v.* Norris, 51 How. Pr. 442 (1874). Even though that interest be usurious. Smith *v.* Heath, 4 Daly, 123 (1871). On commissions, see Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). Excessive expenses will not be allowed, although customary. Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). But the broker is entitled to commissions only when he has rendered some service to the customer. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881); Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552 (1880). The case of Hatch *v.* Douglas, 48 Conn. 116 (1880), holds that the broker's customary monthly charges and interest thereon are not usurious. *Cf.* Robinson *v.* Norris, 6 Hun, 233 (1875). The broker may recover from the principal the purchase price of stocks bought by the broker, but not delivered, before the corporation became insolvent. Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867). Members of a syndicate are jointly liable to a broker employed by them. Sternberger *v.* Bernheimer, 121 N. Y. 194 (1890).

[4] See Adamson *v.* Jarvis, 4 Bing. 66 (1827); Peckham *v.* Ketchum, 5 Bosw. 506 (1859). So, also, for spurious stock innocently given to the broker to sell. Westropp *v.* Solomon, 8 C. B. 345 (1849).

[5] Merwin *v.* Hamilton, 6 Duer, 244 (1856); Bowlby *v.* Bell, 3 C. B. 284 (1846). But after once tendering it he need not continually keep it on hand. Wynkoop *v.* Seal, 64 Pa. St. 361 (1870).

[6] Monroe *v.* Peck, 3 Daly, 128 (1869). In Rosenstock *v.* Tormey, 32 Md. 169 (1869), the necessary allegations were held to be a purchase of stock according to an order, at fair market price, which was paid, and the customer

cover for differences paid the opposite broker in settlement, assumpsit is his remedy.[1] He must clearly prove that the customer authorized the order.[2]

§ 452. *Duties and liabilities of a broker towards customer.*— The broker also owes certain duties and incurs certain liabilities in his relations with his customer. It is said that he cannot sell on credit, since that is not the usual course of his business.[3] He is liable in damages for failure to buy or sell in accordance with his express orders.[4] Where the customer fails to carry out the transaction, but the broker does carry it out at a profit, the profit belongs to the customer.[5] But the customer is not entitled to stock held for him by the broker until he pays the broker all his reasonable disbursements thereon.[6] The broker may deposit a margin with the opposite broker, according to custom, and not be responsible to his customer if it is lost,[7] although the rule may be otherwise as to a delivery of the stocks themselves.[8] The broker is required to exercise reasonable diligence and care, and no more.[9] The broker has a lien on the

notified and payment demanded; willingness to deliver the stock; refusal of customer to pay; notice of sale; a proper sale; and loss.

[1] Pollock *v.* Stables, 12 Q. B. 765 (1848). *Contra*, Child *v.* Morley, 8 T. R. 610 (1800).

[2] Ward *v.* Van Duser, 2 Hall (N. Y.), 162 (1829). In White *v.* Baxter, 71 N. Y. 254 (1877), the court held that a customer's contract with his broker to protect the latter against loss by expulsion from the stock exchange for non-compliance with its rules is a valid and enforceable contract.

[3] 2 Kent, Com. 622 (b), 14th ed.

[4] Speyer *v.* Colgate, 4 Hun, 622 (1875); Whelan *v.* Lynch, 60 N. Y. 469 (1875), the case of a wool-broker. See also Jones *v.* Marks, 40 Ill. 313 (1866). The damages may sound in tort, thus preventing a release in bankruptcy from barring the action. Parker *v.* Crole, 5 Bing. 63 (1828). Under the New York code he may be arrested if he does not use the money for the purpose designated. Dubois *v.* Thompson, 1 Daly, 309 (1863). And in England he is liable criminally. Regina *v.* Cronmire, 54 L. T. Rep. 580 (1886).

[5] Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876).

[6] See McEwen *v.* Woods, 11 Q. B. 13 (1847), where the broker paid calls made on the stock after its sale.

[7] Gheen *v.* Johnson, 90 Pa. St. 38 (1879).

[8] Brown *v.* Boorman, 11 Cl. & F. 1 (1844).

[9] Phillips *v.* Moir, 69 Ill. 155 (1873); Gheen *v.* Johnson, 90 Pa. St. 38 (1879). As to the construction of a contract wherein the broker invests the customer's money as the broker sees fit, and the broker guarantees the return of the capital and interest and all profits made, see Vermilye's Case, 43 N. J. Eq. 146 (1887). As to the liability of stock-brokers and jobbers and vendees towards the vendors, see also 1 White & T. Lead. Cas., 6th Eng. ed., pp. 922–929.

customer's property in his hands for all debts due to the former.[1] But he has no such lien if he knows that the customer is acting as agent for another.[2] It is a question of doubt whether a broker who has received in good faith commissions from a person guilty of embezzlement is liable to pay over to the persons injured by his customer commissions so received.[3] A broker may, by bill of discovery, be compelled to disclose acts amounting to misconduct.[4] Where the brokers do not make actual purchases and sales as ordered, but carry the same on their books and report fictitious transactions, they are guilty of fraud, and the customer may recover back money paid, even though, if the transactions had been carried out, the customer would have lost his money. The records of the stock-exchange clearing-house may be competent evidence.[5] A broker is not responsible where he in good faith loans his customers money, in compliance with his authority, on certificates of stock as collateral, even though they turn out to be forged, provided he was not guilty of negligence. The latter is a question for the jury, and the burden of proof is on the broker. The broker is not bound to present the certificates to the company for verification.[6] Where the broker deposits money in a bank, the bank has a

[1] Jones *v.* Peppercorne, Johns. (V.-C.) (1858).

[2] Fisher *v.* Brown, 104 Mass. 259 (1870); Pearson *v.* Scott, L. R. 9 Ch. D. 198 (1878).

[3] See Butler *v.* Finck, 21 Hun, 210 (1880). The case of Taft *v.* Chapman, 50 N. Y. 445 (1872), seems to hold that the broker is not liable where he acted without knowledge of his customer's acts. See also S. C. *sub nom.* Brownson *v.* Chapman, 63 N. Y. 625 (1875). See also Porter *v.* Parks, 49 N. Y. 564 (1872); § 350, n., *supra*. The case of Kissam *v.* Anderson, 145 U. S. 435 (1892), reversed the decision below (Anderson *v.* Kissam, 35 Fed. Rep. 699, holding the broker liable) on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payment by the broker to the president. A broker who takes money as a margin, knowing that the money comes from a trustee and is trust-estate money, is liable to the estate for money lost thereby. Leake *v.* Watson, 58 Conn. 332 (1890). A broker taking, in payment of losses by an individual, checks drawn by him as an officer of a corporation, must refund the money. Huie *v.* Allen, 87 Hun, 516 (1895).

[4] Green *v.* Weaver, 1 Sim. 404 (1827). See Rawlings *v.* Hall, 1 Car. & P. 11 (1823).

[5] Prout *v.* Chisolm, 21 N. Y. App. Div. 54 (1897).

[6] Isham *v.* Post, 141 N. Y. 100 (1894). See also chs. XXI and XVII, *supra*, and Andrews *v.* Clark, 72 Md. 396 (1890).

banker's lien on it, although the money really belongs to the broker's client.[1]

§ 453. *Method of completing a broker's contract.*— The formalities and method of completing a stock-broker's contract are governed largely by the usages of the stock exchange. It is well-established law that, when a man sells or buys shares through his broker on the stock exchange, he enters into an implied contract to sell or buy according to the custom and usages prevalent in that body.[2] These usages and customs are to be found, for the most part, in the rules of the stock exchange, so far as the formalities of completing the contracts are concerned. Occasionally, however, such formalities are reviewed and sanctioned by the courts.[3]

§ 454. *Privity of contract between broker and opposite parties.*—A broker who buys or sells stock does so subject to certain liabilities towards the parties to whom he sells or from whom he buys. If he does not send in the name of his customer, he is liable on the transaction as though he were the principal himself.[4] He has been held liable for a forgery perpetrated by his customer.[5] Where, however, the broker hands in the name of his customer, and that name is accepted, the broker is thereby discharged,[6] unless, of course, the name is unauthorized, or is that of an infant.[7] Upon the disclosure by the broker of his customer's name, the opposite party has the

[1] Thomson *v.* Clydesdale Bank, [1893] A. C. 282.

[2] See § 462, *infra.*

[3] Thus, a usage by which the ultimate purchaser's name is handed to the seller for the purpose of having the latter execute a transfer to the former is upheld. Sheppard *v.* Murphy, 16 W. R. 948 (1868). The custom (in the oil trade) of giving the seller time to investigate and object to a purchaser may be insisted on by the seller. Sumner *v.* Stewart, 69 Pa. St. 321 (1871). The purchaser may be compelled, by a bill in equity, to register the transfer made through brokers. Paine *v.* Hutchinson, L. R. 3 Eq. 257 (1866).

[4] Wynne *v.* Price, 3 De G. & Sm. 310 (1849).

[5] Royal Exch. Ins. Co. *v.* Moore, 11 W. R. 592 (1863). The broker herein sold in his own name, but the opposite party knew he acted as a broker.

[6] Maxted *v.* Paine, L. R. 6 Exch. 132 (1871), holding that the broker does not guarantee his customer's responsibility, nor that he is the real purchaser. So also of the stock-jobber. Grissell *v.* Bristowe, L. R. 4 C. P. 36 (1868). *Contra*, Cruse *v.* Paine, L. R. 6 Eq. 641 (1868).

[7] See § 446, *supra.* Broker handing in the name of a customer without authority is himself liable. Maxsted *v.* Morris, 21 L. T. Rep. 535 (1869). *Cf.* Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867).

option of holding either the broker or his customer responsible, but cannot hold both.[1] Where a stockholder of record sells the certificate of stock to a broker and delivers the same indorsed in blank, and the broker transfers the same to his principal, the broker is not liable to indemnify the vendor against a statutory liability which the vendor has to pay.[2]

§ 455. *Privity of contract between the opposite customers.*— When the broker of one customer has agreed with the broker of another customer on the terms of a purchase and sale of stock, there immediately arises a privity of contract between the two customers. The purchasing customer is liable to the selling customer for all calls and liabilities arising on the stock after the broker's contract is made, if the selling customer is obliged to pay such liabilities by reason of his being the registered stockholder.[3] So also the purchasing customer may hold the selling customer responsible for the carrying out of the contract.[4] It has been held that the remedy may be an action at law[5] or in equity.[6] The right of set-off for other debts applies as between the two customers,[7] but not for debts due from one of the brokers to the opposite customer.[8]

[1] Watson *v.* Miller, 11 W. N. 18 (1876). A custom or usage releasing the broker from this liability is void. Magee *v.* Atkinson, 2 M. & W. 440 (1837). *Cf.* Jones *v.* Littledale, 1 Nev. & P. 677 (1837), the sale being of hemp. Also Thomson *v.* Davenport, 9 B. & C. 78 (1829), holding that the purchaser's option remains open until the *name* of the undisclosed principal is given. It is for the jury to say which one the opposite customer gave credit to, irrespective of a stock-exchange custom. Mortimer *v.* McCallan, 6 M. & W. 58 (1840).

[2] Boultbee *v.* Gzowski, 24 Ont. App. Rep. 502 (1897).

[3] Hawkins *v.* Maltby, L. R. 4 Ch. App. 200 (1869), aff'g S. C., L. R. 6 Eq. 505; Evans *v.* Wood, L. R. 5 Eq. 9 (1867); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496 (1868); Remfrey *v.* Butler, 1 E., B. & E. 887 (1858); Allen *v.* Graves, L. R. 5 Q. B. 478 (1870). A stock-exchange custom, making the broker a principal, does not prevent the customer suing as principal. Langton *v.* Waite, L. R. 6 Eq. 165 (1868). The refusal of the directors to register the sale does not enable the purchasing customer to recover back the purchase price. Stray *v.* Russell, 1 El. & El. 888 (1859).

[4] Even though the selling customer did not authorize the use of his name, but knew of it and did not object. Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867).

[5] Street *v.* Morgan, L. R. 4 Exch. 384 (1869), cited in Davis *v.* Haycock, L. R. 4 Exch. 373 (1869).

[6] Sheppard *v.* Murphy, 16 W. R. 948 (1868).

[7] Carr *v.* Hinchliff, 4 B. & C. 547 (1825).

[8] Fish *v.* Kempton, 7 C. B. 687 (1849). See also Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859). Unless, possibly, where the customer supposed the opposite broker was the principal. See Kelley *v.* Munson, 7 Mass. 318 (1811).

§ 456. *Intervening sub-brokers and sub-customers.*— Where a customer's broker employs another broker to transact the business, the customer cannot compel the second broker to complete the contract as he might compel the first broker.[1] The second broker cannot claim a lien on the stock for debts due him from the first broker.[2] The broker cannot offset against the customer of the sub-broker a debt due the broker from the sub-broker. Not even a custom of the stock exchange to that effect binds the customer unless he agreed to it.[3] If the first broker merely introduces the parties he cannot charge a commission therefor, although custom allows it.[4] The real customer may hold an intermediate customer liable. A sub-broker or correspondent broker is not obliged to ascertain the relations and agreements between the chief broker and the customer. The sub-broker may hold all stocks as security for all accounts between himself and the chief broker, there being no notice given of the customer's rights. If there is any surplus after the sub-broker's debt is paid, a customer who placed his own stock in the chief broker's hands to sell is preferred to another customer who had purchased on a margin and left the stock as security.[5] Where the customer orders his broker to buy stock, and the broker does buy it through a sub-broker, and the broker then notifies the customer that the stock has been bought, the broker's title to the stock thereby passes to the customer, subject to any amount due from the customer to the broker and to any lien of the sub-broker. The subsequent insolvency of the broker does not prevent a customer notifying the sub-broker not to sell out the stock without notifying him, the customer; and the customer may insist that the sub-broker resort to other stocks belonging to the broker and remaining in the sub-broker's hands to pay the broker's debts to the sub-broker before resort-

[1] Booth *v.* Fielding, 1 W. N. 245 (1866).

[2] Fisher *v.* Brown, 104 Mass. 259 (1870).

[3] Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893).

[4] Gibson *v.* Crick, 1 Hurl. & C. 142 (1862). He may hold the intermediate customer or agent liable for set-off due from the latter to the broker. Jaycox *v.* Cameron, 49 N. Y. 645 (1872).

[5] Willard *v.* White, 56 Hun, 581 (1890). See also §§ 460, 473, *infra*. A sub-broker who knows that the stock deposited as collateral with the chief broker belongs to the customer is liable in damages for conversion where he receives such stock on further orders and it transpires that such use of the stock was unauthorized. Ryman *v.* Gerlach, 153 Pa. St. 197 (1893).

ing to the above stock.[1] If brokers in New York take orders through a local broker in another place, they are liable for false and fictitious orders given to them by him in the name of a customer.[2]

§ 457. *Purchases or sales on margins — Broker as a pledgee.* By far the larger part of a stock-broker's business consists of purchases and sales of stock on what is called a "margin."[3] The customer deposits with the broker, as security, a sum of money equal to but a small part of the value of the stock involved. This sum of money is the "margin." If the customer's order is to purchase, then the broker keeps both the margin and the purchased stock as security against loss in the final closing of the transaction. If the customer's order is to sell, then the broker sells; but, having no stock to deliver, he borrows the same from other parties and delivers it to the purchaser, the broker still keeping the margin as security. Frequently no stock passes, nor is intended to pass, but merely the ultimate profit or loss, called "differences," is paid; the losing customer loses the whole or part of his margin, the winning customer getting back his margin and also the profits, less commissions. This is a gambling contract, and, like all gambling contracts, whether in or out of a stock exchange, is not enforceable.[4] But a purchase or sale of stock on margins, where there is no proof of an intent not to actually deliver the stock, is legal.[5] The relation between a customer and his broker, in

[1] Le Marchant *v.* Moore, 150 N. Y. 209 (1896).

[2] Caswell *v.* Putnam, 120 N. Y. 153 (1890).

[3] A margin "means, in the broker's lexicon, additional collateral security against loss to the broker while . . . carrying stock for his employer." McNeil *v.* Tenth Nat. Bank, 55 Barb. 59 (1869).

[4] McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866). A broker cannot recover commissions or disbursements from his customer, where the transactions were gambling and intended so to be by both. Harvey *v.* Merrill, 150 Mass. 1 (1889).

[5] See ch. XX, *supra*, where the character, effect, and non-enforceability of a broker's gambling contracts are fully treated. A "margin" transaction is not necessarily gambling and invalid. The important case of Hatch *v.* Douglas, 48 Conn. 116 (1880), clearly sets out the legality of such contracts. The court said: "It is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant. . . . The defendant [customer], through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery — not to the principal, but to the agents for the principal." The brokers "knew that the defendant was speculating, and that

cases where the broker buys for his customer and retains the stock as security, is the relation of a pledgor towards a pledgee, the customer being the pledgor, the broker being the pledgee, and the stock being the article pledged.[1] Some of the most important questions connected with brokers' contracts arise out of this pledgee relationship. This subject, however, is fully treated in the following chapter. Like an ordinary pledgee of stock, the broker may have the stock transferred into his own name;[2] he is not allowed to repledge the stock;[3] and he can

they advanced him money for that purpose. But that was neither illegal nor immoral. . . . No case has been cited which declares such a contract illegal. If we should so hold, it would be difficult, if not impossible, to draw the line between legal and illegal transactions." The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. Cashman *v.* Root, 89 Cal. 373 (1891). A broker holding as pledgee stock purchased for a customer on margin need not keep that identical stock on hand, and it is sufficient if he keeps an equal quantity on hand over and above stock of the same kind held by him for other customers. Caswell *v.* Putnam, 120 N. Y. 153 (1890). In Massachusetts it is held that a broker carrying stocks on a margin is not a pledgee. Covell *v.* Loud, 135 Mass. 41 (1883). A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v.* Van Boskerk, 49 How. Pr. 266, 4 Hun, 628 (1875). In England the carrying of stock by a broker on a margin is called "contango," and the broker is held to be the owner of the stock. In the case of Bentinck *v.* London, etc. Bank, [1893] 2 Ch. 120, the court said: "In all these transactions, therefore, when money is borrowed from a stock-broker in this way on "contango" or continuation, whether the money is obtained from the dealer or from other stock-brokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date."

[1] Approved in Skiff *v.* Stoddard, 63 Conn. 198 (1893); Markham *v.* Jaudon, 41 N. Y. 235 (1869); Baker *v.* Drake, 66 N. Y. 518 (1876). The broker is bound to keep constantly on hand the amount of stock so held on margin, *i. e.*, pledged. Taussig *v.* Hart, 58 N. Y. 425 (1874); Rogers *v.* Gould, 6 Hun, 229 (1875). See also § 469, *infra*. In fact, the broker is obliged to conform to the rules governing pledges of stock—a subject treated in ch. XXVI, *infra*. The broker is a pledgee, and without express contract has a lien on the stock for the balance due under a purchase, but not for any general balance due. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897). The customer as pledgor may claim his stock from the broker's assignee for the benefit of creditors if the customer can identify it. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See Boylan *v.* Huguet, 8 Nev. 345 (1873).

[2] Horton *v.* Morgan, 19 N. Y. 170 (1859).

[3] See § 471, *infra*.

put his customer in default only by tendering the stock and demanding payment for their whole value less the margin.[1] A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, and a brokers' custom cannot compel it.[2] Such stock may be redeemed from the assignee of the broker, provided the stock may be identified.[3] A broker who wrongfully pledges his customer's stock is guilty of conversion and may be arrested therefor.[4]

§ 458. *Broker's rights and duties on failure of margin.*— When the "margin" which the customer deposits with his broker happens to become exhausted by the fluctuations of the market adversely to the customer, difficult questions arise as to the several rights and duties of the broker and of the customer. If the broker is under orders to close the transaction when the margin becomes exhausted, he of course is obliged to do so.[5] But, otherwise, the rule is that the broker cannot summarily close the transaction, even though he has fear of greater loss, involving a loss by himself. He is obliged to demand further margin from his customer, at the same time notifying him that the previous margin is exhausted; also that, in case the margin is not made good, he will close the transaction, holding the customer liable for the loss; also stating the time and place of such threatened sale.[6] The notice must

[1] Read *v.* Lambert, 10 Abb. Pr. (N. S.) 428 (1871).

[2] De Cordova *v.* Barnum, 130 N. Y. 615 (1892).

[3] Skiff *v.* Stoddard, 63 Conn. 198 (1893).

[4] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Calder, 48 Hun, 449 (1888). See also § 576, *infra*. Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500 (1897).

[5] See § 448, *supra*.

[6] In the usual short sale of stock through a broker on a margin, the brokers "were bound to carry the stock until plaintiff directed them to close the transaction, so long as he complied with the terms of the contract on his part, and to give the plaintiff reasonable notice of the want of sufficient margin, and of their intention to buy in the stock and cover his short account if the margin was not made good, in accordance with the terms of the notice." Rogers *v.* Wiley, 131 N. Y. 527 (1892). Where a customer who is selling on a margin desires to close the transaction, but his broker dissuades him by promising to carry the stock, the broker cannot close the transaction without notice. Rogers *v.* Wiley, 131

be given a reasonable time before such closing of the transaction, and notice may be sent by mail.[1] If the broker fails to comply with these rules, and sells, he is guilty of conversion of the stock.[2] Where the broker is merely authorized to sell he is not bound to sell.[3]

§ 459. *What will excuse notice and demand for more margin.* All these rights of the customer to notice of failure of margin, demand of more margin, notice of intent to sell, and of time

N. Y. 527 (1892). Brokers, before selling a customer's stock which they hold as pledgees, the stock having been purchased on a margin, are bound to demand further margin and give notice of intent and time and place of sale. If they fail to do so, but sell and then sue the customer for the loss, they cannot recover anything. They cannot claim that their loss has been greater than defendant's loss due to their conversion. Gillett *v.* Whiting, 120 N. Y. 402 (1890); Markham *v.* Jaudon, 41 N. Y. 235 (1869), overruling Hanks *v.* Drake, 49 Barb. 186 (1867), and Sterling *v.* Jaudon, 48 Barb. 459 (1867). See also Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879), and § 461, *infra*. *Cf.* Worthington *v.* Tormey, 34 Md. 182 (1870); and see ch. XXVI, *infra*. Leaving notice at office was held insufficient where it did not reach the customer. Bryan *v.* Baldwin, 52 N. Y. 232 (1873). A formal demand for further margin is insufficient where, subsequently to that demand, the broker negotiates with the customer and tells him that he will consider what to do. McGinnis *v.* Smythe, 1 Silvern. 23 (1886). The broker's telegrams and conversations with his customers may amount to a waiver of his right to demand further margin. Rogers *v.* Wiley, 14 N. Y. Supp. 622 (1891); aff'd, 131 N. Y. 527 (1892). When called upon for further margin, a customer may make a "stop-order," the price fixed in such order being within the margin already furnished. Campbell *v.* Wright, 118 N. Y. 594 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890).

[1] Worthington *v.* Tormey, 34 Md. 182 (1870). Two days' notice held sufficient. Stewart *v.* Drake, 46 N. Y. 449 (1871). See also, in general, § 477, *infra*. A notice after the sale is insufficient, and the question of whether a notice was given is for the jury if it is denied. Gillett *v.* Whiting, 120 N. Y. 402 (1890). The broker is bound to give the customer reasonable notice to furnish more margin. Lazare *v.* Allen, 20 N. Y. App. Div. 616 (1897).

[2] Baker *v.* Drake, 66 N. Y. 518 (1876). *Cf.* Gregory *v.* Wendell, 40 Mich. 432 (1879), involving a purchase of corn. It is only in stock transactions that the relation of pledgor and pledgee arises. Where the broker closes the transaction without notice, and later the customer gives an order which, if the transaction had not been closed, would have yielded a profit, the customer may recover damages to the amount of that profit. Rogers *v.* Wiley, 131 N. Y. 527 (1892).

[3] Robinson *v.* Norris, 51 How. Pr. 442 (1874); Esser *v.* Linderman, 71 Pa. St. 76 (1872). *Cf.* Harris *v.* Tumbridge, 83 N. Y. 92 (1880). On a short sale of grain the broker is not bound to sell as soon as the principal refuses to advance more margin. Perin *v.* Parker, 126 Ill. 201 (1888).

and place of sale, may be waived; and brokers generally require their customers to sign written contracts to that effect. Where the customer, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[2] It is doubtful whether the death of the customer will authorize the broker to close the transaction without notice.[3] A custom of brokers to dispense with these notices is void, and not binding on the customer.[4] The fact that a panic occurs, or unusual fluctuations of the market happen, does not excuse a broker from giving such notice.[5]

[1] Thus, a written authority to the brokers, "to sell, in their discretion, at public or private sale, . . . without any notice whatever, the stocks, bonds, or gold which they might be carrying [for the plaintiff] whenever my margin shall fall below" a certain figure, waives all the customer's rights herein. Wicks *v.* Hatch, 62 N. Y. 535 (1875). See also Cameron *v.* Durkheim, 55 N. Y. 425 (1874). See also § 477, *infra*. The customer may waive his rights after the broker has made the unauthorized sale. Stewart *v.* Drake, 46 N. Y. 449 (1871); Milliken *v.* Dehon, 27 N. Y. 364 (1863). But authority "to close the account, without notice, by purchase or sale, at public or private sale," does not waive right to notice of failure of margin and demand for more. Stenton *v.* Jerome, 54 N. Y. 480 (1873); Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879). The demand for further margin may be waived, and waiver may be inferred from the negotiations and proposition. Harris *v.* Pryor, 18 N. Y. Supp. 128 (1892). A common form of the contract which the broker requires the customer to sign is the following:

"—— hereby agrees to maintain with you at all times a margin of —— per centum of the par value of all stocks and bonds against which you have made or may hereafter make advances to ——, and a like margin on stocks or bonds which —— have borrowed or may hereafter borrow through you to make deliveries on sales made for —— account or otherwise.

"In case —— margin should become impaired and the same is not promptly made good in response to personal notice or notice sent by wire or letter and directed to —— usual address, you are authorized in your discretion to buy or sell at the New York Stock Exchange or at public or private sale, without further notice, such securities as may be necessary to place the account in condition satisfactory to you, or to close the same entirely, as you may prefer.

"In case of my decease you are hereby authorized to close my account by purchase or sale of securities, as the same may require. ——."

[2] Gillett *v.* Whiting, 141 N. Y. 71 (1894).

[3] The broker will be protected in continuing the transaction until personal representatives are appointed. Hess *v.* Rau, 95 N. Y. 359 (1884). *Cf.* Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873).

[4] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); S. C., 5 Rob. (N. Y.) 507. *Contra*, Appleman *v.* Fisher, 34 Md. 540 (1871), a case of a gold-broker; also Colket *v.* Ellis, 10 Phila. 375 (1875), where both parties were brokers and knew the custom. If the customs are expressly made a part of the contract, insolvency of the customer authorizes sale without notice, such being the custom. Lacey *v.* Hill, L. R. 18 Eq. 182 (1874).

[5] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Brass *v.* Worth, 40 Barb. 648

§ 460. *Customer's remedies and damages herein.*— For an unauthorized sale by a broker of stock held upon a margin, the customer has ample remedies. He may claim the benefit of the sale, or may claim the value of the stock.[1] Or the customer may require the broker to replace the stock, and, upon his failure so to do, the customer may replace it himself and charge the broker with the loss.[2] Or the customer may recover the advance in the market price from the time of the sale up to a reasonable time to replace the stock after notice of the sale.[3] The unauthorized sale by the broker herein is not necessarily a fraudulent sale.[4] The customer cannot enjoin the broker unless the latter is insolvent.[5] The suit should be at law,[6] and demand and tender need not be alleged.[7] An illegal sale of the pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[8]

Where a broker buys or sells stock on his customer's account in violation of the terms of his contract, and thereby makes a profit, the customer has his option either to repudiate the transaction altogether and sue for damages, or he may adopt it and

(1863); Ritter *v.* Cushman, 7 Rob. (N. Y.) 294 (1867). See also § 448, *supra.*

[1] Taussig *v.* Hart, 58 N. Y. 425 (1874); Strong *v.* National, etc. Assoc., 45 N. Y. 718 (1871).

[2] Baker *v.* Drake, 53 N. Y. 211, 217 (1873); Colt *v.* Owens, 90 N. Y. 368 (1882).

[3] Colt *v.* Owens, 90 N. Y. 368 (1882), holding that prices within thirty days after the sale is a reasonable rule. See also Gruman *v.* Smith, 81 N. Y. 25 (1880); Capron *v.* Thompson, 86 N. Y. 418 (1881). *Cf.* Andrews *v.* Clerke, 3 Bosw. 585 (1858).

[4] Stratford *v.* Jones, 97 N. Y. 586 (1885).

[5] Park *v.* Musgrave, 2 Thomp. & C. 571 (1874).

[6] Delevan *v.* Simonson, 35 N. Y. Super. Ct. 243 (1873). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable."

[7] Clarke *v.* Meigs, 22 How. Pr. 340, 13 Abb. Pr. 467 (1861).

[8] Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

claim for himself the benefit made by his agent.[1] It has been held that, where the broker fails to buy according to the instructions of his customer, and the customer suffers a loss by reason of the failure, the object of the purchase being to cover a short sale, the measure of damages is the difference between the price at which the stock was sold short and the market price upon the day when the order was given to the broker to buy in. In other words, the plaintiff may in such a case recover the profits which he would necessarily have made had his order been properly executed.[2] And the rule is the same when the loss to the customer results from the failure of the broker to sell as instructed, or where the broker sells at an improper or manifestly unfavorable time.[3] A customer who owns particu-

[1] Kimber *v.* Barber, L. R. 8 Ch. App. 56 (1872); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834); Taussig *v.* Hart, 49 N. Y. 301 (1872); S. C., 58 N. Y. 425 (1874); Pickering *v.* Demerritt, 100 Mass. 416 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). For the measure of damages where a broker converts his customer's securities, and then is unable by reason of his insolvency to replace them, see Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). Sometimes an advance in the price of the stock, within a reasonable time after notice of the conversion is received, is allowed. Gruman *v.* Smith, 81 N. Y. 25 (1880). See § 475. And what is a reasonable time in such a case is a question for the jury. Baker *v.* Drake, 66 N. Y. 518 (1876); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 H. & N. 617 (1861). *Cf.* Allen *v.* Dykers, 3 Hill, 593 (1842). As to the measure of damages in an action against a broker for fraud, inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work, 70 Hun, 296 (1893).

[2] In an action to recover damages, where a firm of stock-brokers sold for a customer, upon his order and for his account, three hundred shares of stock, short, at 186, and subsequently, without the customer's order or knowledge, bought in stock to cover the sale, and then a few days later, the stock having declined several points, the customer ordered them to cover their sale, to which order no attention was paid, it was held that the proper measure of damages was the difference between the price at which the stock was sold short and the market price upon the day when the order was received to purchase, with interest, deducting commissions, etc. White *v.* Smith, 54 N. Y. 522 (1874). See Magee *v.* Atkinson, 2 M. & W. 440 (1837). In Allen *v.* McConihe, 124 N. Y. 342 (1891), the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made.

[3] In Harris *v.* Tumbridge, 83 N. Y. 92 (1880), it appears that the plaintiff purchased through the agency of the defendant a stock option, a privilege known as a "straddle," upon which the defendant guaranteed that the fluctuations in the stock during the pendency of the contract should amount to eight per cent. On the next day after the purchase defend-

lar certificates of stock and pledges them with his broker may reclaim such certificates from the broker's assets upon the insolvency of the latter, but he cannot claim any particular stocks which the broker has purchased for him, even though he is able to identify them as being the ones which were purchased for him, inasmuch as his equities are no better than the equities of other customers.[1] Where a broker, by custom and authority impliedly given, repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of his claim.[2] Where a party telegraphs to sell a certain stock, the sale to be "short" and speculative, the damages for failure of the telegraph company to deliver the message are too remote

ant sold the stock short, which resulted in a loss to the plaintiff, who had at the time of the purchase authorized defendant, as her agent, to exercise the option. As to the measure of damages the court said: "An objection is taken to the rule of damages. It is insisted that, as plaintiff never gave any directions to 'put' or 'call' the stock, she should not have recovered as if she had. But in the absence of such directions it was defendant's duty. under the circumstances of this case, as we have already said, to have closed the 'straddle' contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care and skill. As he did not do so, she is entitled to recover what she has lost by his neglect; and the price of the stock from day to day during the running of the option having been shown, it was for the jury to determine that amount." *Cf.* Speyer *v.* Colgate, 4 Hun, 622 (1875). Where a broker sold stock for his customer without authority and in violation of an agreement not to sell, and it appeared that for thirty days after notice was given to the customer of the sale the stock could have been purchased in the market for the price at which it was sold or even for less, it was held, in an action to recover damages, that the customer, having had a reasonable time after he was notified of the sale of his stock to replace it at the same or a lower price, was entitled only to nominal damages. Colt *v.* Owens, 90 N. Y. 368 (1882). *Cf.* Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). See also McArthur *v.* Seaforth, 2 Taunt. 257 (1810). But when the action of the broker is fraudulent the customer may, upon obtaining knowledge of the facts, repudiate the whole transaction and recover back the money paid. Levy *v.* Loeb, 89 N. Y. 386 (1882), reversing S. C., 47 N. Y. Super. Ct. 61. *Cf.* Stewart *v.* Drake, 46 N. Y. 449 (1871). In Baker *v.* Drake, 66 N. Y. 518 (1876), where a broker, unauthorized to do so, sold stock which he was carrying for his customer, it was held, in an action for damages, that the measure of damages was the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of sale.

[1] Sillcocks *v.* Gallaudet, 66 Hun, 522 (1892). As to sub-brokers or correspondent brokers, see § 456, *supra*. See also § 473, *infra*.

[2] Skiff *v.* Stoddard, 63 Conn. 198 (1893).

and speculative, even though the stock goes down on the market.[1] The question of the customer's rights, where the broker has repledged the stock and then failed, is considered elsewhere.[2]

§ 461. *Brokers' remedies and damages herein.*— If a broker sells out his customer's stock without notice, he may recover any loss from the customer, where the broker's loss is greater than the customer's damages for the conversion.[3] But where the broker's act is strictly according to law, he is of course entitled to recover from his customer any loss that has been sustained in excess of the margin.[4] And where a broker purchases stock on an order and demands payment of the price, the broker may sell the stock for non-payment, after waiting a reasonable time, such being the custom of the market.[5]

It is a well-settled rule that if a broker, acting in good faith and without default, incurs personal loss or damage in the course of transacting the business of his agency, or in following the instructions of his principal, he may recover from the principal full compensation therefor.[6] Accordingly, where a broker buys

[1] Cahn *v.* Western U. Tel. Co., 48 Fed. Rep. 810 (1891), 46 Fed. Rep. 40. The measure of damages for error in the delivery of telegraph messages to buy stock "is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message." Pearsall *v.* Western U. Tel. Co., 124 N. Y. 256 (1891).

[2] See §§ 471–473, *infra.*

[3] Minor *v.* Beveridge, 141 N. Y. 399 (1894), practically overruling Gillett *v.* Whiting, 120 N. Y. 402, and holding that the broker *may* sue the customer for losses, even though he sold without notice, and that the customer is entitled to a counter-claim only. To same effect, see Gruman *v.* Smith, 81 N. Y. 25 (1880). See also Capron *v.* Thompson, 86 N. Y. 418 (1881); § 458, *supra;* and § 475, *infra.* In Ellis *v.* Pond, 78 L. T. Rep. 125 (1897), the court held that even though a broker sold his principal's stock, which the broker held as pledgee, prior to the time to which the broker had agreed to carry the stock, yet that the broker might recover from his principal any loss in such sale as compared with the price at which the broker originally bought the stock, but that the client could counter-claim for the damage due to the sale being made prior to the agreed time. The court held, however, that where by the contract the broker was to accept delivery of certain stock at a certain time for his principal, but before that time the broker sold such stock, contrary to his agreement with his principal, the broker could not recover any damages for the loss.

[4] Schepeler *v.* Eisner, 3 Daly, 11 (1869).

[5] Taylor *v.* Bailey, 48 N. E. Rep. 200 (Ill., 1897).

[6] Sedgwick on Damages (7th ed.), 86; Lindley on Companies (5th ed.), pp. 512–516; Sutton *v.* Tatham, 10 Ad. & E. 27 (1839); Bayliffe *v.* Butterworth, 1 Exch. 425 (1847); Bowlby *v.* Bell, 3 C. B. 284 (1846); Bayley *v.* Wil-

stock upon his customer's order and pays for it, and upon a decline in value the customer refuses to accept it, the broker may recover the price paid by him, and not merely the difference between that price and the market value on the day of his demand.[1] The guaranty by a third party of the customer's account may be enforced.[2]

§ 462. *Brokers' customs and usages.*— It has been a greatly disputed question as to how far and when a custom or usage among stock-brokers or at stock exchanges may enter into and govern stock-brokers' contracts. At an early day the rule was laid down by the English courts that he who buys or sells stock through a stock-broker must be considered as dealing with him according to the usages of the market in which he deals, and the customs which prevail in relation to that species of business.[3] A late decision, however, seems to hold that a stock-

kins, 7 C. B. 886 (1849); McEwen *v.* Woods, 2 Car. & K. 330 (1846); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Stray *v.* Russell, 1 El. & El. 888 (1859); Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867); Robinson *v.* Mollett, L. R. 7 H. L. 802 (1875); S. C., L. R. 7 C. P. 84; L. R. 5 C. P. 646; Pollock *v.* Stables, 12 Q. B. 765 (1848); Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873). See also Dos Passos on Stock-brokers, pp. 123, 802.

[1] Giddings *v.* Sears, 103 Mass. 311 (1869). *Cf.* Field *v.* Kinnear, 4 Kan. 476 (1868). Where there is a rescission of a contract for the sale of stock, the measure of the damages is the value of the stock at the time and place of the proposed delivery. White *v.* Salisbury, 33 Mo. 150 (1862); Vance *v.* Tourne, 13 La. 225 (1839).

[2] Oppenheim *v.* Waterbury, 86 Hun, 122 (1895).

[3] In Biederman *v.* Stone, L. R. 2 C. P. 504 (1867), the court said: "It has been held in a great number of cases that persons buying or selling stock or shares through members of the stock exchange are bound by the rules which govern the transactions of that body." To the same effect, see Bayliffe *v.* Butterworth, 5 Railw. Cas. 283 (1847), per Parke, B.; Mitchell *v.* Newhall, 15 M. & W. 308 (1846); Maxted *v.* Paine, L. R. 6 Exch. 132 (1871); Grissell *v.* Bristowe, L. R. 4 C. P. 36, 47 (1868); Appleman *v.* Fisher, 34 Md. 540 (1871); Coles *v.* Bristowe, L. R. 4 Ch. App. 3 (1868); Stray *v.* Russell, 1 El. & El. 888 (1859); Davis *v.* Haycock, L. R. 4 Exch. 373 (1869); Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875). *Cf.* Pollock *v.* Stables, 12 Q. B. 765 (1848); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Morrice *v.* Hunter, 14 L. T. Rep. 897 (1866); Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451 (1878); aff'd, 77 N. Y. 612. But the usage must not be illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496 (1868); Tayler *v.* Great Indian, etc. R'y, 4 De G. & J. 559, 573 (1859). Nor may the custom be established by that one transaction. Westropp *v.* Solomon, 8 C. B. 345 (1849). It must be reasonable. Goldschmidt *v.* Jones, 22 L. T. Rep. 220 (1870). A usage that is contrary to an act of parliament, requiring the broker to notify his customer of the particular numbers of

exchange custom does not bind the customer, unless he knew of it and agreed to it.[1] The American rule allows usages of brokers to interpret the language of the contract, and where it is obscure to ascertain its nature and extent, but not to vary its terms, introduce new conditions, or authorize acts contrary to its provision.[2] The customer may, however, by express agreement, waive his common-law rights and allow usage to govern the transaction.[3] A customer directing a purchase of stock in

the shares purchased on his account, is void. Perry *v.* Barnett, L. R. 15 Q. B. D. 388 (1885). *Cf.* Seymour *v.* Bridge, L. R. 14 Q. B. D. 460 (1885).

[1] Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893).

[2] "Usage can be admitted to interpret the language of a contract where it is obscure, but not to change its legal character, or derogate from the rights of parties, or authorize acts contrary to its provisions." German Sav. Bank *v.* Renshaw, 28 Atl. Rep. 281 (Md., 1894); Parsons *v.* Martin, 77 Mass. 111 (1858); Hopper *v.* Sage, 112 N. Y. 530 (1889); Lombardo *v.* Case, 30 How. Pr. 117 (1865); 1 Addison, Contracts (8th Eng. ed., 1883), *p. 60; 21 Am. L. Reg. (N. S.) 176, note; Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). *Cf.* Winans *v.* Hassey, 48 Cal. 634 (1874). The case of Baker *v.* Drake, 66 N. Y. 518 (1876), holds that stock-brokers' usage cannot add to or make part of the contract. *Cf.* Horton *v.* Morgan, 19 N. Y. 170 (1859); Peckham *v.* Ketchum, 5 Bosw. 506 (1859); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861). If there is doubt as to the existence of the usage the question is for the jury. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873). The usage may be introduced in evidence to show how the business is to be transacted, but it must not be unreasonable. Rosenstock *v.* Tormey, 32 Md. 169 (1869), holding also that the broker's correspondence with his city broker is not competent to prove purchases and sales. Upon the effect of usage in other transactions, see Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74 (1883); Richmond *v.* Union Steamboat Co., 87 N. Y. 240 (1881); Walls *v.* Bailey, 49 N. Y. 464 (1872); Vail *v.* Rice, 5 N. Y. 155 (1851); Delafield *v.* Illinois, 26 Wend. 192 (1841); Dawson *v.* Kittle, 4 Hill, 107 (1843); Boardman *v.* Gaillard, 1 Hun, 217 (1874); Minnesota Cent. R'y *v.* Morgan, 52 Barb. 217 (1868); Sipperly *v.* Stewart, 50 Barb. 62, 68 (1867); Duguid *v.* Edwards, 50 Barb. 288 (1867); Haskins *v.* Warren, 115 Mass. 514, 536 (1874); Dickinson *v.* Gay, 89 Mass. 29 (1863); Parrott *v.* Thacher, 26 Mass. 426 (1830); Greenleaf *v.* Moody, 95 Mass. 363 (1866); Tilley *v.* Cook County, 103 U. S. 155 (1880); National Bank *v.* Burkhardt, 100 U. S. 686 (1879); Vermilye *v.* Adams Exp. Co., 21 Wall. 138 (1874); Forrestier *v.* Bordman, 1 Story, 43 (1839); S. C., 9 Fed. Cas. 459; Oelricks *v.* Ford, 23 How. 49 (1859); Renner *v.* Bank of Columbia, 9 Wheat. 581 (1824); Cope *v.* Dodd, 13 Pa. St. 33 (1850); Corbett *v.* Underwood, 83 Ill. 324 (1876); Phillips *v.* Moir, 69 Ill. 155 (1873); Bissell *v.* Ryan, 23 Ill. 566 (1860); Williams *v.* Gilman, 3 Me. 276 (1825); Partridge *v.* Forsyth, 29 Ala. 200 (1856); Halwerson *v.* Cole, 1 Spears (S. C.), 321 (1843); Hogg *v.* Snaith, 1 Taunt. 346 (1808); Gibson *v.* Crick, 1 Hurlst. & C. 142 (1862); Fleet *v.* Murton, L. R. 7 Q. B. 126 (1871). Brokers' usages cannot vary fixed principles of law. Hopper *v.* Sage, 112 N. Y. 530 (1889).

[3] In Robinson *v.* Norris, 51 How. Pr.

the New York Stock Exchange is bound by the usages and customs of that exchange.[1] Although a transfer of stock is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless the pledgee may be a *bona fide* holder.[2]

442 (1874), the court said: "It has been settled by our court of appeals that no custom among brokers can deprive parties of rights which the law gives them, but they have not decided that those rights may not be waived by agreement. I think it perfectly clear that if the broker informs his customer of the terms upon which he will act for him as his broker, and in view of that notice the customer gives an order, he is bound by the terms on which the broker proposed to act for him." See also Baker *v.* Drake, 66 N. Y. 518 (1876). See, in general, Colket *v.* Ellis, 10 Phila. 375 (1875); Sutton *v.* Tatham, 10 Ad. & El. 27 (1839); Bayley *v.* Wilkins, 7 C. B. 886 (1849); Duncan *v.* Hill, L. R. 6 Exch. 255 (1871); Sheppard *v.* Murphy, Ir. Rep. 2 Eq. 544 (1868); Bowring *v.* Shepherd, L. R. 6 Q. B. 309 (1871); Evans *v.* Waln, 71 Pa. St. 69 (1872); Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859); Shaw *v.* Spencer, 100 Mass. 382 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). See also § 477, *infra*.

[1] Taylor *v.* Bailey, 48 N. E. Rep. 200 (Ill., 1897).

[2] Smith *v.* Savin, 141 N. Y. 315 (1891).

CHAPTER XXVI.

PLEDGES AND MORTGAGES OF STOCK.

§ 463. Definitions of pledge, mortgage, and lien.
464. Mortgages and pledges of stock.
465. How a pledge of stock arises or is made — Pledge by the corporation itself.
466. Pledgee may have the stock registered in his own name or the name of another.
467. Stock-broker purchasing stock for a customer on a margin is a pledgee.
468. Miscellaneous rights of pledgee and pledgor — The equity of redemption.
469. Pledgee need not retain or return to the pledgor the identical certificates or shares of stock which were pledged, but must have equal quantity always on hand.
470. Pledgee's liability on subscription and statutory liability on stock.
471. Pledgee has no right to sell or repledge the stock, even temporarily, except upon notice, unless the debt is assigned with the stock.
§ 472. Purchasers or pledgees of stock from pledgee with notice are not protected.
473. *Bona fide* repledgees or purchasers of pledged stock are protected — Pledgor's remedies — Arrest — Marshaling the assets.
474. Pledges by agents, trustees, executors, etc., legally and in breach of trust.
475. Pledgor's remedies.
476. Pledgee's remedies when debt secured is not paid — Sale and deficiency.
477. Notice of sale of stock by pledgee to apply to debt secured — Waiver of notice.
478. Formalities of sale.
479. If the pledgee himself purchases at the sale, then the sale is voidable.

§ 463. *Definition of pledge, mortgage, and lien.*— A pledge may be defined to be a delivery of personal property as a security for some debt or engagement. A mortgage of personalty, on the other hand, is a sale with the condition attached that, if the mortgagor performs some act, the sale shall be void. In a pledge the title remains in the pledgor, and the pledgee has a special property in the thing pledged.[1] In a mortgage the title passes to the mortgagee, subject to being revested in the mortgagor upon payment of the debt. In pledges the thing pledged must be delivered to the pledgee. In mortgages, generally, the possession of the thing mortgaged remains with the mortgagor.

[1] See Pars. Cont. I, p. 569; II, p. 113; III, p. 272. Where an employee is by contract entitled to a certain salary so long as he should own certain stock, he does not break the contract by pledging his stock. McMullan *v.* Dickinson Co., 63 Minn. 405 (1896).

A pledge differs also from a lien. A pledge, by implication, gives the pledgee a power to sell on due notice, in case the debt is not paid at maturity, while a lien gives merely the power of detention until the debt is paid.[1]

§ 464. *Mortgages and pledges of stock.*— Shares of stock may be the subject of a mortgage or pledge.[2] A mortgage of stock, however, is not often made; and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage.[3] In fact it is difficult to ascertain from the cases how shares of stock may be mortgaged; and a few early decisions, which held certain transactions to be mortgages, would to-day be held to be pledges.[4] There are but few clear

[1] Donald *v.* Suckling, L. R. 1 Q. B. 585, 604 (1866). "A simple lien — that is to say, a right to detain chattel property until a given debt be paid, but without any right to sell and apply the proceeds in payment — is one thing; a pledge, since it implies the right in the depositary to sell the deposit and apply the proceeds to the debt it was given to secure, is another. Shares of stock put up as collateral security constitute a pledge." First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

[2] "Nothing is better settled than that shares in the capital stock of a corporation are the subject of pledge." Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208 (1881). "It was formerly doubted whether it [stock] could be the subject of a pledge, but it is now held that it can be." Newton *v.* Fay, 92 Mass. 505 (1865). As to pledges to secure parties who advance money to the company, see ch. XX and § 76, *supra*.

[3] Newton *v.* Fay, 92 Mass. 505 (1865); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Merchants' Bank *v.* Cook, 21 Mass. 405 (1826); Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846), In England security is given by a process called a sale with a contract of repurchase. The court holds that this is not a pledge. "An essential term of a pledge is that on fulfillment by the pledgor of the conditions of the bargain, commonly called redemption, the pledgee is bound to hand back to the pledgor the very thing deposited with him," whereas in a sale and contract of repurchase, the identical property in numbers, etc., need not be returned. Simmons *v.* London J. S. Bank, [1891] 1 Ch. 270.

[4] Thus, in Huntington *v.* Mather, 2 Barb. 538 (1848), the court said: "There are two leading considerations to be regarded in determining whether the transaction is a pledge or a mortgage: namely, the title and the possession. If it is a mortgage, the legal title passes to and is vested in the creditor. With a pledge it is different; the legal title, until a sale on default of payment or redemption, continuing in the pledgor. . . . The essential difference as to matter of right is that in one the title passes and in the other it does not. But the difference in substance and fact is that, in the case of a pawn or pledge, the possession must pass out of the pawner, but in the case of a mortgage it need not." The court, however, influenced probably by the equities of the case, held the transaction to

cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered at the municipal clerk's office, as required by law in case of chattel mortgages, would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books.[1] Where a railroad company owns

be a mortgage, and that the right of the debtor to redeem was barred by the ten-year statute of limitations. In the case of Smith *v.* Forty-nine and Fifty-six Quartz Min. Co., 14 Cal. 242 (1859), the court held the transaction to be a mortgage rather than a conditional sale of the stock. The question of pledge was not considered. Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881), speaks of the transaction as a mortgage; and Williamson *v.* New Jersey, etc. R. R., 26 N. J. Eq. 398 (1875), says that such a mortgage need not be recorded in the municipal clerk's office, as required by the chattel-mortgage act. In both cases the transaction might better have been treated as a pledge. In Adderly *v.* Storm, 6 Hill (N. Y.), 624 (1844), the court said: "I have already said that this was not a pawn or pledge of the stock; neither was it strictly a mortgage." At the present day it would be held to be a pledge. Wilson *v.* Little, 2 N. Y. 443 (1849); Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850). In Brewster *v.* Hartley, 37 Cal. 15 (1869), the court said: "The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner." In Thompson *v.* Holladay, 15 Oreg. 34 (1887), a chattel mortgage on shares of stock was involved. It was declared void because it was given to a receiver who previously held the stock as receiver. Sometimes a chattel mortgage of stock arises where a railroad mortgage covers not only real estate, but also all personal property, bonds, and stock which are or shall be owned by the mortgagor corporation.

[1] The clearest and most satisfactory case is Spalding *v.* Paine, 81 Ky. 416 (1883), where a chattel mortgage of a share of stock was duly recorded in the proper county, the mortgagor retaining the certificate of stock. The mortgagor subsequently sold and transferred the certificate of stock to a *bona fide* purchaser. The court held that the recording of the mortgage was of no avail, that there could be no mortgage of choses in action, and that the *bona fide* transferee took the stock. Pryor, J., well said: "Much of the business of the country is conducted on the faith of the pledge of such stock as collaterals; and to adjudge that the holder of the stock by transfer on the books of the corporation, or by indorsement and delivery by the owner, is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers." The right of a subscriber to demand a certificate of stock may be attached before such certificate is issued and delivered, and such attachment has precedence over a mortgage, even though the mortgage is

shares of stock in an elevator company, such stock is not subject to the general mortgage executed by the railroad company.[1] A pledge of stock without a delivery is not strictly and legally a pledge. It "may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt."[2]

recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896). *Cf.* Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Foster *v.* Potter, 37 Mo. 525 (1866); Vowell *v.* Thompson, 3 Cranch, 428 (1829); S. C., 28 Fed. Cas. 1308. See also Holyoke *v.* McMurtry, 33 Neb. 548 (1891). A mortgage of stock is valid as between mortgagor and mortgagee without a transfer of certificates. The mortgagee after foreclosure may compel the corporation to transfer without making the transferee a party. Tregear *v.* Etiwanda Water Co., 76 Cal. 537 (1888). Stock may be mortgaged and no delivery of the certificates need be made. Though a foreclosure is made irregularly, the mortgagor may ratify it, or may be barred by the six-year statute of limitations. Campbell *v.* Woodstock Iron Co., 83 Ala. 351 (1887). The pledgor may, by an instrument in writing, assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898).

[1] Humphreys *v.* McKissock, 140 U. S. 304 (1891). A chattel mortgage does not include shares of stock, although broad enough in its terms to do so, where both parties testify that it was not the intent to include the stock, and the mortgagee allowed the mortgagor's assignee to take away the stock. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891).

[2] Christian *v.* Atlantic, etc. R. R., 133 U. S. 233, 242 (1890). A pledge to secure the debt of another is not waived by temporarily allowing that other to have the pledge for a short time. Wing *v.* Holland T. Co., 5 N. Y. Supp. 384 (1889). An agreement that certain bonds in the possession of a third party shall be held in pledge is not a good pledge. Actual delivery is necessary to constitute a pledge. Seymour *v.* Hendee, 54 Fed. Rep. 563 (Vt., 1893). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustee's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). Where one party loans money to another party to buy stock in a certain company, such stock to be delivered to the former party in pledge, and the latter party uses the stock for another purpose, the loan of the money is not a mere loan, but the money is impressed with a trust, and this trust follows the stock except as against *bona fide* holders. Barnard *v.* Hawks, 111 N. C. 333 (1892). A pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's re-

Where, on the other hand, the certificate of stock is delivered to the creditor as security, it is evident that possession of the property is given to the creditor, but that the debtor still considers the stock to be his. Such a transaction is a pledge and not a mortgage; and consequently, since the giving of stock certificates as security is almost invariably effected by a delivery of the certificates, a mortgage of stock may be said to be possible, but not technically a correct use of the word. The delivery of a certificate of stock with a blank power of attorney, as collateral security, constitutes a pledge and not a mortgage;[1] and the same rule prevails even though an absolute transfer or registry is made on the corporate books.[2] A mortgage on shares of stock is sometimes made by transferring the stock to the trustee of the mortgage.[3] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage, where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[4] A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways and the stock then to be returned, is a conditional sale, and not a loan to the corporation.[5] It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that time.[6]

ceiver who takes possession of the certificates. Atkinson *v.* Foster, 134 Ill. 472 (1890).

[1] Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857). But see Greene *v.* Dispeau, 14 R. I. 575 (1884). A delivery of the certificates as security is a pledge and not a mortgage. George, etc. Co. *v.* Range, etc. Co., 50 Pac. Rep. 630 (Utah, 1897).

[2] Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Wilson *v.* Little, 2 N. Y. 443 (1849). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financed the matter for him was discussed in Griggs *v.* Day, 58 N. Y. Super. Ct. 385 (1890).

[3] See §§ 777, 852, *infra*. Where stock is mortgaged and delivered to the trustee of the mortgage, this is a mortgage and not a pledge. Toler *v.* East Tennessee, etc. R'y, 67 Fed. Rep. 168, 178 (1894).

[4] Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

[5] Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896).

[6] Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

§ 465. *How a pledge of stock arises or is made — Pledge by the corporation itself.*— A pledge of stock is generally made by a delivery of the certificates of stock indorsed in blank to the pledgee, and a memorandum in writing to the effect that the stock is held in pledge is generally signed and given to the pledgor, and a copy thereof attached to the certificates of stock. The pledge may be to a third person for the benefit of the creditor.[1] A mere direction to the corporation cannot constitute a pledge.[2] But where no certificate has been issued to the stockholder he may pledge the stock by an instrument in writing.[3] A pledge does not exist although the president of a railroad company has its bonds in his possession and states that he holds them in pledge for a syndicate of which he is a member. Actual delivery is necessary. An equitable pledge may

[1] Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds the stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895). Where the pledge is deposited with a third party, the pledgor and pledgee may modify their agreement as to the pledge. The depositary of the pledge cannot act upon a provision in the original agreement relative to an independent and outside transaction, and in an action by the pledgee to realize on the stock cannot set up that by reason of the modified agreement between the pledgor and pledgee the depositary in its outside transaction has suffered damage. Mercantile Trust Co. *v.* Atlantic Trust Co., 69 Hun, 264 (1893). A party receiving money paid on subscriptions for stock does not, merely because he places in a tin box in a safe-deposit company a declaration that certain securities owned by him are held as collateral security therefor, create a pledge for the benefit of the corporation to secure the paying over of such subscriptions to the corporation. Girard Trust Co. *v.* Mellor, 156 Pa. St. 579 (1893).

[2] Cumming *v.* Prescott, 2 Y. & C. Exch. 488 (1837); Lallande *v.* Ingram, 19 La. Ann. 364 (1867), the court saying: "In all cases of pledges the pledgee must be put in possession of the thing pledged; and, if it be a claim, the evidence of the obligation must be transferred and delivered. Shares in stock cannot be pledged unless they be evidenced by certificates, which must be transferred and delivered to the pledgee." If the certificates of stock are not delivered to the pledgee nor to any one for him there is no pledge. Succession of Lanaux, 46 La. Ann. 1036 (1894). As to how a pledge is made, see § 464, *supra*.

[3] First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877), where such a pledgee was protected against a third person who had advanced the money to the pledgor to purchase the stock. See also Brigham *v.* Mead, 92 Mass. 245 (1865); Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844). Unissued stock may be pledged by the person entitled to it. When issued, it at once becomes a pledge. Harris's Appeal, 12 Atl. Rep. 743 (Pa., 1888).

be enforced by the court, but only where there is a contract by the pledgor corporation applying to specific property.[1] A pledgee does not waive his pledge although he returns the stock to the pledgor to be sold.[2] In a few cases a mere delivery of the certificate without a written transfer has been held sufficient to constitute a pledge.[3] A delivery of the certificate of stock indorsed in blank is sufficient to constitute a pledge, without any memorandum in writing to that effect, and without a registry of the same being made on the corporate books.[4] Not even a provision of the charter or a by-law of the corporation to the effect that transfers are not valid until registered on the corporate books can prevent a pledge of stock being made by a mere delivery of the certificates indorsed in blank, or indorsed to the pledgee, without such registry.[5] The

[1] Hook *v.* Ayers, 80 Fed. Rep. 978 (1897). On the question of the necessity of a delivery in order to constitute a pledge, see also Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896).

[2] Winslow *v.* Harriman Iron Co., 42 S. W. Rep. 698 (Tenn., 1897).

[3] See Brewster *v.* Hartley, 37 Cal. 15 (1869); Robinson *v.* Hurley, 11 Iowa, 410 (1860); but see Lallande *v.* Ingram, 19 La. Ann. 364 (1867). *Contra*, Nisbit *v.* Macon, etc. Co., 12 Fed. Rep. 686 (1882). See also § 375, *infra*. A pledge of the certificates of stock is effective without notice to the corporation. Crescent City, etc. Co. *v.* Deblieux, 40 La. Ann. 155 (1888). A pledge without a transfer confers no legal title. Wagner *v.* Marple, 10 Tex. Civ. App. 505 (1895). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

[4] Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Finney's Appeal, 59 Pa. St. 398 (1868); Jarvis *v.* Rogers, 13 Mass. 105 (1816); Blouin *v.* Hart, 30 La. Ann. 714 (1878); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879); Baldwin *v.* Canfield, 26 Minn. 43 (1879); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881); Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881); U. S. *v.* Cutts, 1 Sumner, 133 (1832); S. C., 25 Fed. Cas. 745. *Cf.* State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883). A pledge may be made by signing in blank on the back of the certificate and pinning the certificate to the note. McClintock *v.* Central Bank, 120 Mo. 127 (1894). As to how a pledge may be made, see also Winslow *v.* Harriman Iron Co., 42 S. W. Rep. 698 (Tenn., 1897). The pledgor may, by word of mouth, extend stock already pledged to further advancements by the pledgee. Van Blarcom *v.* Broadway Bank, 9 Bosw. 532 (1862).

[5] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Dickinson *v.* Central

provision requiring such registry would seem not to concern the pledgee in any way, except that he could not claim the dividends without the registry; and in a few states, where an attachment of the stock for the pledgor's debts would cut off a previous unregistered vendee's or pledgee's rights, he by not registering encounters that risk.[1] Although a transfer is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless the pledgee may be a *bona fide* holder.[2] A transfer of stock, whether registered on the corporate books or not, may be shown to be a pledge, and parol evidence is admissible to prove that fact.[3]

Nat. Bank, 129 Mass. 279 (1880); Fraser *v.* Charleston, 11 S. C. 486 (1878); Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879); Pitot *v.* Johnson. 33 La. Ann. 1286 (1881); Continental Nat. Bank *v.* Eliot Nat. Bank, 12 Rep. 35 (1881); S. C., 7 Fed. Rep. 369; Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); S. C., 15 Fed. Cas. 1040; Blouin *v.* Hart, 30 La. Ann. 714 (1878); Lightner's Appeal, 82 Pa. St. 301 (1876); U. S. *v.* Cutts, 1 Sumner, 133 (1832); S. C., 25 Fed. Cas. 745; Leitch *v.* Wells, 48 N. Y. 585 (1872); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839), aff'g 20 Wend. 91; Otis *v.* Gardner, 105 Ill. 436 (1883). As regards such provisions requiring registry, a pledge of stock stands on the same footing as a sale of stock. See also § 379, *supra*. Stocks are not goods and chattels within the meaning of the act concerning chattel mortgages. State *v.* King County Super. Ct., 13 Wash. 607 (1896). Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. Galvin *v.* Mac Mining, etc. Co., 14 Mont. 508 (1894). The unregistered pledge is protected against the pledgor's assignee in bankruptcy. *Re* Shelley, 34 L. J. (Bankr.) 6 (1864).

[1] Thus, in states where an attachment has precedence over not only transfers without registry made after the attachment is levied, but over unregistered transfers made before the levy of attachment, a pledge, like a sale of stock, is protected against attachment on the pledgor's debts only by registry. Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); S. C., 29 Fed. Cas. 1376; State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507 (1875); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Shipman *v.* Ætna Ins. Co., 29 Conn. 245 (1860); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827). *Cf.* Strout *v.* Natoma W. & M. Co., 9 Cal. 78 (1858). But the purchaser at the execution sale is not protected against the pledgee, if he purchased with notice. Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856). And if notice of the pledge is given to the corporation, the pledgee is protected against attachments, although no registry is had. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874). See also § 486 *et seq.*, *infra*. As to the dividends, the pledgee is entitled to them as against the pledgor, but of course can obtain them from the corporation only by obtaining registry.

[2] Smith *v.* Savin, 141 N. Y. 315 (1894).

[3] Brick *v.* Brick, 98 U. S. 514 (1878); Wilson *v.* Little, 2 N. Y. 443 (1849);

A corporation may pledge its unissued stock,[1] but there is a difference of opinion as to whether the pledgee is liable as an

Ginz *v.* Stumph, 73 Ind. 209 (1880); Newton *v.* Fay, 92 Mass. 505 (1865); McMahon *v.* Macy, 51 N. Y. 155 (1872); Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880); Burgess *v.* Seligman, 107 U. S. 20 (1882); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Butman *v.* Howell, 144 Mass. 66 (1887); Ayer *v.* Seymour, 5 N. Y. Supp. 650 (1889). A certificate of stock indorsed in blank may be shown to have been delivered in pledge. Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482 (1895). It may be a question of fact whether the delivery of certificates of stock is made as a sale, or as collateral security. The presumption is that it is collateral security where the facts show a prior debt, and there is no proof as to the purpose of the transfer. Borland *v.* Nevada Bank, 99 Cal. 89 (1893). A depositor in a bank who has been induced to take from the bank its stock as security may show by parol evidence that he took such stock as collateral security and not in liquidation of his deposit. Williams *v.* American Nat. Bank, 85 Fed. Rep. 376 (1898). An apparent sale of stock is not proven to be a pledge on the evidence of plaintiff, contradicted by defendant, when the full value of the stock was paid and a receipt therefor given by the plaintiff. Travers *v.* Leopold, 124 Ill. 431 (1888). A pledgor may bring a suit for an accounting and to establish the fact that the transfer of stock was a pledge, and he may restrain a suit by the pledgee against the corporation for the stock. McDowell's Appeal, 123 Pa. St. 381 (1889).

[1] Burgess *v.* Seligman, 107 U. S. 20 (1882); Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); *Re* City Terminus Hotel Co., 14 Eq. 10 (1872); Union Sav. Assoc. *v.* Seligman, 92 Mo. 635 (1884), overruling Griswold *v.* Seligman, 72 Mo. 116. *Contra*, Brewster *v.* Hartley, 37 Cal. 15 (1869). See § 247, *supra*, p. 477, note 1. Where a corporation pledges its own stock, the pledgee may sell that stock for non-payment of the debt at less than par. This rule prevails even though the charter provides that the stock shall not be sold below par. Peterborough R. R. *v.* Nashua, etc. R. R., 59 N. H. 385 (1879). Unissued stock may be issued by the corporation as a pledge to secure a loan, and the corporation cannot set up that it was issued at less than par in violation of the constitution. The issue is good in the hands of the pledgee to the extent of the loan. Casquet *v.* Crescent City B. Co., 49 Fed. Rep. 496 (1892). Where the company issues its stock as collateral security to notes given to it by its subscribers in payment for such stock, and then sells the notes, the stock follows the notes and may be subjected to the payment of judgments on the notes. If the corporation has issued the stock to others it must pay the judgments. Houston, etc. R'y *v.* Bremond, 66 Tex. 159 (1886). A mortgage is valid as against the corporation giving it, although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of the mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. Powell *v.* Blair, 133 Pa. St. 550 (1890). Questions relative to the pledge by a company of its own bonds are considered elsewhere. See § 763, *infra*.

absolute stockholder on such stock.[1] The question of usury in the note secured by a pledge of stock may affect the pledge itself.[2] A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person.[3] A *bona fide* pledgee of stock is protected against claims of former owners of that stock to the same extent that an absolute purchaser of the stock would be protected, with the single exception that the power of a trustee or agent to sell stock does not give him power to pledge it.[4] The quasi-negotiability of certificates of stock protects a pledgee and a vendee alike.[5] The negotiability of a note is not destroyed by a provision that certain bonds are given as collateral security for its payment.[6]

§ 466. *Pledgee may have the stock registered in his own name or the name of another.*— Where certificates of stock indorsed in blank are delivered to a person in pledge as collateral security for a debt or for any other purpose, the pledgee may fill in the blanks and have the stock registered in his own name on

The unissued stock of a corporation may be issued to one of its creditors as collateral security. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896). The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell. National, etc. Bank *v.* Benbrook, etc. Co., 27 S. W. Rep. 297 (Tex., 1894). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement, and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895).

[1] See §§ 247, 309–314, *supra.*

[2] See Little *v.* Barker, 1 Hoffm. Ch. 487 (1840); and see Frost *v.* Stokes, 55 N. Y. Super. Ct. 76 (1887), holding that the New York statute of 1882 allows any interest if the debt is on demand and is over $5,000, and stock is pledged. If the loan secured by the pledge of stock is usurious, the pledgor may recover back the stock without payment. The pledge is void. Cousland *v.* Davis, 4 Bosw. 619 (1859). If stock is pledged to secure an usurious note, the pledgor may, under the New York statute, sue to recover back the stock without paying the debt. Dickson *v.* Valentine, 6 N. Y. Supp. 540 (1889). See also Birdseye's Statutes, 2d ed., p. 1696. The New York statute of 1882, as to bankers loaning on collateral, was applied in Thomas *v.* Coffin, 62 Fed. Rep. 665 (1894), a case in which the taking of commissions was also involved.

[3] McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894).

[4] See §§ 326, 351, *supra.*

[5] See § 432, *supra.*

[6] Valley Nat. Bank *v.* Crowell, 148 Pa. St. 284 (1892). The fact that a promissory note negotiable in form recites that it is secured by collateral and that the latter may be sold does not destroy the negotiability of the note. 1 Daniel, Neg. Inst., 4th ed., §§ 1774–1784.

the corporate books;[1] or the pledgee may have the stock registered in the name of another person, in order that he may protect his special property in the stock and at the same time not be liable thereon.[2] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee," or "as collateral security," or similar words.[3] In some states there are statutes as well as decisions to the effect that notice to the corporation that a person holds as pledgee certain certificates of stock, which stand on the books of the company in the pledgor's name, prevents an attachment against the pledgor from reaching more than the equity of redemption in such stock.[4]

§ 467. *Stock-broker purchasing stock for a customer on a margin is a pledgee of the stock.*— It has been well established that, where a stock-broker purchases stock on an order from his customer, and the customer does not pay for the stock, but deposits with the broker a sum of money called a "margin," to protect the broker against loss, the broker is bound to have on hand the stock so purchased during the entire time of the contract, and has the rights, duties, and liabilities of a pledgee,

[1] Skiff *v.* Stoddard, 63 Conn. 198 (1893); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); *Re* Angelo, 5 De G. & S. 278 (1852); Horton *v.* Morgan, 19 N. Y. 170 (1859); Union, etc. Bank *v.* Farrington, 13 Lea (Tenn.), 333 (1884); Hiatt *v.* Griswold, 5 Fed. Rep. 573 (1881), holding also that a surety is not thereby discharged; Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891); Day *v.* Holmes, 103 Mass. 306 (1869); Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239 (1883), also holding that a release of the stock by the pledgee releases a surety; Fay *v.* Gray, 124 Mass. 500 (1878). *Cf.* State *v.* Smith, 15 Oreg. 98, 114 (but see p. 132) (1887). The pledgee may sue to have the pledge transferred to himself and determine the rights of other claimants. Newcombe *v.* Lottimer, 12 N. Y. Supp. 381 (1890). The corporation must allow the registry. Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879). Where a contract does not merely pledge stock, but gives the creditor the legal title and unlimited power of disposition, the creditor may, by suit in equity, compel the company to allow a transfer, and the transferrer need not be made a party to the suit. Skinner *v.* Fort Wayne, etc. R. R., 58 Fed. Rep. 55 (1893). In California a pledgor may enjoin a pledgee from transferring stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording such a pledge without a transfer of the stock itself. Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896); 53 Pac. Rep. 845.

[2] Day *v.* Holmes, 103 Mass. 306 (1869); Hiatt *v.* Griswold, 5 Fed. Rep. 573 (1881); Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479 (1884). See also § 470, *infra*.

[3] See § 247, *supra*, and ch. XXVII, *infra*.

[4] See ch. XXVII, *infra*.

with the customer as a pledgor.[1] The broker under such circumstances must conform to all the rules governing a pledgee's attitude towards a pledgor. He cannot repledge, nor can he sell without due notice, unless such rights are given by the customer, the pledgor.[2]

§ 468. *Miscellaneous rights of pledgee and pledgor — The equity of redemption.*— Dividends declared during the continuance of the pledge belong to the pledgee, even though the latter is not registered as owner on the corporate books,[3] provided

[1] Baker *v.* Drake, 66 N. Y. 518 (1876); Markham *v.* Jaudon, 41 N. Y. 235 (1869); and see ch. XXV, *supra*. A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v.* Van Boskerk, 49 How. 266, 4 Hun, 628 (1875). A broker may pledge his customer's securities for an amount not exceeding the amount due from the customer, but the broker must not put the securities beyond the reach of the customer, nor mingle such securities with others and hypothecate all of them for a larger amount, the reason of this decision being that, so long as the customer could go to the pledgee and redeem the securities without loss, he, the customer, was not injured. Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897).

[2] See ch. XXV, *supra*. A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. The repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 28 Atl. Rep. 281 (Md., 1894).

[3] Herrman *v.* Maxwell, 47 N. Y. Super. Ct. 347 (1881). And the pledgor who collects them holds them in trust for the pledgee. Hill *v.* Newichawanick Co., 8 Hun, 459; affirmed, 71 N. Y. 599 (1877). In Central, etc. Bank *v.* Wilder, 32 Neb. 454 (1891), it was held that not only was the pledgee entitled to the dividends, but was entitled to them although the stock stood on the corporate books in the name of the pledgor, where the officers knew all about the pledge. Where a pledge of stock is renewed and a new note given, dividends accruing before the renewal go to the pledgor. Fairbank *v.* Merchants' Nat. Bank, 132 Ill. 120 (1889). A pledgee is entitled to collect the dividends, and in some instances may do so even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511 (1895). A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892). Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer, with a written request of the pledgor to the same effect, to-

notice has been given to the corporation. The pledgee is entitled to the dividends on the stock, but must account for them when the pledge is redeemed.[1] A pledgee may surrender his certificate to the corporation and take a new certificate, where the corporation has decreased the par value of the stock.[2]

Where the pledgor pledged the stock to secure the debts of another at a bank, and renewals thereof, the pledge continues though the pledgor dies.[3] But a pledge of stock to secure another person's debt is released by an extension of that debt.[4] An indorser, however, is not released by a change in the security, except to the extent that the security is decreased.[5] Where a

gether with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt, or for a debt of a firm in which he is interested. American, etc. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn., 1896). The corporation is liable to a pledgee, to whom the stock has been transferred on the books, for dividends paid to the pledgor. The acceptance of part payment, etc., by the pledgee from the pledgor does not waive his cause of action against the company. Boyd *v.* Conshohocken Worsted Mills, 149 Pa. St. 363 (1892). In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder, and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897). Where a certificate is issued by the corporation to the pledgee as pledgee, on the face of the certificate, the dividends must be paid to him, and if the corporation pays the dividends to the pledgor it is liable therefor to the pledgee. Hunt *v.* Laconia, etc. R'y, 39 Atl. Rep. 437 (N. H., 1896). In insolvency proceedings a pledgee is entitled to dividends without giving up his security, and the federal court will not follow the state decisions on this point in receivership cases. London, etc. Bank *v.* Willamette, etc. Co., 80 Fed. Rep. 226 (1897). See § 763, *infra*, on this point. The pledgee is entitled to the dividends, even though the stock stands in the name of the pledgor on the books of the company. George, etc. Co. *v.* Range, etc. Co., 50 Pac. Rep. 630 (Utah, 1897).

[1] Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Edw. Bailm., § 300.

[2] Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887).

[3] Cotton *v.* Atlas Nat. Bank, 145 Mass. 43 (1887).

[4] Price *v.* Dime Sav. Bank, 124 Ill. 317 (1888).

[5] Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). A pledgee may enforce his claim against the principal debtor, although the stock, which had been pledged by a third person to the pledgee to secure the debt, has been exchanged for stock in a

pledge is deposited in third parties' hands for the benefit of both parties, the creditor is not bound to see to the return of the pledge.[1] A pledge to secure indebtedness of specified parties is not security for their individual debts.[2] A pledge to secure the note of another person, past due, is not binding, where there is no extension of the time of payment.[3] If a person agrees to deposit stock to secure the debt of another, and fails to do so, he is liable, not for the debt, but for the value of the stock.[4] The pledge may be for a running liability, and is not released by an extension of any particular debt.[5] Stock may be given by the debtor to his creditor to sell for the benefit of the creditor, and the surplus to be returned to the debtor.[6] The pledge may be to secure the carrying out of a contract.[7] The pledge of stock may provide that, for part payments of the debt, the pledgor may withdraw part of the stock pledged.[8] A pledge, to secure a certain note and all other present or future demands of any kind, due or not due, is good as a pledge for the note specified, but does not apply as a pledge to another note due five years later, the payment of which is secured by real estate. Upon payment of the first note the pledgor may file a bill in equity to obtain the stock.[9] By a custom of banks in a particular locality, stock held by the bank against the pledgor as collateral for one loan may be held as collateral for all loans.[10] The statute of limitations may be a bar to the debt and yet not to the pledge.[11]

A pledgee has the right to vote on the pledged stock where he is registered as a stockholder,[12] but the pledgor may compel him, by legal proceedings, to give a proxy for voting purposes

reorganized company with the consent of the owner of the stock, but without the consent of the debtor or its receiver. McKusick *v.* O'Gorman, 69 N. W. Rep. 317 (Minn., 1896).

[1] Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896).

[2] Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky., 1898).

[3] Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky., 1898).

[4] Hite Nat. Gas Co.'s Appeal, 118 Pa. St. 436 (1888).

[5] Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338 (1881).

[6] Beckwith *v.* Burrough, 13 R. I. 294 (1881). Such action would probably make the creditor the agent of the debtor.

[7] Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844).

[8] First Nat. Bank *v.* Root, 107 Ind. 224 (1886).

[9] First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

[10] Bacon's Adm'r *v.* Bacon's Trustees, 27 S. E. Rep. 576 (Va., 1897).

[11] See § 476, *infra*.

[12] See § 612, *infra*.

where there are equitable reasons for so doing.[1] A pledgee is not bound to protect the stock from forfeiture for non-payment of calls.[2] A pledgee of certificates of stock is protected against further sales or pledges of the same stock by the pledgor, such other sales or pledges being without the delivery of any certificate, the same as the vendee of a certificate of stock is protected against another sale of the stock to a purchaser who takes without any certificate.[3] The possession of the certificate protects the pledgee herein. The pledgee is not liable for a loss of the pledge by theft, there being no negligence on his part.[4]

A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts.[5] The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo it, nor hold the latter corporation liable. His remedy is against the pledgor and the first corporation.[6]

[1] See § 612, *infra*.

[2] Southwestern R. R. Bank *v.* Douglas, 2 Spears (S. C.), 329 (1844).

[3] Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105 (1851). See § 321, *supra*. The cases therein cited are partly cases of pledge and partly of sale of certificates of stock. The rule applies equally to both. A person to whom a pledgor fraudulently transfers his equity and who redeems the stock cannot be compelled to turn it over to creditors except upon repayment of the amount so paid by him. Hamilton Nat. Bank *v.* Halsted, 56 Hun, 530 (1890).

[4] Fleming *v.* Northampton Nat. Bank, 9 Fed. Cas. 264 (1881).

[5] Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificates issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890). "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding." National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895), applying the rule to pledgees also. See also § 209, *supra*.

[6] Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A pledgee of common stock cannot object to the merging of preferred stock into mortgage bonds. Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). In Allis *v.* Jones, 45 Fed. Rep. 148 (1891), it is intimated that a pledgee has not the same right to attack an

Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet, in the absence of fraud, the pledgee is bound.[1] A pledgor of stock may enforce a claim against the corporation, even though thereby the corporation will become insolvent and the stock be rendered worthless. Although the pledgor has made an assignment for the benefit of creditors, yet his assignee cannot be enjoined by the pledgee from enforcing the claim against the corporation.[2]

The fact that the pledgee, a corporation, gave through its president incorrect information to the pledgor, whereby the pledgor did not sell the stock in pledge and liquidate the debt, is no defense to an action on the debt.[3] A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable, in an action for damages for deceit, on the ground that its published statements were false and fraudulent and that he relied on those statements.[4] Where stock has been pledged, and the pledgor makes a contract with a third person, by which the latter agrees to pay the debt and take the stock, the pledgor may enforce this contract without tendering the stock.[5] Where a bank states to a pledgee that it holds certain negotiable bonds in pledge to secure the debt, and the bonds are produced, shown, and handed back to the bank, the latter cannot afterwards claim that it held these bonds subject to a prior pledge by the same pledgor to another person.[6] Pledgees of a majority of the

ultra vires corporate debt that the pledgor has, especially where the stock is worthless. *Cf.* § 735, *infra*. In McCaleb *v.* Goodwin, 21 S. Rep. 967 (Ala., 1897), one street railway purchased all the stock of another street railway and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first-mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor.

[1] Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

[2] Janney *v.* Merchants', etc. Bank, 98 Ala. 515 (1893).

[3] Investment Co. *v.* Eldridge, 175 Pa. St. 287 (1896).

[4] Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895).

[5] Gilbert *v.* Adams, 68 N. W. Rep. 883 (Iowa, 1896).

[6] Gibson *v.* Lenhart, 111 Pa. St. 624 (1886). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim

corporate stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[1] "The bailee owes a direct duty to the pledgor to be reasonably careful that no harm shall come through his custody to the subject-matter of the pledge."[2]

The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent even though it be kept secret from the other creditors of the pledgor.[3] A judgment creditor of the pledgor may file a bill to reach the equity of redemption in a pledge of stock.[4]

that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895).

[1] Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where stock is pledged and the pledgee is in control of the company, and instead of declaring dividends he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given in pledge. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). A pledgor of stock cannot, in a suit brought by his creditor to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. McMullen *v.* Ritchie, 57 Fed. Rep. 104 (1893). It is no defense to a note secured by stock that the pledgee, by means of the stock, controlled the company and managed it so badly that the stock became worthless. Dunham *v.* Boyd, 64 Conn. 397 (1894).

[2] Ritchie *v.* McMullen, 79 Fed. Rep. 522, 533 (1897). In this case the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

[3] National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898).

[4] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). Where a judgment creditor of a person files a bill in equity to reach the equity of that person in a pledge of stock which he has made to other parties, and the pledgees are joined as parties defendant, the accounts and claims between the pledgor and pledgees may be adjusted in the same suit. Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). The equity of redemption of the pledgor may be reached by garnishee process, and the property sold by a receiver to pay the pledgee, and the balance to the other creditor, where the pledgee consents and his debt is

Where the pledgee is notified by a person that the latter is entitled to the collateral, subject to the pledge, and the pledgee upon payment of the debt returns the collateral to the pledgor, the pledgee is liable to such third person.[1]

Where the pledgee allows the pledgor to take the pledge and pledge it for another loan, and then the second pledgee allows the same thing to be done for a third loan, and the third pledgee sells out the pledge, and the second pledgee buys, the first pledgee may redeem from the second by paying both loans.[2] A pledgee may deduct from the proceeds of a sale reasonable expenses in keeping and caring for the pledge, paying taxes and liens, preserving title, or rendering it available.[3] The pledgee cannot set up the title of a third person as against the pledgor, however tortious the possession of the latter, unless the owner has claimed the pledge and the pledgee has yielded to the claim.[4] A pledgee is not bound to prosecute suits to protect the pledge, nor to sell, and a

past due. Kimbrough *v.* Orr Shoe Co., 98 Ga. 537 (1896). An attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or have a sale subject to the pledge. McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894). Where a worthless equity of redemption in land is turned in for stock, and then the stock is pledged with the mortgagee of the land, and then "scrip" is taken from the corporation by the parties pledging the stock, this scrip reciting that it represents the equity of the right to the certificates of stock after the mortgage is paid off, such scrip is valid and may be sold, it having been treated as valid for twenty years, even though it was issued without consideration. Higgins *v.* Lansingh, 154 Ill. 301 (1895). In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables such creditor to reach the equity in the stock. Old Second Nat. Bank *v.* Williams, 71 N. W. Rep. 150 (Mich., 1897). Where stock is placed in escrow, to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. Pabst, etc. Co. *v.* Montana, etc. Co., 48 Pac. Rep. 234 (Mont., 1897).

[1] Hughes *v.* Settle, 36 S. W. Rep. 577 (Tenn., 1895).

[2] Manhattan Trust Co. *v.* Sioux City, etc. R. R., 65 Fed. Rep. 559 (1895).

[3] Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). While the pledgee is entitled to defend his title, yet in his suit to foreclose the pledge he cannot be allowed disbursements made to counsel in defending his title in another suit brought by the real owner of the stock, the pledge being in fraud of such owner's rights, but the pledgee being *bona fide*. Work *v.* Tibbits, 87 Hun, 352 (1895).

[4] Sedgwick *v.* Macy, 24 N. Y. App. Div. 1 (1897), the court refusing to follow the English rule on this subject.

provision that the pledgee may claim repayment of any sums expended in the prosecution of claims is not an agreement of the pledgee to prosecute.[1] If a note is secured by collateral, an accommodation indorser is not liable if the collateral is released from its deposit as security for the note.[2] A pledge for any "note or claim against me" applies to a claim against the pledgor's firm.[3] The pledgee cannot be taxed on the stock.[4]

§ 469. *Pledgee need not retain or return to the pledgor the identical certificates or shares of stock which were pledged, but must have equal quantity always on hand.*— One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges, and property. Accordingly, it is held that a pledgee of stock need not retain in his possession the identical shares of stock which were pledged to him, but that the rights of the pledgor are fully preserved if similar stock is retained by the pledgee until the termination of the pledge.[5] The pledgee

[1] Culver *v.* Wilkinson, 145 U. S. 205 (1892). The pledgee may claim credits for defending the pledge against attacks by law suits, and in some cases for adding to its value by aiding the subject of the pledge. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa., 1890).

[2] Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891).

[3] Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359 (1891). A pledge of stock to secure future liabilities does not apply to past liabilities. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

[4] See § 564, note, *infra.*

[5] Caswell *v.* Putnam, 120 N. Y. 153 (1890); Skiff *v.* Stoddard, 63 Conn. 198 (1893); Nourse *v.* Prime, 4 Johns. Ch. 490 (1820); S. C., 7 Johns. Ch. 69 (1823); Horton *v.* Morgan, 19 N. Y. 170 (1859); Barclay *v.* Culver, 30 Hun, 1 (1883); Noyes *v.* Spaulding, 27 Vt. 420 (1855); Atkins *v.* Gamble, 42 Cal. 86 (1871); Price *v.* Gover, 40 Md. 102 (1874); Gilpin *v.* Howell, 5 Pa. St. 41 (1847); Hardenbergh *v.* Bacon, 33 Cal. 356 (1867); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); Thompson *v.* Toland, 48 Cal. 99 (1874); Le Croy *v.* Eastman, 10 Mod. 499 (1722); Harding *v.* Field, 1 N. Y. App. Div. 391 (1896); Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); Boylan *v.* Huguet, 8 Nev. 345 (1873). *Cf.* Langton *v.* Waite, L. R. 6 Eq. 165 (1868). In the case of Dykers *v.* Allen, 7 Hill, 497 (1844), the pledgee at one time seems to have had no stock on hand. In selling the pledgor's stock on notice for non-payment of the debt, the pledgee need not sell the identical stock pledged. Berlin *v.* Eddy, 33 Mo. 426 (1863). In Mayo *v.* Knowlton, 134 N. Y. 250 (1892), the court said: "The stock had no ear-mark; one share was the same as another, and could not be identified or distinguished therefrom." Where a customer knows that the broker is insolvent, and has not kept on hand the stock which the customer had deposited on margin, and the broker purchases stock in order to satisfy the demand of the customer, the transaction is a preference, in violation of the statutes of Massachu-

must have on hand at all times the full amount of the stock pledged, whether the debt secured is due or not, since the law will not allow the pledgee to speculate or deal with the stock of another as though it were his own.[1] It is not enough that he can at once procure the stock from one to whom it is loaned,[2] or that he had sufficient on hand for the plaintiff pledgor, but not enough for all the pledgors whom he had at any particular time.[3] The law requires him to set aside as much stock as has been pledged to him.

§ 470. *Pledgee's liability on subscription and statutory liability on stock.*[4]—A pledgee who has obtained registry on the corporate books appears to third parties as a full stockholder. Accordingly, in case the corporation becomes insolvent, the registered pledgee is held liable on his stock, as though he were an absolute stockholder. In order to avoid this danger, the law allows the pledgee to have the pledged stock registered on the corporate books in the name of a nominee of the pledgee.[5] Where such a registry is obtained, the pledgee has the advantage of a control of the stock, and at the same time escapes the danger of liability as a stockholder.

§ 471. *Pledgee has no right to sell or repledge the stock even temporarily, except upon notice, unless the debt is assigned with the stock.*—"Equity will not tolerate a separation of the pledge from the debt, and they must stand together, and will force upon a wrong-doer the character of a trustee, and thus compel him to do justice." Such is the language of the New York court of appeals.[6] In no other way can the pledgee legally part with the possession of such stock by a sale or repledge of it. If he does so he is guilty of a conversion,[7] and in New

setts. Weston *v.* Jordan, 168 Mass. 401 (1897). *Contra*, 75 N. W. Rep. 443.

[1] *Ex parte* Dennison, 3 Ves. Jr. 552 (1797); Taussig *v.* Hart, 58 N. Y. 425 (1874); Thompson *v.* Toland, 48 Cal. 99 (1874); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882). The pledgor may waive this restriction by express agreement. Ogden *v.* Lathrop, 65 N. Y. 158 (1875).

[2] Allen *v.* Dykers, 3 Hill, 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill, 497 (1844); *Ex parte* Dennison, 3 Ves. Jr. 552 (1797).

[3] Fay *v.* Gray, 124 Mass. 500 (1878).

[4] See ch. XIV, § 247, *supra*.

[5] Newry, etc. R'y *v.* Moss, 14 Beav. 64 (1851). See § 466, *supra*.

[6] Bennett *v.* Austin, 81 N. Y. 308, 322 (1880). *Cf.* Easton *v.* Hodges, 18 Fed. Rep. 677 (1883).

[7] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Gass *v.* Hampton, 16 Nev. 185 (1881). Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the

York state may be arrested.[1] A broker has no right to repledge his customer's stocks or bonds, carried by the broker as collateral or on a margin, unless the debt is transferred at the same time, or unless an express contract authorizes such repledge.[2]

express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500 (1897). The case of *Ex parte* Sargent, L. R. 17 Eq. 273 (1874), contained a dictum giving a contrary rule; but France *v.* Clark, L. R. 22 Ch. D. 830 (1883), disapproves such dictum and says: "As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption, and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due to him." Fay *v.* Gray, 124 Mass. 500 (1878), holds that the pledgee has no right to sell, lend, or repledge the stock. In the notes in 21 Am. Law Reg. (N. S.) 454–461, a contention is made that the pledgee should be allowed to repledge, but it is admitted that the weight of authority holds otherwise. The following cases are cited: Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520 (1873); First Nat. Bank *v.* Bryce, 19 Am. L. Reg. (N. S.) 503 (1880); Work *v.* Bennett, 70 Pa. St. 484 (1872); Wood *v.* Hayes, 81 Mass. 375 (1860); Thompson *v.* Patrick, 4 Watts (Pa.), 414 (1835); and see § 469, *supra*. In Lawrence *v.* Maxwell, 53 N. Y. 19 (1873), the court said: "Ordinarily, and in the absence of any agreement or assent by the pledgor, the pledgee would have no right to use the thing pledged, and a use of it would be illegal. But, under special circumstances depending somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, express or implied, the property pledged may be used by the pledgee in any way consistent with the general ownership and the ultimate rights of the pledgor." Where the pledgee has an option to purchase the stock, but, instead of purchasing, he repledges it illegally, the pledgor may consider this as an exercise of the option. Upham *v.* Barbour, 65 Minn. 364 (1896). Where the pledgee transfers the stock to another person as security that a proposed contract between the corporation and another corporation will be ratified at a stockholders' meeting, and such other person votes said stock at such stockholders' meeting, the pledgee is guilty of conversion of the stock. Upham *v.* Barbour, 65 Minn. 364 (1896).

[1] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Colder, 48 Hun, 449 (1888). See also § 457, *supra*, and § 576, *infra*.

[2] Dykers *v.* Allen, 7 Hill, 497 (1844). Where it was understood between a firm of brokers and its customers, for whom and on whose order it bought stocks on the security of a margin, that the firm might, according to the usual course of business, pledge or hypothecate as security for loans to the firm the stocks thus bought, it was held that a mere pledge of such stocks would not be of itself a conversion. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See also Lawrence *v.* Maxwell, 58 Barb. 511 (1871); 6 Lans. 469; 53 N. Y. 19. In Wood *v.* Hayes, 81 Mass. 375 (1860), it was held that "a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for

In Pennsylvania it is a penal offense for the pledgee to repledge the stock.[1] Although, apparently, the pledgor would not be injured by the pledgee's separating the stock from the debt and by transferring to another the stock pledged as collateral security, yet the law rigidly protects the interests of

his own debt to a third person, without making himself liable to an action by his employer; and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money." Approved in Covell *v.* Loud, 135 Mass. 41 (1883), where it was held that, where the customer is unable to advance further margin, and tells the broker to do the best he can, he may sell without notice. The decided weight of authority, however, holds that, unless the power is expressly given to the broker to repledge the stock, he cannot legally repledge it. A broker has no right to repledge the stocks held by him as collateral to advances to a customer, especially so after the customer has repaid the advances. Van Voorhis *v.* Rea, 153 Pa. St. 19 (1893). Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). A broker has no implied power to repledge. Skiff *v.* Stoddard, 63 Conn. 198 (1893). Where a broker repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of the claim. Skiff *v.* Stoddard, 63 Conn. 198 (1893); Jamison's Assigned Estate, 3 Pa. Dist. 217 (1894). Where the pledgee converts the pledge by selling it, and then assigns for the benefit of creditors, the pledgor comes in as any other creditor, and not as a preferred creditor. *Re* Jamieson's Estate, 163 Pa. St. 143 (1894), holding also that the debt due from the pledgor to the pledgee may be set off. Where the pledgee, without the knowledge of the pledgor, sells one of the notes, and gives with it a part of the collateral as security, the pledgor may pay that note and take all the security so given to the repledgee. The first pledgee cannot claim any lien on the part so repledged. McDonald *v.* Grant, N. Y. L. J., July 16, 1895, Supr. Ct. Sp. T. A broker may pledge his customer's securities for an amount not exceeding the amount due from the customer, but the broker must not put the securities beyond the reach of the customer, nor mingle such securities with others and hypothecate all of them for a larger amount; the reason of this decision being that, so long as the customer could go to the pledgee and redeem the securities without loss, he, the customer, was not injured. Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897).

[1] Act of May 25, 1878, modified as to purchases by broker on margin by act of June 10, 1881 (P. L. 1881, 107). Section 1784 of the code of Alabama forbids an assignment of a pledge without an assignment of the debt it secures. Dexter *v.* McClellan, 22 S. Rep. 461 (Ala., 1897).

the debtor and pledgor, and will not compel him to submit to the danger of such transfers by the pledgee. There may, of course, be an express agreement or understanding to the contrary.[1] Where an agent has wrongfully pledged his principal's stock, and the pledgee then wrongfully converts the pledge, the principal may ratify the act of his agent and sue the pledgee for conversion. The pledgee may offset the amount actually due him.[2]

A pledgee may assign the principal debt to a third person and "give him the benefit of the collateral securities to secure the payment of the principal debt. So long as nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt, the pledgor is not injured."[3] "Nothing is better settled than the right of a

[1] Chouteau *v.* Allen, 70 Mo. 290 (1879). A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. In this case it was held also that the repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 28 Atl. Rep. 281 (Md., 1894).

[2] Smith *v.* Savin, 141 N. Y. 315 (1894).

[3] Chapman *v.* Brooks, 31 N. Y. 75, 84 (1865); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 208 (1881). The pledgee may assign his interest in the pledge and transfer the pledge to such assignee. Overton, Liens, §§ 168, 172; Schoul. Bailm. (2d ed.), § 218, etc. Story, Bailm., § 324, says the pawnee "may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn to another person, without in either case destroying or invalidating his security." See also Talty *v.* Freedman's Sav. etc. Co., 93 U. S. 321 (1876); 2 Kent, Com. 579; Jarvis *v.* Rogers, 13 Mass. 105 (1816), 15 Mass. 389, 408; Mores *v.* Conham, Owen, 123 (1610); Ratcliffe *v.* Davis, 1 Bulst. 29 (1611); Anon., 2 Salk. 522 (1694). The right of the pledgee to repledge may exist by force of a custom understood by both parties. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). In Lewis *v.* Mott, 36 N. Y. 394 (1867), where, after the debt was due and unpaid, the pledgee turned over the debt and security to another without a foreclosure or sale on notice, the court held that the latter could hold the collateral stock until the pledgor tendered the amount of the debt. The latest English cases hold that, although the repledge may be wrong, yet that the pledgor cannot reclaim the stock from the repledgee until the former pays the debt for which the pledge was made. Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Halliday *v.* Holgate, L. R. 3 Exch. 299 (1868). Where a broker, holding stock in pledge on a margin, repledges it without the consent of his customer, it has been held that he cannot recover the value of the stock from the customer on a tender

transferee of a pledge to hold it until the debt for which it was given is paid."[1] Where a pledgee repledges both the note and the stock, an agreement between the original pledgor and the second pledgee, whereby the second pledgee sells the stock and takes in payment notes of the purchaser, is illegal as regards the rights of the first pledgee. As against the second pledgee the first pledgee is entitled to be credited with the value of the stock at the time of the sale.[2] The pledgee of securities, who turns them in to a reorganization and takes new securities without the consent of the pledgor, is guilty of a conversion, but the pledgor can recover only the actual value of the securities so turned in. The pledgee is not bound to aid the pledgor in using the pledge in a reorganization, nor is the pledgee bound to delay the reorganization on account of any demand of the pledgor.[3]

§ 472. *Purchasers or pledgees of stock from pledgee with notice are not protected.*— A person who purchases or takes in pledge stock which he knows is held in pledge by the person from whom he takes it is not a *bona fide* holder of such stock, and is not entitled to the rights of such. At the best he stands merely in the place of the pledgee from whom he receives the stock. He must restore the stock to the owner in case the pledgee would be obliged to restore it, had no second sale or pledge been made.[4] The second pledgee or vendee, with notice that he was taking pledged stock, has no rights which the first pledgee has not. He is but an equitable assignee of the latter, and can be compelled by the owner to deliver the stock in any case where the first pledgee could be so compelled.[5]

of the certificate. Clarkson *v.* Snider, 5 Can. L. T. 587 (1885). In Langton *v.* Waite, L. R. 6 Eq. 165 (1868), the court said that the law was clear that, in the absence of express contract to the contrary, a pawnee cannot sell without the express permission of the owner, and that if he does, the owner can charge him with the excess of the price over the loan. The court, however, seemed to think that the pledgee could repledge the stock. In Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880), the court said that the pledgee might repledge the stock so far as he had an interest in it.

[1] Philler *v.* Yardley, 62 Fed. Rep. 645, 649 (1894).

[2] Pauly *v.* Wilson, 57 Fed. Rep. 548 (1893).

[3] Griggs *v.* Day, 21 N. Y. App. Div. 442 (1897). To same effect see S. C., 136 N. Y. 152, 162 (1892).

[4] Quoted and approved in German Sav. Bank *v.* Renshaw, 28 Atl. Rep. 281 (Md., 1894).

[5] Any fact, such as usury in the

The same rule applies whether the pledgee assigns or repledges both the debt and the stock or the stock alone.[1] Where a pledgee has been fraudulently induced to sell the stock to a person, the pledgor may file a bill in equity against such person to obtain a retransfer of the stock to himself and also the dividends which have been paid, and need not join the pledgee as a party.[2]

§ 473. *Bona fide repledgees or purchasers of pledged stock are protected — Pledgor's remedies — Arrest — Marshaling the assets.*— Where, however, a pledgee of certificates of stock indorsed in blank takes the certificates and sells or pledges them to another, who takes such certificates in good faith and for value, and without notice that his vendor or pledgor held them as a pledge, the purchaser or pledgee from the pledgee is as fully protected in his rights as though the person with whom he dealt was the absolute owner of the stock.[3] This rule arises,

second transaction, which prevents the second pledgee or purchaser from being a *bona fide* purchaser, applies to a repledgee of stock. The repledgee is not protected. Felt *v.* Heye, 23 How. Pr. 359 (1862); Little *v.* Barker, 1 Hoffm. Ch. 487 (1840). So also in Pennsylvania, where the repledgee takes in consideration of a pre-existing indebtedness. Ashton's Appeal, 73 Pa. St. 153 (1873). In general, see also Duncan *v.* Jaudon, 15 Wall. 165 (1872); Shaw *v.* Spencer, 100 Mass. 382 (1868); Ellis's Appeal, 8 W. N. Cas. (Pa.) 538 (1880); Porter *v.* Parks, 49 N. Y. 564 (1872); Chouteau *v.* Allen, 70 Mo. 290 (1879). A pledgee taking with notice that the pledge is in breach of trust is not protected. Kern's Estate, 176 Pa. St. 373 (1896). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 50 Pac Rep. 611 (Utah, 1897). In Hampton, etc. R. R. *v.* Bank, 26 S. E. Rep. 238 (S. C., 1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

[1] Felt *v.* Heye, 23 How. Pr. 359 (1862). Nor can the repledgee claim the benefit of the debt not assigned to him. Felt *v.* Heye, 23 How. Pr. 359 (1862). See also Talty *v.* Freedman's, etc. Co., 93 U. S. 321 (1876).

[2] Smith *v.* Lee, 77 Fed. Rep. 779 (1896).

[3] The important case of McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871), was on the rights of a *bona fide* repledgee of stock, and fully sustains

not on the ground that the certificate of stock is negotiable, but for the reason that the owner is held to have enabled his pledgee to sell the stock as the pledgee's own, and that as between the owner and the *bona fide* purchaser or pledgee from the pledgee the owner must bear the loss. The law of estoppel prevents his denying the right of his pledgee to sell or pledge as against a *bona fide* purchaser or pledgee from the pledgee. So, also, this principle arises under the well-established rule that, where one of two innocent parties must suffer from the fraud of a third, the loss must fall upon him who enabled the third party

the general rule. See also Fatman *v.* Lobach, 1 Duer, 354 (1852); Nelson *v.* Owen, 113 Ala. 372 (1896); Wood's Appeal, 92 Pa. St. 379 (1880); Gass *v.* Hampton, 16 Nev. 185 (1881); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Otis *v.* Gardner, 105 Ill. 436 (1883); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), the court saying that in general a pledgee of personal property cannot convey a good title to another; but "if the owner entrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto and of unconditional power of disposition over it, the case is vastly different." Thus, a pledgee, without notice, of bonds from a pledgor, who turns out to have held the bonds as securities for the cancellation of a mortgage, is protected in his pledge. Saloy *v.* Hibernia Nat. Bank, 39 La. Ann. 90 (1887). In Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878), the court, following the English doctrine that an unregistered transferee of certificates of railway stock has no more rights than his transferrer, refused to protect the unregistered repledgee of stock. A *bona fide* purchaser of pledged stock is protected in his title. Krouse *v.* Woodward, 110 Cal. 638 (1895). Where stock is pledged as collateral, and the pledgee sells to a *bona fide* purchaser without notice, such purchaser is protected, even though he at the same time purchases the note for which the stock is collateral. Strickland *v.* Leggett, 21 N. Y. Supp. 356 (1892). A *bona fide* transferee, absolutely or in pledge from a broker, holding his customer's stock in pledge, is protected to the extent of the transfer, the transferee having no notice of the fact that the stock was held in pledge by the broker. Thompson *v*, Toland, 48 Cal. 99 (1874); Zulick *v.* Markham, 6 Daly, 129 (1875); and see many cases in § 321, *supra*. These cases apply equally whether the person transferring contrary to law is an agent or a pledgee, and equally, also, whether he sells or only repledges. In a recent case in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary in Maryland to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 28 Atl. Rep. 281 (Md., 1894), a case wherein a broker holding stock on a margin repledged it at a bank.

to perpetrate the fraud. If the pledgee has repledged the stock, the owner can obtain the stock only by paying to the repledgee the amount of the latter's advancement to the first pledgee.[1] The pledgor of stock, under these rules, has practically no protection as to his stock except the honesty and responsibility of his pledgee. The *bona fide* purchaser or pledgee from the pledgee is equally protected whether the certificates of stock are indorsed by the pledgor or vendor, or are indorsed in blank by some previous holder.[2] The repledgee or vendee is held to be a *bona fide* holder only where he would be held so to be in cases of promissory notes and other similar cases.[3] The general rule of law is that a pledgee holding various securities may resort to any one security which he chooses. He is not bound to resort to those securities upon which other creditors have no claim.[4] Under such circumstances, however, as give a court of equity power so to do, especially where a repledgee has other collateral for his debt, a court of equity may marshal the assets and compel resort to such other collateral first.[5] Where, by

[1] Wood's Appeal, 92 Pa. St. 379 (1880); Fatman *v.* Lobach, 1 Duer, 354 (1852); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), holding, however, that payments on the subscription by the owner subsequently to the repledge do not enure to the benefit of the repledgee. See, in general, Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Moore *v.* Conham, Owen, 123 (1610); Ratcliff *v.* Davis, Yelv. 178 (1611); Jarvis *v.* Rogers, 15 Mass. 389 (1819).

[2] Goss *v.* Hampton, 16 Nev. 185 (1881).

[3] In California the peculiar doctrine is sustained that the word "trustee" on the face of the certificate is no notice, and does not deprive the pledgee of his character of being a *bona fide* holder. Brewster *v.* Sime, 42 Cal. 139 (1871); Thompson *v.* Toland, 48 Cal. 99 (1874). In New York a pledgee is not *bona fide* when he takes bonds in pledge for a precedent debt. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190 (1881); Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880). A pledgee is not such *in bona fide* when the name of another pledgee in the certificate is erased and his own inserted. Denny *v.* Lyon, 38 Pa. St. 98 (1860). Where a party receives from his debtor certain stock as security for the purchase of other stock, and holds it for the old debt, and sells it after being notified that it belongs to another party, he is liable to the latter party for conversion. Niles *v.* Edwards, 90 Cal. 10 (1891).

[4] Jennings *v.* Loefiler, 39 Atl. Rep. 214 (Pa., 1898).

[5] Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880); Herbert *v.* Mechanics' Bldg. etc. Assoc., 17 N. J. Eq. 497 (1864), reversing, on this point, Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862). Where the pledgee repledges the stock illegally with other stock, the first pledgor may enjoin the second pledgee from selling the stock until the other stock of the pledgee is sold, and an account

custom, a broker repledges the stock of his customer, together with other stock, the customer cannot insist that the broker's stock be first applied to the debt. Where, however, the customer had not authorized the broker to repledge the stock, then the stock owned by the broker and pledged together with the stock of the customer will first be applied to the debt.[1] Where the pledgee has repledged the stock illegally to *bona fide* holders, the latter, upon being informed of the fact by the first pledgor, are bound to apply the proceeds of the other securities held by them before resorting to the stock owned by him, the first pledgor.[2] Where a customer pledges his stock

rendered, and notice of intent to sell the remainder given. Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor himself cannot enjoin a sale by the pledgee, unless the pledgee is insolvent. The pledgor's remedy is at law. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a broker pledgee, with the assent of the pledgor, has repledged the stock, the second pledgor, having no notice of who the first pledgor is, may hold all stocks until all debts from the second pledgor to him are paid. A person who gave stock to the first broker to sell is preferred to one who purchased stock on a margin. Willard *v.* White, 56 Hun, 581 (1890). Where pledged stock is repledged and sold out by the repledgee, together with various other stock held as collateral by the repledgee, a court of equity will marshal the assets. Smith *v.* Savin, 9 N. Y. Supp. 106 (1890); aff'd, 69 Hun, 311, and 141 N. Y. 315 (1894). Where the pledgee sells the securities and has a surplus, he cannot interplead between two claimants where he is sued by one of them for more than he admits the surplus amounts to. Dodge *v.* Lawson, N. Y. L. J., April 20, 1892. A pledgee need not resort to the pledge in order to obtain payment, but if the pledgor becomes insolvent the court will marshal the assets. Chemical Nat. Bank *v.* Armstrong, 50 Fed. Rep. 798 (1892). See also §§ 476, 763, *infra*, and §§ 456, 460, *supra*.

[1] Skiff *v.* Stoddard, 26 Atl. Rep. 874 (Conn., 1893). A customer who deposits stock with a broker to secure a marginal contract may redeem the same from the assignee of the broker for the benefit of the creditors, but the identity of the stock must be established. If there is not sufficient stock to satisfy all claims on that class of stock, the stock is prorated among all claimants. Skiff *v.* Stoddard, 63 Conn. 198 (1893).

[2] The latter cannot object to the mode of selling the other securities. Smith *v.* Savin, 141 N. Y. 315 (1894), holding, moreover, that the first pledgor may hold such second pledgee liable for a sale without notice, there being no waiver of notice. Where the pledgee wrongfully rehypothecates the pledge, together with other securities, the pledgor may pay the debt due to the repledgee and take all the securities and sell them all out, and may also sue the pledgee for conversion. The court will require the pledgor to indorse upon the judgment for conversion a suitable credit for the amount realized out of such sale of the securities by the pledgor. The court said that if a *bona fide* repledgee is informed of the conversion

with the broker, and the latter wrongfully repledges it and fails, and the customer notifies the repledgee of his claim and demands notice of any sale, the repledgee is liable if he sells without notice to the former and turns the surplus over to the assignee of the broker.[1] Arrest is considered elsewhere.[2]

§ 474. *Pledges by agents, trustees, executors, etc., legally and in breach of trust.*—It is within the power of an executor or administrator to pledge shares of stock belonging to the estate, and the pledgee is protected even though he knew that the executor pledged it as an executor.[3] A trustee, on the other hand, has no implied power to pledge or sell corporate stock belonging to the trust.[4] An agent's pledges of his principal's stock follow the same rules as where a pledgee repledges the

by the original pledgee, the repledgee is then bound, in case he sells out the securities, to turn over the surplus to the pledgor. The court also held that the repledgee, upon receiving notice, was bound to resort to other collateral before selling the collateral wrongfully repledged by the pledgee to the repledgee. A receiver of the pledgee has no greater rights than the pledgee himself. Union Pac. R'y *v.* Schiff, 78 Fed. Rep. 216 (1897). Where the pledgee wrongfully repledges the securities, and the original pledgor takes up the securities from the repledgee and agrees to protect the repledgee, the original pledgor cannot subsequently repudiate the transaction and hold the repledgee liable for the securities originally repledged. Union Pac. R'y *v.* Schiff, 74 Fed. Rep. 674 (1896). Where the pledgor sues the pledgee for conversion, in that the pledgee repledged the collateral, and the pledgor obtains judgment for the difference between the value of the stock and the amount due from the pledgor, and subsequently the pledgee or his receiver recovers back some of the stock so repledged, the pledgor cannot reclaim such stock. Deitz *v.* Field, 10 N. Y. App. Div. 425 (1896).

[1] Le Marchant *v.* Moore, 79 Hun, 352 (1894); aff'd, 150 N. Y. 209.

[2] See § 475, *infra.*

[3] Goodwin *v.* American Nat. Bank, 48 Conn. 550 (1881); Wood's Appeal, 92 Pa. St. 379 (1880); Carter *v.* Manufacturers' Nat. Bank, 71 Me. 448 (1880); § 329, *supra;* Manhattan Bank *v.* Walker, 130 U. S. 267 (1889). A pledgee from an executor is protected. Gottberg *v.* U. S. Nat. Bank, 13 N. Y. Supp. 841 (1890). If a pledge of stock by an executor is illegal, the pledgee is not protected where, not trusting to the executor's power as executor, he causes the stock to be transferred first to a legatee. Moore *v.* American L. & T. Co., 115 N. Y. 65 (1889). Where an executor pledges stock for his own debt, the pledgee knowing the fact so to be, the latter becomes trustee, and the statute of limitations does not run against redemption until after the pledgee has notified the *cestui que trust* of the estate that he holds the stock adversely. Marshall's Estate, 138 Pa. St. 285 (1890). Pledgees from the trustee for antecedent debts are not *bona fide* holders without notice, even though the form of a public sale was gone through. Darling *v.* Potts, 118 Mo. 506 (1893).

[4] See ch. XIX, §§ 323–327, 465, *supra.*

stock given to him in pledge. A *bona fide* holder for value and without notice is protected, while one who takes with notice is not protected. Where, however, the one taking stock in pledge from an agent knows that the latter is acting as agent, he is bound to inquire whether the principal has authorized his agent to pledge the stock, since a power to pledge cannot be presumed from a power to sell.[1] The right of corporations and persons to give and take stock in pledge is considered elsewhere.[2] The authority of a guardian given by the court to sell stock does not authorize him to pledge the stock.[3] Power of an agent to sell does not give him power to pledge for his own use, and where the corporation with knowledge of the facts allows a transfer it is liable to the owner.[4] The power of a corporate agent to sell bonds does not give him power to pledge them even to secure corporate debts. Holders not *bona fide* are not protected.[5] A *bona fide* pledgee of stock indorsed in blank on the back is protected.[6]

§ 475. *Pledgor's remedies.*— The pledgor cannot enjoin a sale of the pledge by the pledgee or by a repledgee, unless the pledgee is insolvent. The pledgor's remedy is at law.[7] The fact that a pledgor claims that the pledgee owes him more money than he owes the pledgee is not sufficient to sustain a bill in equity to enjoin the pledgee from selling the stock in order to pay the amount due. Some other ground of equitable jurisdiction must be set forth.[8] Where the pledgee of stock has been guilty of a conversion of it, the pledgor's remedy against him is

[1] See ch. XIX, § 321, *supra*.

[2] See ch. XIX, *supra*.

[3] O'Herron *v.* Gray, 168 Mass. 573 (1897).

[4] Read *v.* Cumberland Tel. etc. Co., 93 Tenn. 482 (1894).

[5] Shaw *v.* Saranac, etc. Co., 144 N. Y. 220 (1894). Where one party authorizes another party to pledge the former's stock for a certain purpose, and the latter pledges it for a different purpose, the pledgee is not protected if he took the stock with notice. Bowen *v.* Cleary, 35 S. W. Rep. 281 (Ky., 1896).

[6] Gilbert *v.* Erie Bldg. Assoc., 39 Atl. Rep. 291 (Pa., 1898).

[7] Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). *Cf.* note, p. 849, *infra*.

[8] Elliott *v.* Sibley, 101 Ala. 344 (1893). In a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant. The complainant must aver a readiness to pay whatever may be found due. Elliott *v.* Sibley, 101 Ala. 344 (1893). In a sale by a bank as pledgee, the bank cannot be enjoined on the ground that the president had secretly agreed that the collateral would not be resorted to. Breyfogle *v.* Walsh, 71

generally by an action at law for damages. He need not tender to the pledgee the amount of the debt secured by the pledge, since the pledgee may recoup to that extent and thus decrease the damages of the pledgor.[1] The pledgor's damages are measured by the market value of the stock at the time of the conversion, together with interest and subsequent damages.[2] The

Fed. Rep. 898 (1894). Where the pledgee illegally includes another debt in his claims and advertises the stock for sale, and a bill is then filed to enjoin the sale and to redeem, and the pledgee then offers to take the amount justly due, but does not give the pledgor reasonable time in which to pay, and the sale takes place, and the pledgee buys the stock and then sells a part of it, the pledgor in the bill so filed may have damages for the value of all the stock with interest, less the amount justly due. Blood *v.* Erie, etc. Loan Co., 164 Pa. St. 95 (1894).

[1] Allen *v.* Dykers, 3 Hill (N. Y.), 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill (N. Y.), 497; New York, etc. R. R. *v.* Davies, 38 Hun, 477 (1886); Work *v.* Bennett, 70 Pa. St. 484 (1872); Fisher *v.* Brown, 104 Mass. 259 (1870); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Langton *v.* Waite, L. R. 6 Eq. 165 (1868); Felt *v.* Heye, 23 How. Pr. 359 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805). However, a later case in Massachusetts — Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886) — holds that a tender of payment of a debt is necessary to enable a pledgor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. "After the sale by the pledgee, the pledgor need not make a tender of the amount due nor a demand of the securities before bringing his action. . . . A formal tender of the amount of the notes would have been a useless ceremony, such as the law never requires." Fletcher *v.* Dickinson, 89 Mass. 23 (1863). A pledgor's vendee may tender the amount of the debt and demand the stock as a condition of payment. Trover lies for a refusal of pledgee to deliver. The pledgee is liable for depreciations of stock after such tender. An attachment of stock against the pledgor, but after sale by him, is no defense to the pledgee. Loughborough *v.* McNevin, 74 Cal. 250 (1887). An assignee of the pledgor of stock may tender the amount due and demand the stock. The pledgee cannot refuse because the stock has been attached, the assignee not being a party thereto. Tender is sufficient without paying the money into court. Loughborough *v.* McNevin, 74 Cal. 250 (1887). See also Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889), and § 461, *supra*. The pledgee sued for conversion may set off the debt due him. Van Shaick *v.* Ramsey, 90 Hun, 550 (1895). Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off for the full value of the securities wrongfully resold, and need not make a tender. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases.

[2] See ch. XXXV, *infra*. In Fowle *v.* Ward, 113 Mass. 548 (1873), the court said the damages should be "a sum of money which would enable him to purchase seventeen new shares to replace those which have been taken from him, with such additional sum as would indemnify him

pledgor may be barred from his action for damages by a waiver of the particular act of conversion by the pledgee.[1] He has the option, however, of ratifying the transaction and claiming the proceeds, or he may repudiate the sale and sue for conversion,[2] and in New York state may arrest the pledgee.[3] The remedy at law may be on contract or in tort.[4] An illegal sale of the

for the dividends which he has lost since the sale, and also an equitable allowance for interest." Where the pledgee refuses to deliver up the stock upon a tender of the debt, he is liable in damages for the value of the stock on the day of the tender and demand, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

[1] See cases in note 2, p. 850, *infra*.

[2] Atkins *v.* Gamble, 42 Cal. 86, 91 (1871). If there are several pledgors, and the pledge is redeemed, and the pledgee, at the request of one of the pledgors, transfers the stock to third parties, the pledgee is liable to the other pledgors for the loss incurred thereby. Magnus *v.* Queensland Nat. Bank, L. R. 36 Ch. D. 25 (1887).

[3] See § 471, *supra*.

[4] The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in assumpsit, but not in both. Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). It is a conversion for the pledgee to retain the stock after the principal of the debt is paid, nothing being said about interest. Kullman *v.* Greenebaum, 92 Cal. 403 (1891). A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between assumpsit and case in such an action. In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable." As to the complaint in action by pledgor against pledgee for not returning goods pledged, see 2 Chitty, Pl. 69; Stanton *v.* Collier, 3 El. & Bl. 274 (1854). An answer is not good where it merely denies the conversion and does not deny the possession by the defendant of certain stocks belonging to the plaintiff, nor the tender of the balance due, nor the demand for such stocks, nor the non-delivery of the same. Dubois *v.* Sistare, N. Y. L. J., Dec. 9, 1890. See Smith *v.* Savin, 141 N. Y. 315 (1894). Where the repledgee converts the stock,

pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[1] The pledgor may, if he prefers, begin suit in a court of equity, when the pledgee has converted the stock, and compel him either to replace the stock or give compensation in damages. The jurisdiction of a court of equity in such a case has been denied,[2] but in certain cases may be sustained on the ground that only a court of equity can compel a retransfer of the stock or an accounting of the dividends declared while the pledge was running, or an accounting by third persons to whom the pledgee has assigned the debt and pledge, or enjoin an illegal transfer of the stock.[3] A pledgor may by suit in equity compel

the remedy for conversion is with the first pledgee, not with the first pledgor. Thompson *v.* Toland, 48 Cal. 99 (1874). *Contra,* Smith *v.* Savin, 69 Hun, 311 (1893). See S. C., 9 N. Y. Supp. 106, and 141 N. Y. 315. A pledge of stock to secure future liabilities does not secure past liabilities. If the pledgee refuses to surrender the stock on demand and tender, the pledgor may recover the value of the stock on that day, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893). Where the pledgor learns of the illegality of the sale after he has commenced suit for the surplus, he will be allowed to amend and sue for conversion. Smith *v.* Savin, 141 N. Y. 315 (1894).

[1] Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

[2] Lacombe *v.* Forstall's Sons. 123 U. S. 562 (1887); Genet *v.* Howland, 45 Barb. 560 (1866). The remedy of the pledgor is at law after a tender, not by bill in equity to redeem. Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846). Where the pledgee has sold the stock, the pledgor cannot compel him to restore it by a bill in equity, even though he alleges that the sale was to a person who holds the stock as trustee for the pledgee. The pledgor's remedy is at law. Hinckley *v.* Pfister, 83 Wis. 64 (1892). A bill in equity does not lie for damages due to an illegal sale of stock by a pledgee. Henry *v.* Travelers' Ins. Co., 45 Fed. Rep. 299 (1891). A pledgor cannot file a bill in equity to hold the pledgee liable for selling the stock in violation of the pledge, there being no disputed accounts. Roland *v.* Lancaster, etc. Bank, 135 Pa. St. 598 (1890); Angus *v.* Robinson, 62 Vt. 60 (1890). It is well settled that a bill in equity will not ordinarily lie to redeem property from a pledge. Kemp *v.* Westbrook, 1 Ves. Sr. 278 (1749); Story, Eq. Jur., § 1032. The reason is obvious. The legal title to the thing pledged does not pass to the pledgee, as it does to a mortgagee in possession in the case of a mortgage. The pledgor retains the legal title and parts only with possession and a special property. Jones, Pledges, § 552. He has therefore a legal right to redeem, and upon tendering the amount due to the pledgee he may bring replevin for the collateral or an action to recover its value. It is only when his legal remedies are insufficient that the pledgor can come into equity. Jones, Pledges, § 556, and cases cited.

[3] Bryson *v.* Raynor, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Hasbrouck *v.* Vandervoort, 4

the pledgee to deliver up the stock in pledge, and if the pledgee has sold the pledged stock, but has similar stock, he may be

Sandf. 74 (1850); Koons *v.* Jeffersonville Nat. Bank, 89 Ind. 178 (1883); Smith *v.* Anderson, 8 Tex. Civ. App. 188 (1894). An action to redeem may be sustained in equity where the transaction is a complicated one. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where the pledgee has transferred the stock held in pledge, and is insolvent, the pledgor may file a bill in equity, and bring in all parties interested. Nelson *v.* Owen, 113 Ala. 372 (1896). The pledgor may file a bill to reach the excess realized by the pledgee on a sale of the collateral, and in such suit may enjoin the assignee of the pledgee from using such excess to pay other debts of the pledgee. Adams *v.* Ball, 24 N. Y. App. Div. 69 (1897). A pledgor may maintain a suit in equity to redeem his stock, and the judgment may order the pledgee to deposit the certificate of stock in court. Colburn *v.* Riley, 52 Pac. Rep. 684 (Colo., 1898). The pledgee must return the stock and stock dividends and account for money dividends. Vaughan *v.* Wood, 1 M. & K. 403 (1833). A court of equity has power to decree the return of pledged stock and money deposited as collateral. Post *v.* Simmons, 9 N. Y. Supp. 112 (1890); Brown *v.* Runals, 14 Wis. 693 (1861). A pledgor may file a bill in equity to have a surplus delivered up and the notes for which the collateral was given delivered up also. Cahoon *v.* Bank of Utica, 7 N. Y. 486 (1852), rev'g 7 How. Pr. 134. In case of a wrongful repledge the pledgor may claim the proceeds or redeem the stock from the second pledgee. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). Where the second pledgee has sold the stock for non-payment of his debt, the first pledgor may claim the excess, the amount retained by the repledgee being more than the first pledgor's debt. *Re* Bonner, 8 Daly, 75 (1878). See also Fowle *v.* Ward, 113 Mass. 548 (1873). In England an action to redeem a pledge of stock is to be tried without a jury, even though the defendant sets up a counter-claim of false representations. Lynch *v.* Macdonald, L. R. 37 Ch. D. 227 (1887). Where the pledgee is about to sell the stock and denies the pledge, the pledgor may enjoin the sale. Thielens *v.* Dialogue, 19 Atl. Rep. 970 (N. J., 1890). For other cases sustaining the jurisdiction on the ground that an injunction was proper, see Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893); Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor cannot enjoin a sale by the pledgee on the ground that the sale will be at a sacrifice. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a purchaser of stock agrees to give a long-time note with the stock as security, and subsequently, for the accommodation of the vendor, a short-time note with the stock as security is delivered to a third person named by the vendor, and the vendor then obtains possession of the stock and note, and, after the short-time note becomes due, proposes to collect the note and sell out the stock, the pledgor may enjoin the sale of the stock. In this case the stock was of uncertain value, and represented a controlling interest in the company, and damages for its conversion would not have been an adequate remedy. The court held that an action for replevin was not adequate, inasmuch as, in order to bring replevin, the pledgor would have to tender the debt, which, according to the original agreement, was not yet due. Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893). "If, for instance, the col-

compelled to transfer the latter.[1] An unreasonable delay or laches on the part of the pledgor will bar his remedy against the pledgee.[2] But delay in bringing suit to redeem pledged

laterals consist of shares of stock which have been transferred into the pledgee's name upon the books of a corporation, an action in equity will lie, for the reason that such an action is necessary to secure the re-transfer of the shares. So equity may be invoked where an accounting or a discovery is needed or where the pledgee has assigned the pledge." Stokes *v.* Stokes, N. Y. L. J., Nov. 15, 1892, p. 375. See also cases in note 2 below.

[1] Krouse *v.* Woodward, 110 Cal. 638 (1895). See also, 53 Pac. Rep. 617.

[2] Eight years' delay by pledgor in complaining of refusal of pledgee to deliver up the stock on tender of the debt, the stock having subsequently declined in value, held fatal under the facts of this case. Merriam *v.* Childs, 93 Mo. 131 (1887). Where the pledgor's executor for value received sells the pledgor's interest to the pledgee, long lapse of time after full knowledge of the facts by all parties will raise a presumption in favor of the pledgee's complete ownership. Lockwood *v.* Brantly, 1 Silvern. 187 (1886); S. C., 103 N. Y. 680. Equity has jurisdiction to ascertain the amount due on a pledge and to decree that the pledgor may redeem. As to the statute of limitations, see Maynard *v.* Tilden, 28 Fed. Rep. 688, 703 (1886); Child *v.* Hugg, 41 Cal. 519 (1871), where long delay was held to be a bar. In Greene *v.* Dispeau, 14 R. I. 575 (1884), a pledge of stock was treated as a mortgage, and the right to redeem was held to be barred six years after the date of the mortgage. A pledgor waives informality of the notice, where, after the sale, he, as an officer of the corporation, enters a transfer of the stock to the one who purchased at the sale. Downer *v.* Whittier, 144 Mass. 448 (1887). Four years' delay in complaining is fatal. Receiving the benefit of the sale is a waiver of objections. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Although the pledgee gives no public notice of the sale, and although he purchases the stock at the sale, yet the pledgor ratifies the sale by acquiescing and by negotiating to buy the stock. Hill *v.* Finigan, 77 Cal. 267 (1888). The statute of limitations is no bar to an action to redeem a pledge of stock, unless the statute was set running by demand of payment and notice of intent to sell. Gilmer *v.* Morris, 35 Fed. Rep. 682 (1888). See S. C., 80 Ala. 78. In the case of a pledge of stock to secure future advances, the statute of limitations begins to run against the right of the pledgor to redeem from the time when the pledgee, by some positive act, repudiates the pledge and claims the property as his own, or improperly disposes of it. Gilmer *v.* Morris, 43 Fed. Rep. 456 (1890). If the pledge is recognized by extension to other debts, the statute of limitations runs from the latter date. Gilmer *v.* Morris, 46 Fed. Rep. 333 (1891). This case, Gilmer *v.* Morris, 80 Ala. 78, arose again in Billing *v.* Gilmer, 60 Fed. Rep. 332 (1894), rev'g Gilmer *v.* Billings, 55 Fed. Rep. 775. The statute of limitations runs against a receipt reciting a first payment on stock "standing in my name but owned by him, and he remaining responsible for the balance of the instalments when called in," there being no agreement as to the future disposition of the stock and of dividends. Cone *v.* Dunham, 59 Conn. 145 (1890). A pledge is not legally abandoned although no demand is made for it during a long lapse of time. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa., 1890).

property does not constitute laches, when the debt is kept alive until the suit is begun.[1]

Tender of the debt when or after it becomes due releases the pledge.[2] A pledgor cannot compel his pledgee to sell the stock and apply the proceeds to the debt by a notice to make such a sale.[3] When the pledgee causes the stock to be sold, the pledgor is entitled to the surplus proceeds of the sale remaining after the debt and the expenses of the sale have been paid.[4] A pledgor cannot defeat an action by the pledgee on the debt by showing that the pledgee has converted the pledge.[5] The measure of damages on an illegal sale is considered elsewhere.[6]

As to redemption, laches, etc., see Schouler, Bailm. (2d ed.), § 250. As to the rule in New York, see Bailey *v.* Chamberlain, N. Y. D. Reg., July 23, 1888, and Miner *v.* Beekman, 50 N. Y. 337 (1872). The pledgee cannot claim that he has held the stock, adversely to the pledgor, for a time more than sufficient to give him title to it under the statute of limitations. He is not allowed to assert that he holds the stock adversely. Cross *v.* Eureka Lake, etc. Co., 73 Cal. 302 (1887).

[1] Higgins *v.* Lansingh, 154 Ill. 301 (1895).

[2] Hyams *v.* Bamberger, 10 Utah, 3 (1894); 53 Pac. Rep. 845.

[3] Lawrence *v.* Maxwell, 53 N. Y. 19 (1873); Robinson *v.* Hurley, 11 Iowa, 410 (1860); O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Smouse *v.* Bail, 1 Grant (Pa.), 397 (1856); Taggard *v.* Curtenius, 15 Wend. 155 (1836); Fisher *v.* Fisher, 98 Mass. 303 (1867); Napier *v.* Central, etc. Bank, 68 Ga. 637 (1882), holding, however, that where the pledgee does not sell, because he and others were "bearing" the market, there may be an element of fraud which gives a cause of action. The pledgor cannot by request compel the pledgee to sell. Minneapolis, etc. Co. *v.* Betcher, 42 Minn. 210 (1889). If there is no agreement so to do, the pledgee is not bound to sell, although requested to do so by the pledgor. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893).

[4] And the pledgor's assignee for the benefit of creditors may claim it. The pledgee bank has no banker's lien on the surplus for other debts. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262 (1884). A pledgee bank cannot refuse to deliver back the stock to pledgor who tenders the amount due, on the ground that the pledgee owes it still another debt. McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa., 1888). If the officers of a pledgee bank refuse to deliver back the pledged stock upon a tender of the debt, they are liable personally in damages to the pledgor. McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa., 1888). If pledgee has also other security, an unsecured creditor of the pledgor may compel the pledgee to resort to such other security first. Bishop, etc. Assoc. *v.* Kennedy, 12 Atl. Rep. 141 (N. J., 1887). A pledgee cannot, on sale of the pledge, apply the excess to another debt due him from the pledgor, who died before the sale was made. Peters *v.* Nashville Sav. Bank, 86 Tenn. 224 (1887).

[5] See §§ 461, 458, note, *supra*. In an action by the pledgee for the debt, the pledgor may set up a conversion of the stock pledged. Donnell *v.* Wyckoff, 49 N. J. L. 48 (1886).

[6] See ch. XXXV, *infra*.

§ 476. *Pledgee's remedies when debt secured is not paid — Sale and deficiency.*— Where shares of stock are pledged as collateral security for a debt, and the debt is not paid, and the pledgee wishes to apply the stock to the payment of the debt, he has the right to pursue either one of two remedies. He may file a bill in equity for the foreclosure and sale of the pledge.[1] A suit to foreclose a pledge of stock need not be brought at the domicile of the corporation, but may be brought at the domicile of the pledgor,[2] or wherever the certificates of stock are held in pledge. Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing and foreclosing a pledgee's lien, even though the corporation is located in another state.[3] In an action to foreclose a pledge of stock, persons claiming a lien thereon are proper parties defendant, and it is sufficient to allege that they claim some lien.[4] Second. The pledgee may give notice to the pledgor of an intent to sell the stock, and may so sell it without any judicial proceedings, and apply the proceeds to the payment of the debt.[5] No express

[1] The pledge may be made to secure the carrying out of a contract, and a court of equity will foreclose it although the damages are unliquidated. Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). From Robinson *v.* Hurley, 11 Iowa, 410 (1860), it seems that where the pledge was made without a written transfer of the certificate this is the only remedy. See also Merchants' Nat. Bank *v.* Hall, 83 N.Y. 338 (1881); Smith *v.* Coale, 34 Leg. Int. 58 (1877); Blouin *v.* Hart, 30 La. Ann. 714 (1878); Johnson *v.* Dexter, 2 MacArthur, 530 (1876). A person holding and carrying stock for himself and others may file a bill in equity to bring about a sale and an adjustment of the accounts. Evans *v.* Goodwin, 132 Pa. St. 136 (1890). A suit lies for judgment on a note, and for a sale of the collateral and the application to the judgment of the amount realized on such sale. Farmers', etc. Bank *v.* Rogers, 1 N. Y. Supp. 757 (1888). There is a dictum in Ritchie *v.* McMullen, 79 Fed. Rep. 522, 535 (1897), to the effect that where a pledgee enters into a conspiracy to depreciate the pledged stock the pledgee cannot maintain a bill to foreclose the pledge. A mortgage given in pledge may be foreclosed by bill in equity. Anderson *v.* Olin, 145 Ill. 168 (1893). In a suit between the pledgor and pledgee, each side demanding affirmative relief, the court may decree that stock is held as collateral and order a sale to satisfy the claim. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893).

[2] State *v.* King County Super. Ct., 13 Wash. 607 (1896).

[3] Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897). See also § 361, *supra.*

[4] Plankinton *v.* Hildebrand, 89 Wis. 209 (1895).

[5] Guinzberg *v.* H. W. Downs Co., 165 Mass. 467 (1896); Story, Bailm., 8th ed. (1877), § 310, saying: "The law as at present established leaves an election to the pawnee. He may file a

power to sell need be contained in the memorandum of pledge in order to authorize the latter remedy. It exists by force of law.

The pledgee, however, is not bound to pursue either remedy

bill in equity against the pawnor for a foreclosure and sale; or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally obligatory as in the first case." The leading case, allowing this remedy of the pledgee against the pledge, is Tucker *v.* Wilson, 5 Bro. Parl. Cas. 193 (1714), rev'g 1 P. Wms. 261. In Brown *v.* Ward, 3 Duer, 660 (1854), the court said: "Since the time of the case of Hart *v.* Ten Eyck [2 Johns. Ch. 62—1816], before Chancellor Kent, the right of the pledgee to sell after the debt is due, upon reasonable notice, has been unquestioned, and a custom has grown up, and has been sanctioned by the courts, of selling stocks at the Merchants' Exchange." To same effect, Diller *v.* Brubaker, 52 Pa. St. 498 (1866); Finney's Appeal, 59 Pa. St. 398 (1868); Easton *v.* German-American Bank, 127 U. S. 532 (1888); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864), where the court said: "A sale of a pledge by the pawnee, where reasonably and *bona fide* made, and after notice to the pawner, is equally obligatory as if made by judicial process;" 2 Kent's Com. 582, saying that the pledgee "may file a bill in chancery and have a judicial sale under a regular decree of foreclosure, . . . and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem;" Sitgreaves *v.* Farmers', etc. Bank, 49 Pa. St. 359 (1865); Stearns *v.* Marsh, 4 Denio, 227 (1847); Markham *v.* Jaudon, 41 N. Y. 235, 241 (1869); Drury *v.* Cross, 7 Wall. 299 (1868). The parties may provide for any manner of disposing of the pledge to satisfy the claim upon it which is not in contravention of statute, against public policy, or fraudulent. In McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 334 (1871), it is said: "The distinction between a lien and a pledge is said to be that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded." The pledgee's power of attorney to sell is coupled with an interest and is not revocable. Renshaw *v.* Creditors, 40 La. Ann. 37 (1888). A person secured by a pledge of stock in another's name may sue the latter for the amount received by the latter on a sale of the stock. Maynard *v.* Lumberman's Nat. Bank, 11 Atl. Rep. 529 (Pa., 1887). Although the pledgee has not advanced all that he agreed to, yet, where he ceased advances after the pledgor's default in paying the part already advanced, the pledgee may proceed to sell the pledge after notice. Midland R'y *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. The pledgee cannot be enjoined from selling the pledge on notice, merely because by legal proceedings he has injured the value of the pledge. Midland R'y *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A pledgee who has brought an action to foreclose his pledge may nevertheless abandon the suit and resort to his remedy of a sale after notice. Midland R'y *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A sale by a pledgee will not be enjoined merely because the corporation is in insolvency proceedings in another state and the sale has been enjoined by courts of that state. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889).

merely because the debt is due and unpaid.[1] He need not sell the stock upon the maturity of the note secured, nor is he liable because the stock declines in value.[2] He may sue on the debt without tendering back the stock.[3] The pledgor cannot compel him to sell by merely giving him notice so to do.[4] Nor is the pledgee bound to sell on non-payment of the debt, although the memorandum of pledge expressly authorizes a sale, but he may file a bill in equity to foreclose instead of pursuing the other remedy.[5] In an action at law against a pledgor on a debt, the judgment cannot provide for a return of the pledge upon payment of the debt.[6] The pledgee's remedy by attaching the stock and selling it at an execution sale[7] is his remedy as a

[1] O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Palmer *v.* Hawes, 73 Wis. 46 (1888).

[2] Simonton *v.* Sibley, 122 U. S. 220 (1887); Palmer *v.* Hawes, 73 Wis. 46 (1888). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security, but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896).

[3] Taylor *v.* Cheever, 72 Mass. 146 (1856); Butman *v.* Howell, 144 Mass. 66 (1887). A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, nor does a broker's custom compel it. De Cordova *v.* Barnum, 130 N. Y. 615 (1892). A pledgee having sold the stock, and there still being a balance due him from the pledgor, may sue for such balance, and need not allege that the sale was on due notice and demand. Wallace *v.* Berdell, 24 Hun, 379 (1881). Where stock pledged to secure a note is to be transferred as payment in case the note is not paid, the pledgee may sue on the note if the pledgor has not transferred the stock. Fullerton *v.* Mobley, 15 Atl. Rep. 856 (Pa., 1888). The pledgee may sue on the debt before selling the collateral. Sinclair *v.* Weekes, 41 S. W. Rep. 107 (Tex., 1897). As to the duties of the pledgee towards an indorser of the note, see Payne *v.* Commercial Bank, 14 Miss. 24 (1846). Misrepresentations by a pledgee of stock as to the value of the stock, made after its pledge, are no defense for the pledgor when sued on the debt. Palmer *v.* Hawes, 73 Wis. 46 (1888). The maker of a note is liable personally, although it recites that it is secured by stock as collateral "without recourse." Rathburn *v.* Jones, 47 S. C. 206 (1896).

[4] See § 475, *supra.*

[5] Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879); Coffin *v.* Chicago, etc. Co., 4 Hun, 625 (1875).

[6] Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896).

[7] Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). His remedies as a pledgee are not released or affected by his pursuit of other remedies. See Sickles *v.* Richardson, 23 Hun, 559 (1881). Judgment on the debt does not release the stock pledged. "Until the debt is paid, the pledgor, under the terms of the bailment, has no right to have the pledge given up to him." Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887). See also Hill

creditor and not as a pledgee of the person indebted to him. A pledgee may prove his entire claim against the insolvent estate of the pledgor, and obtain his proportionate part thereof.[1] Or the pledgee may sell out the collateral in accordance with law and then sue for the deficiency.[2] A pledgee may sell at public sale on notice, even though a receiver of the pledgor has been appointed.[3] Where stock is held as collateral to a debt,

v. Beebe, 13 N. Y. 556, 563, 567 (1856). A person holding stock in pledge may waive his rights as pledgee and attach the property of his debtor. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896), citing Drake on Attachments, 7th ed., § 35.

[1] People *v.* Remington, 121 N. Y. 328 (1890). The pledgee may prove his entire claim against the insolvent pledgor's estate without first resorting to, surrendering, or accounting for the pledge. *Re* Ives, 11 N. Y. Supp. 655 (1890). See also § 473, *supra*, and § 763, *infra*. A pledgee is entitled to a dividend from the pledgor's estate without resorting to his pledge and without delivering it up to the estate. Wheeler *v.* Walton, etc. Co., 72 Fed. Rep. 966 (1896). The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral, since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. New York Security, etc. Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537 (1896). The pledgee may file his claim in the probate court against the pledgor's estate, and may then sell the pledge, and will be entitled to participate in the estate without deduction of the amount realized on the sale, unless he would thereby receive more than the whole debt. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). Where a pledgee has realized on his security, he participates in the insolvent estate of the pledgor on only the balance remaining due to him. Philadelphia Warehouse Co. *v.* Anniston Pipe Works, 106 Ala. 357 (1895). In Nebraska, the court, after reviewing the conflicting rules in the different states, held that where a creditor held collateral he must deduct from his claim all that he realizes from the collateral, before he can get a dividend, and must also deliver up his collateral to the receiver. State *v.* Nebraska Sav. Bank, 40 Neb. 342 (1894). Where stock is pledged to secure several debts, some of which are secured in other ways, the pledgee may apply the proceeds of the pledge to those debts which are not secured by indorsements. Fall River Nat. Bank *v.* Slade, 153 Mass. 415 (1891). Where the pledgor gives the pledgee the right to say which debt or liability the pledge should be applied to, this right cannot be controlled by the court. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). In a suit to foreclose a pledge of stock where the pledgee has other securities also, the court will not compel the pledgee to sell the other securities first. Work *v.* Ogden, N. Y. L. J., May 20, 1890. *Cf.* § 473, *supra*.

[2] See § 461, *supra*. See also § 763, *infra*, as to pledges of bonds. In a suit to foreclose a pledge of stock, a judgment for deficiency cannot be asked against a part of the defendants. Plankinton *v.* Hildebrand, 89 Wis. 209 (1895).

[3] Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896).

the statute of limitations does not run as against the pledge, and, although the debt itself is barred, the court may order the stock sold to satisfy the debt.[1]

§ 477. *Notice of sale of stock by pledgee to apply to debt secured—Waiver of notice.*—In case the pledgee pursues the remedy of selling the stock without any judicial proceedings, he must give the pledgor reasonable notice of the intent to sell and of the time and place of sale.[2] A sale without a notice is a conversion of the stock.[3] The pledgee must demand payment of the debt secured by the pledge of stock, and a waiver of notice of sale is not a waiver of a right to have such a demand made.[4] But where the time of payment is fixed by the note, no demand of payment need be made before sale of the pledge.[5] Where the indorser of a note deposits collateral as security, the collateral may be sold, although notice of nonpayment of the note is not given to him.[6] A notice of intent to sell, however, is equivalent to a demand of payment.[7] A

[1] Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). The fact that stocks are deposited as collateral security to a note does not prevent the statute of limitations running against the note. *Re* Hartranft's Estate, 153 Pa. St. 530 (1893). Although the debt is barred by the statute of limitations, the pledgee may compel the corporation to transfer the stock to him on the books. Miller *v.* Houston City St. R'y, 55 Fed. Rep. 366 (1893). A pledgee may enforce payment of his debt by sale of stock held as collateral security therefor, even though the debt itself may be barred by the statute of limitations. Tombler *v.* Palestine Ice Co., 43 S. W. Rep. 896 (Tex., 1897).

[2] "To authorize the defendants to sell the stock purchased, they were bound, first, to call upon the plaintiff to make good his margin; and, failing in that, he was entitled, secondly, to notice of the time and place where the stock would be sold; which time and place, thirdly, must be reasonable." Markham *v.* Jaudon, 41 N. Y. 235, 243 (1869). See also Stratford *v.* Jones, 97 N. Y. 586 (1885); Baker *v.* Drake, 66 N. Y. 518 (1876); Conyngham's Appeal, 57 Pa. St. 474 (1868); Stearns *v.* Marsh, 4 Denio, 227 (1847); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Cushman *v.* Hayes, 46 Ill. 145 (1867). A joint owner is entitled to notice. Clark *v.* Sparhawk, 2 W. N. Cas. 115 (1875); S. C., 5 Fed. Cas. 928.

[3] Fowle *v.* Ward, 113 Mass. 548 (1873); Hempfling *v.* Burr, 59 Mich. 294 (1886); Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889).

[4] Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Brass *v.* Worth, 40 Barb. 648 (1863); Wilson *v.* Little, 2 N. Y. 443, 448 (1849), saying: "It is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately." Genet *v.* Howland, 45 Barb. 560 (1866).

[5] Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896).

[6] Fiske *v.* Williams, 4 N. Y. App. Div. 487 (1896).

[7] Nabring *v.* Bank of Mobile, 58

broker's custom to the effect that no notice is necessary is illegal and void.[1] The time and place of the proposed sale must be specified in the notice.[2] Where the note for which stock is pledged is made and delivered and payable in Massachusetts, and the pledge was also made there, and the stock is in a small Massachusetts corporation and is not known elsewhere, it is unreasonable for the pledgee to fix the place of sale in New York, even though the pledgee is a New York corporation; but where the pledgor, on receiving notice of the proposed sale, does not make any protest or objection to the place of sale, and takes no action whatsoever in regard to it, the pledgor waives any objection on this account.[3] The time between the service of the notice and the time when the sale is to take place must be reasonable in length, so as to give the debtor an opportunity to obtain money to pay the debt.[4] Four days' notice is sufficient, although the sale is made in New York and the pledgor resides in Boston.[5] A notice by a newspaper advertisement is insufficient.[6] It is not sufficient notice to the pledgor to send

Ala. 204 (1877). So also of notice of intent to foreclose. Goodrich *v.* Willard, 68 Mass. 203 (1854). Demand of payment may be made by long urging for payment, even though the word "demand" is not used. Carson *v.* Iowa, etc. Co., 80 Iowa, 638 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890).

[1] Markham *v.* Jaudon, 41 N. Y. 235 (1869).

[2] Conyngham's Appeal, 57 Pa. St. 474 (1868); Genet *v.* Howland, 45 Barb. 560 (1866); Canfield *v.* Minneapolis, etc. Assoc., 14 Fed. Rep. 801 (1883). See Schouler, Bailm., 2d ed., § 229. It has been held in Maryland that a notice of the place is unnecessary. Worthington *v.* Tormey, 34 Md. 182 (1870). But such decision would be unsafe, and probably would not be followed elsewhere. In New York, the place of sale formerly, by custom, was at the Merchants' Exchange, No. 111 Broadway, but is now both there and at the Real Estate Exchange in Liberty Street.

[3] Guinzburg *v.* H. W. Downs Co., 43 N. E. Rep. 195 (Mass., 1896).

[4] In Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866), a week's notice was held sufficient. Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holding that thirty-four days, where the pledgor resides in Illinois and the sale is to be in New York, is sufficient; Bryan *v.* Baldwin, 7 Lans. 174 (1872); aff'd, 52 N. Y. 232, holding that two days was sufficient; Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862), holding that a sale on the same day is unreasonable and the notice insufficient. See other cases in §§ 457, 458, *supra;* Willoughby *v.* Comstock, 3 Hill, 389 (1842), where two days was held sufficient; Edwards, Bailm., § 285. As to place of sale, see §§ 458, 476, *supra.*

[5] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

[6] Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); and see § 119, *supra.*

him a printed copy of the public notice of sale, the pledged stock being included in a large amount of other stock, and there being nothing to indicate an intent to sell nor to indicate that the pledgor was interested.[1] The notice must be served personally, and it seems that it cannot be served on one who has charge of the pledgor's office for the transaction of business.[2] A sale of bonds as collateral security, in violation of the agreement as to the notice to be given, does not release a surety on the note secured by the bonds, but discharges him only to the extent of the actual value of the bonds.[3]

By an express agreement the pledgor may waive his right to notice of the time and place of the sale.[4] Such contracts are

[1] McCutcheon *v.* Dittman, 23 N. Y. App. Div. 285 (1897).

[2] Bryan *v.* Baldwin, 52 N. Y. 232 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863).

[3] Vose *v.* Florida R. R., 50 N. Y. 369 (1872).

[4] Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866); Genet *v.* Howland, 45 Barb. 560 (1866); and see §§ 459, 462, *supra;* Milliken *v.* Dehon, 27 N. Y. 364 (1863); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Hyatt *v.* Argenti, 3 Cal. 151 (1853); Wheeler *v.* Newbould, 16 N. Y. 392 (1857); Stenton *v.* Jerome, 54 N. Y. 480 (1873); Wicks *v.* Hatch, 62 N. Y. 535 (1875); Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869). The pledgor of stock may, by the terms of the agreement creating the pledge, waive his right to notice of sale for non-payment of the debt. Jeanes's Appeal, 116 Pa. St. 573 (1887). Formerly the validity of a waiver was doubted. Campbell *v.* Parker, 9 Bosw. 322 (1862); Wilson *v.* Little, 2 N. Y. 443 (1849); Gilpin *v.* Howell, 5 Pa. St. 41 (1846); Hanks *v.* Drake, 49 Barb. 186 (1867); Sterling *v.* Jaudon, 48 Barb. 459 (1867). Authority to the pledgee to sell "at public or private sale, at his discretion," thirty days after notice, waives notice of sale. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Notice may be waived. Chouteau *v.* Allen, 70 Mo. 290 (1879). In Huiskamp *v.* Wise, 47 Fed. Rep. 236, 249 (1891), where the pledgee was authorized to sell before maturity and without notice if the security became insufficient, the court held that "the pledgee could not make sale of the collateral until after the default in the payment of the note, without notice and demand of payment to the pledgor." See also S. C. *sub nom.* West *v.* Huiskamp, 63 Fed. Rep. 749 (1894). Where the pledgees are given power to sell "in such manner as they, in their discretion, may deem proper, without notice," a sale without notice after the maturity of the loan is legal. Williams *v.* United States Trust Co., 133 N. Y. 660 (1892). The pledgor may, subsequently to the making of the pledge, release his right to redeem. He may agree that the pledgee may sell the pledge at any time at private sale, and that the proceeds shall, after repayment of the amount loaned, be divided equally between the pledgor and pledgee. Rutherford *v.* Massachusetts Mut. Ins. Co., 45 Fed. Rep. 712 (1891). The fact that the pledgee, under a waiver of notice, of demand, and of public sale, sells the stock and debt to an enemy of the corporation, does not invalidate the sale. Carson

frequently entered into with stock-brokers by customers buying stock on a margin. But an express power to the pledgee to sell the pledge on certain contingencies is not a waiver of a right to notice.[1] Irregularities in the notice may be waived. Thus, where a person, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[2]

§ 478. *Formalities of sale.*— A sale of stock on notice by a pledgee, for the purpose of applying the proceeds to the pledgor's debt, must be at public auction.[3] A private sale is unauthorized and illegal, even though the utmost market price is obtained.[4] But a special contract by which the pledgor au-

v. Iowa, etc. Co., 80 Iowa, 638 (1890). Although the pledgor agrees that the pledgee may sell part of the pledge without notice upon default, this does not release the remainder of the pledge from being additional security for the debt. Bank of Africa *v.* Salisbury, etc. Co., L. R. 17 App. Cas. 281 (1892).

An approved form of a note and waiver is as follows:

"$——. NEW YORK, ——, 18—.

"—— after date —— promise to pay to the order of ——, —— dollars, at ——, for value received, with interest at the rate of —— per cent per annum, having pledged to the said —— —— the undermentioned securities (with authority to sell the same on non-performance of this promise, in such manner as they, in their discretion, may deem proper, without notice, either at any brokers' board or at public or private sale, and to apply the proceeds thereon), viz.: ——.

"In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged, for this loan, a payment is to be made on account on demand, so that the said market value shall always be at least —— per cent more than the amount unpaid of this note. In case of failure to do so, this note shall be deemed to be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the —— —— may immediately reimburse —— —— by sale of the security. It is understood and agreed that if such sale be by public auction, the said —— —— shall be at liberty to purchase for —— own account any property offered at such sale; and it is further agreed and understood that the above-mentioned securities, or substitutes therefor, or additions thereto, shall also be held as collateral and be applicable to any other note or claim held against —— —— by said —— ——, and that in case the proceeds of the whole of the collaterals shall not cover principal, interest, and expenses, —— hold —— —— bound to pay on demand any deficiency.

"Due ——. —— ——

"—— ——."

[1] Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857). See also Wilson *v.* Little, 2 N. Y. 443 (1849); Genet *v.* Howland, 30 How. Pr. 360 (1866); Stenton *v.* Jerome, 54 N. Y. 480 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863). But an express power to sell on a specified day is held to waive right of notice. Bryson *v.* Raynor, 25 Md. 424 (1866).

[2] Gillett *v.* Whiting, 141 N. Y. 71 (1894).

[3] Conyngham's Appeal, 57 Pa. St. 474 (1868); Rankin *v.* McCullough, 12 Barb. 103 (1851); Genet *v.* Howland, 45 Barb. 560 (1866); Ogden *v.* Lathrop, 65 N. Y. 158 (1875); Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891). An express power to sell has been held to authorize a private sale. Bryson *v.* Raynor, 25 Md. 424 (1866). Or a sale at a brokers' board. Bryson *v.* Raynor, 25 Md. 424 (1866).

[4] Castello *v.* City Bank of Albany, 1 N. Y. Leg. Obs. 25 (1842). *Cf.* Na-

thorizes the pledgee to sell without notice and at public or private sale has been upheld.[1] The pledgee cannot have the sale made at a brokers' board or in a stock exchange, since only the members of the association are allowed to bid for stocks sold therein, while the law requires that the public shall be allowed to bid at a pledgee's sale.[2] Frequently a special agreement is made between the pledgor and pledgee, especially between a customer and his stock-broker, whereby the pledgee is allowed to sell at a brokers' board.[3] Such an agreement, however, does not authorize a private sale at a brokers' board.[4] A sale is valid though the stock is sold for only a small part of its value.[5] The fact that there is only one bidder does not render the sale invalid.[6] The pledgor in selling must "exercise reasonable skill and diligence in order to get the value of the property."[7] Where stock is sold on a mortgage foreclosure, it will be sold "by offering the shares in small blocks, and then as

bring *v.* Bank of Mobile, 58 Ala. 205 (1877). The pledgee's right to object is waived by long delay. Hayward *v.* National Bank, 96 U. S. 611 (1877). In Willoughby *v.* Comstock, 3 Hill, 389 (1842), it was held that the pledgee's failure to object when he received notice of intent to sell at a brokers' board was fatal.

[1] Williams *v.* United States Trust Co., 133 N. Y. 660 (1892); S. C., 14 N. Y. Supp. 502. A private sale by the pledgee in accordance with an agreement authorizing such sale was upheld in Smith *v.* Lee, 84 Fed. Rep. 557 (1898), where the price realized was, under the circumstances, a fair price. In this case a third party had substituted his stock for the stock of the original pledgor, and the court held that the substituted stock was subject to the terms of the original agreement of pledge as to mode of sale. A private sale in accordance with the contract allowing said sale was held in Dulling *v.* Weekes, 40 S. W. Rep. 178 (Tex., 1897), not to be invalid, where the amount realized was greater than the market value. The court held also that a waiver of advertisement or notice waived any notice to the pledgor and also to the public.

[2] Brass *v.* Worth, 40 Barb. 648 (1863); Rankin *v.* McCullough, 12 Barb. 103 (1851). A sale in New York is legal. King *v.* Texas, etc. Ins. Co., 58 Tex. 669 (1883).

[3] Wicks *v.* Hatch, 62 N. Y. 535 (1875). See ch. XXV, *supra*.

[4] Allen *v.* Dykers, 3 Hill, 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill, 497 (1844).

[5] A *bona fide* purchaser at a pledgee's sale is protected, though he purchased for less than the real value of the stock, and though a receiver had previously been appointed of the pledgor's property and it had been transferred to the receiver. Dudley *v.* Gould, 6 Hun, 97 (1875).

[6] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

[7] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896). A pledgee who is given power to manage the stock and sell cannot easily be held liable in damages for mismanagement, even though it turns out that he sold for much less than the stock was worth. Hewitt *v.* Steele, 118 Mo. 463 (1893). See also 76 N. W. Rep. 195 (Minn., 1898).

a whole, and taking the bid which aggregates the larger sum."[1] But a sale in small blocks is not required at common law.[2]

§ 479. *If the pledgee himself purchases at the sale, then the sale is voidable.*— It is a well-established rule that, where a pledgee pursues the remedy of selling the stock upon notice, the pledgee himself is disqualified from purchasing the stock.[3] The rule is based on the principle that the law carefully protects the interest of the pledgor, and will not open the door to possible devices of the pledgee for purchasing the stock for himself at a low price. The pledgee cannot purchase, either directly or indirectly, in his own name or in the name of another.[4] The effect of a purchase by the pledgee for himself is that the whole proceeding of the pledgee for subjecting the pledge to the payment of the debt is utterly futile, and voidable at the election of the pledgor. Where the pledgee buys the stock at the sale the pledgor may elect to abide by the sale.[5] The pledgor cannot claim that the pledgee has converted

[1] Toler *v.* East Tennessee, etc. R'y, 67 Fed. Rep. 168, 181 (1894).

[2] Even though the sheriff, under execution, sells a large block of stock in one lot, instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. R'y *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887); Morris *v.* Connecticut, etc. R'y, L. R. 2 Q. B. 303 (1886).

[3] Easton *v.* German-American Bank, 127 U. S. 532 (1888); Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court saying: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. . . . This sale to the plaintiff was not void, but voidable at the election of the defendant." Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866). Nor can he buy where the pledge is being sold on a forfeiture sale for non-payment of calls. Freeman *v.* Harwood, 49 Me. 195 (1859). See also Sickles *v.* Richardson, 23 Hun, 559 (1881), where the sale of the property pledged was on an attachment. The pledgor's silence may constitute a ratification of the pledgee's purchase. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). If the pledgee is a corporation its president cannot purchase for it. Star F. Ins. Co. *v.* Palmer, 41 N. Y. Super. Ct. 267 (1876). Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holds that a special partner of the pledgee firm may purchase. And see ch. XXV, § 450, *supra*. *Cf.* Finney's Appeal, 59 Pa. St. 398 (1868). Where a pledgee bank having a right to sell at private sale and without notice sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond *v.* Palmer, 41 La. Ann. 425 (1889).

[4] Minnesota Assoc. *v.* Canfield, 121 U. S. 295 (1887). He cannot buy in the name of a dummy. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895).

[5] Appeal of Hibernia Nat. Bank, 17 S. Rep. 200 (La., 1895).

the stock by purchasing at the sale,[1] but he may disregard the notice and sale and whole proceeding as being ineffectual and voidable. The pledge relationship continues as though no attempt had been made by the pledgee to subject the pledge to the payment of the debt.[2] Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off for the full value of the securities wrongfully resold, and need not make a tender.[3] Where, however, the pledge is foreclosed by legal proceedings similar to those for the foreclosure of chattel mortgages, either party may bid at the public judicial sale.[4] Even though the pledgee is author-

[1] Bryan *v.* Baldwin, 52 N. Y. 232 (1873). If the pledgee buys it in, there is no conversion. The pledge continues. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891). Where the pledgee buys at a sale he cannot be held liable for conversion so long as he retains the property, unless the pledgor demands the return of the same and offers to perform his part of the contract; but where the pledgee sells a part of the property he is liable for conversion without any demand or offer of performance by the pledgor. Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588 (1895). Where the pledgee purchases at the sale the sale is void, but does not amount to a conversion of the securities. First Nat. Bank *v.* Hall, 22 N. Y. App. Div. 356 (1897).

[2] Bryson *v.* Raynor, 25 Md. 424 (1866); Middlesex Bank *v.* Minot, 45 Mass. 325 (1842); Hestonville, etc. R. R. *v.* Shields, 3 Brewst. (Pa.) 257 (1869). If the pledgee purchases at the sale the pledge continues. The pledgor does not waive his rights by settling in ignorance that the pledgee purchased. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). If the pledgee buys, the pledge continues unless the pledgor confirms the sale. Hyams *v.* Bamberger, 10 Utah, 3 (1894). Where a pledgee buys in the stock himself, it is the same as though no sale had taken place, and the corporation is not liable for allowing a transfer of the stock to such pledgee. First Nat. Bank *v.* Mings, 11 Tex. Civ. App. 302 (1895). Where a pledgee buys for himself, and subsequently takes the stock into his possession, the pledge continues, and he cannot sell a second time without due notice. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897).

[3] Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases. Where the pledgee sues for the balance due on the note after a sale of the pledge, and the pledgor sets up a counterclaim that the pledgee had sold the stock "for the use of defendant and converted to its own use," the pledgor thereby ratifies the sale, and is entitled only to the purchase price of the stock, and not its actual value. Terry *v.* Birmingham Nat. Bank, 99 Ala. 566 (1893).

[4] Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). In Newport, etc. Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 720 (1877), the pledgee of bonds from the company issuing them obtained a foreclosure of the pledge by suit, and bought the bonds in, and was then held to be the absolute owner of them.

ized to sell at public or private sale without notice, yet he cannot buy for himself, notwithstanding he has sold the note with the collateral to another person who makes the sale.[1] The pledgor may authorize the pledgee to purchase at the sale and retain the pledge.[2] Stock held in pledge to secure a debt cannot be sold before the debt is due,[3] unless there is a special contract to that effect. The pledgor may release his equity to the pledgee.[4] A court of equity scrutinizes with great care a contract between pledgor and pledgee for transfer of title, and will set it aside if there is any ground for believing that it is a harsh contract, brought about by the position of vantage occupied by the pledgee.[5]

[1] Greer *v.* Lafayette, etc. Bank, 128 Mo. 559 (1895).

[2] Chouteau *v.* Allen, 70 Mo. 290 (1879). See also Farmers', etc. Co. *v.* Toledo, etc. Co., 54 Fed. Rep. 759 (1893), where bonds were bought in. A pledgee cannot himself purchase the stock at the sale, but the pledgor may lawfully contract so as to allow the pledgee to purchase at such sale, or may ratify such purchase after it has been made. If there is no such contract or ratification, however, the sale is void, and the parties remain in the same position as though no sale had taken place. Appleton *v.* Turnbull, 84 Me. 72 (1891). Under a power of sale authorizing a pledgee to purchase, and waiving notice of sale, the pledgee may purchase, and it is immaterial that the sale took place at a time when stocks and bonds had declined in a panic. The pledgee need not wait for a favorable condition of the market. Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896). A provision in a contract of pledge that the pledgee may, at a sale for non-payment, buy in the stock for himself, is legal. Manning *v.* Shriver, 79 Md. 41 (1894). In Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896), the court sustained a purchase by the pledgee himself, where the agreement of pledge authorized him to sell at public or private sale and without notice or demand of payment.

[3] Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889).

[4] Thomas *v.* Coffin, 62 Fed. Rep. 665 (1894); Small *v.* Saloy, 42 La. Ann. 183 (1890). A pledgor may sell the securities pledged, and the sale may be to the pledgee. The sale may be oral and will be upheld, the debt being canceled thereby. Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266 (1889). *Cf.* Ryle *v.* Ryle, 41 N. J. Eq. 582 (1886). Receiving the surplus in ignorance of illegality is no waiver. Allen *v.* American, etc. Assoc., 49 Minn. 544 (1892). A creditor of an individual cannot set aside a sale by the latter of his stock to a pledgee and indorser of notes, even though such sale was at a figure much less than the price at which said pledgee finally sold the stock after putting in additional money. Davis *v.* Yoder, 33 Atl. Rep. 882 (Pa., 1896). In Fox *v.* Hartford, etc. R. R., 38 Atl. Rep. 871 (Conn., 1897), the pledgor sold the pledge to the pledgee. Where an insolvent pledgor sells the pledge to the pledgee for the debt itself, $7,000, the transaction is legal, even though a jury find that the stock was worth $1,500 more. Wachovia L. & T. Co. *v.* Forbes, 27 S. E. Rep. 43 (N. C., 1897).

[5] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897).

CHAPTER XXVII.

LEVY OF ATTACHMENT AND EXECUTION UPON SHARES OF STOCK.

§ 480. An execution at common law could not reach shares of stock.

481. Nor, it seems, could a court of equity subject stock to the payment of debts, except when it had been conveyed away fraudulently.

482. By statutory provisions executions are generally sufficient to reach the debtor's stock — Strict compliance necessary.

483. Attachment of stock as allowed by the statutes of the various states.

484. Levy of attachment or execution upon stock held in pledge or by trustee, and of stock which the debtor has fraudulently transferred away.

485. Stock can be attached only in the state creating the corporation.

486. Rights of an unregistered transferee of a certificate of stock as against an attachment or execution levied on that stock.

487. In New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Tennessee, Kentucky, Louisiana, Mississippi, Texas, Washington, and in the federal courts passing upon the transfer of national-bank stock, it is held that by the common law the unregistered transferee of a certificate of stock is protected as against all subsequent attachments or executions levied on that stock.

§ 488. In Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, Wisconsin, West Virginia, and Wyoming, the statutes have prescribed that an unregistered purchaser or pledgee of certificates of stock shall be protected against subsequent attachments or executions levied upon that stock.

489. Rights and duties of the corporation in such cases.

490. In Alabama, California, Colorado, Connecticut, Indiana, Iowa, New Mexico, and Vermont, the usual statutes requiring transfers of stock to be registered on the corporate books are so construed as to give an attachment or execution precedence over a prior unregistered sale or pledge of the certificates of stock — Notice of transfer without registry.

491. Shares of stock cannot be subjected to the payment of the stockholder's debts by the process of garnishment.

§ 480. *An execution at common law could not reach shares of stock.*— A share of stock is in the nature of a chose in action, and at common law a chose in action could not be reached by or made subject to a levy of execution. Consequently it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock. Unless, therefore, the process of execution has been extended by statute so as to reach such property, the stock of a judgment

debtor cannot be made subject to the payment of his debts by means of an execution.[1] An attachment, being entirely statutory, can be levied on shares of stock only when the words of the statute declare that an attachment may be levied on such property.[2]

§ 481. *Nor, it seems, could a court of equity subject stock to the payment of debts, except when it had been conveyed away fraudulently.*— There is some doubt whether a court of equity has power to subject a judgment debtor's choses in action to the payment of his debts, where the only ground for the interference of the court is that, unless it does interfere, such property cannot be reached by the judgment creditor. In New York, previous to the statutes regulating this subject, the jurisdiction of a court of equity therein was emphatically denied in one case,[3] and with equal emphasis declared to exist in another case.[4] The English authorities are quite uniform in holding that a

[1] Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879); Blair *v.* Compton, 33 Mich. 414 (1876); Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849); Foster *v.* Potter, 37 Mo. 525 (1866); Howe *v.* Starkweather, 17 Mass. 240 (1821); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Denton *v.* Livingston, 9 Johns. (N. Y.) 96 (1812), per Chancellor Kent; Nashville Bank *v.* Ragsdale, Peck (Tenn.), 296 (1823). Even where the stock is held to be real estate. Cooper *v.* Dismal Swamp Canal Co., 2 Murph. (N. C.) 195 (1812). *Cf.* Gue *v.* Tidewater Canal Co., 24 How. (U. S.) 257 (1860). In the District of Columbia, stock in an incorporated company cannot be subjected to the process of attachment or of execution. Barnard *v.* Insurance Co., 4 Mackey, 63 (1885). At an early day, when the nature of stock was little understood, an attachment was attempted on the corporate property for the debts of a stockholder. It failed. Williamson *v.* Smoot, 7 Mart. (La.) 31 (1819). Stock cannot be taken on a tax warrant. Barnes *v.* Hall, 55 Vt. 420 (1883). *Cf.* McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885); Smith *v.* Northampton Bank, 58 Mass. 1 (1849). A tax collector cannot levy on and sell stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. R'y, 93 Ala. 494 (1891); and § 566, *infra*. Execution against a corporation cannot be levied on stock owned by the corporation itself, such stock having been purchased by it under statutory authority at a forfeiture sale for non-payment of calls. Robinson *v.* Spaulding, etc. Co., 72 Cal. 32 (1887). An attachment of stock does not prevent a sale of property by the corporation. Gottfried *v.* Miller, 104 U. S. 521 (1881). The question of whether an execution may be levied on a seat in an exchange is considered in ch. XXIX, *infra*.

[2] Plimpton *v.* Bigelow, 93 N. Y. 592, 602 (1883); Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873).

[3] Donovan *v.* Finn, 1 Hopk. Ch. 59, 67 (1823). See also 2 Dan. Ch. Pr., p. 1037, n.

[4] Storm *v.* Waddell, 2 Sandf. Ch. 495, 511 (1845).

court of equity has no such jurisdiction.[1] And in America, for the most part, a similar conclusion is arrived at.[2] Where, however, the debtor has conveyed away his stock for the purpose of defrauding his creditors, a court of equity will aid the judgment creditor, inasmuch as it has jurisdiction in all matters involving fraud, trust, or accident, or other element of similar character.[3]

§ 482. *By statutory provisions executions are generally sufficient to reach the debtor's stock — Strict compliance necessary.*— Nearly all of the states of the Union have enacted statutes extending the scope of executions so as to render subject to them

[1] Dundas *v.* Dutens, 1 Ves. Jr. 196 (1790); Bank of England *v.* Lunn, 15 Ves. Jr. 569 (1809); Grogan *v.* Cooke, 2 Ball & B. (Ir. Ch.) 230 (1812); Nantes *v.* Corrock, 9 Ves. Jr. 182 (1803); McCarthy *v.* Goold, 1 Ball & B. (Ir. Ch.) 387 (1810), applying the same rule to dividends. In King *v.* Dupine, 2 Atk. 603, n. (1744), a court of equity subjected to the payment of a debt the debtor's reversionary interest in an annuity. In Horn *v.* Horn, Ambl. 79 (1749), the court refused aid, inasmuch as the debtor had been imprisoned under a *capias ad satisfaciendum.*

[2] Williams *v.* Reynolds, 7 Ind. 622 (1856); Disborough *v.* Outcalt, 1 N. J. Eq. 298, 306 (1831); McFerran *v.* Jones, 2 Litt. (Ky.) 219 (1822); Erwin *v.* Oldham, 6 Yerg. (Tenn.) 185 (1834). *Contra,* dictum, Watkins *v.* Dorsett, 1 Bland's Ch. (Md.) 530 (1828). In Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836), the proceeding was statutory.

[3] See §§ 339, 340, *supra,* on Statute of Frauds; also Taylor *v.* Jones, 2 Atk. 600 (1743), holding that the debtor's transfer of stock in trust was in fraud of creditors; Hadden *v.* Spader, 20 Johns. (N. Y.) 554 (1822); Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874); Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Lathrop *v.* McBurney, 71 Ga. 815 (1883); Gillett *v.* Bate, 86 N. Y. 87 (1881); State Bank *v.* Gill, 23 Hun, 410 (1881), and § 484, *infra;* Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); State *v.* Warren F. & M. Co., 32 N. J. L. 439 (1868); Bayard *v.* Hoffman, 4 Johns. Ch. 450 (1820); Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41 (1873); Colbert *v.* Sutton, 5 Del. Ch. 294 (1880). The fraudulent transferee must be made a party defendant. Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1 (1885). But the fraudulent transferee is not liable unless he has accepted the stock. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Cartmell's Case, L. R. 9 Ch. App. 691 (1874). Acceptance is a question of fact. Pim's Case, 3 De G. & S. 11 (1849). But he cannot plead the statute of frauds himself. Smith *v.* Forty-nine, etc. Min. Co., 14 Cal. 242 (1859). The judgment creditor who institutes the suit in equity has priority in the distribution of the proceeds of his suit. See Freeman on Executions (2d ed.), § 434. The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898).

all choses in action, including shares of stock in a corporation. Frequently special provisions are made applicable to stock, and prescribing the steps which are necessary to render the levy of execution effectual. Where an execution is levied in accordance with such statutes, its provisions must be substantially complied with, and, if not complied with, the sale is not merely voidable, but is wholly unauthorized and void.[1] It is fatal to the levy and sale if the sheriff fails to give to the corporation the notice that is generally required by statute,[2] or if the sale by the sheriff is not made promptly as advertised in accordance with the statute.[3] The sale itself is not complete until the

[1] Blair *v.* Compton, 33 Mich. 414 (1876), holding that where the sheriff sold without knowing or stating how many shares of stock the debtor owned, and which were being sold, the sale was void. See also People *v.* Goss, etc. Mfg. Co., 99 Ill. 355 (1881), reversing Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879). The procedure in levy of execution on stock, as laid down by the charter of the corporation, supersedes the procedure of a previous general statute. Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811). And a statute which is subsequent to the charter supersedes in this respect the latter. Howe *v.* Starkweather, 17 Mass. 240 (1821). The sheriff need not sell the stock in parcels, but may sell the whole at once. Morris *v.* Connecticut, etc. R. R., (Montreal) L. R. 2 Q. B. 303 (1886). Even though the sheriff sells in one lot a large block of stock under execution instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. R'y *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887). An execution sale of stock will be set aside where it was made with an intentional concealment of the sale from the stockholder, the execution debtor. Voorhis *v.* Terhune, 50 N. J. L. 147 (1888). If no notice is given to the debtor of the levy on his stock, a sale under the attachment is not good. Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 192 (1891). A levy and sale of "all the shares" which defendant owns is not good. The number of shares must be ascertained and stated. Keating *v.* Stone, etc. Co., 83 Tex. 467 (1892). A statute must be substantially complied with, and a failure to give notice to the corporation as required by the statute is fatal to the attachment. Deutschman *v.* Byrne, 40 S. W. Rep. 780 (Ark., 1897). A judgment creditor of a corporation may cause its treasury stock to be sold on execution. Coit *v.* Freed, 49 Pac. Rep. 533 (Utah, 1897). Stock is personal property, and may be seized under an execution. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851).

[2] Princeton Bank *v.* Crozer, 22 N. J. L. 383 (1850), where no notice was given, but the stock was merely mentioned in the inventory returned by the sheriff. Oral notice by the sheriff to the corporation that stock has been attached is insufficient. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890). 75 N. W. Rep 952 (Wis. 1898).

[3] Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811), and Howe *v.* Starkweather, 17 Mass. 240 (1821), where the sale was made after the

sheriff gives the proper instruments of title to the purchaser, and until then the corporation is not obliged to recognize the latter as having any rights.[1] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale, where the price paid at such sale is so small as to shock the conscience of the court.[2] A person who buys stock at an execution sale thereof and takes the sheriff's certificate therefor and presents the same to a corporation for transfer, thereby becomes a stockholder to the extent at least of being liable for any unpaid part of the subscription price of such stock.[3]

§ 483. *Attachment of stock as allowed by the statutes of the various states.*— The states of the Union have quite generally passed statutes providing for the attachment of a debtor's property where the debtor is a non-resident or is guilty of a fraud, or where other facts exist which bring the case within the attachment statute. Inasmuch as in modern times a large part of the property of individuals consists of shares of stock in corporations, the attachment statutes generally provide specially for the attachment of stock, and give specific directions in reference to the steps necessary to be taken in making such attachment.[4] In New York an attachment of stock is provided

proper day, without a re-advertisement, and consequently was held to be void. The court said: "The sale of them upon execution not being justifiable at common law, the statute must be strictly pursued to give any property to the purchaser." An execution sale of stock at nine o'clock at night, when few are present, is void. McNaughton *v.* McLean, 73 Mich. 250 (1889).

[1] Morgan *v.* Thames Bank, 14 Conn. 99 (1840).

[2] See §§ 489, 850, *infra.*

[3] Basting *v.* Northern Trust Co., 61 Minn. 307 (1895). And is also liable on the statutory liability attaching to such stock. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). A dictum in Sturges *v.* Stetson, 1 Biss. 246 (1858); S. C., 23 Fed. Cas. 311, says that the purchaser at execution sale is liable on unpaid subscription the same as his debtor was.

[4] Where both an attachment and an execution on stock are allowed by statute, the former is said to be the preferable remedy when the corporation has a lien on the stock or there is a claimant to the stock. Weaver *v.* Huntingdon, etc. Coal Co., 50 Pa. St. 314 (1865); Lex *v.* Potters, 16 Pa. St. 295 (1851). An attachment of stock covers the dividends also. Upon vacating the attachment damages may be recovered. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395 (1888). A decrease in the value of the stock, while subject to attachment, does not render the sureties on the undertaking liable therefor. Miller *v.* Ferry, 50 Hun, 256 (1888). An attachment bond should not be increased merely because the price

for; but an execution without a previous attachment is not allowed.[1] It has been held that shares of stock may be attached under the general provisions of an attachment law which does not specify shares of stock as being subject to an attachment.[2] The formalities prescribed by the statute must be complied with fully, as in the case of a levy of execution upon stock.[3] It

of the stock may go down. Miller *v.* Ferry, 50 Hun, 256 (1888). In New York shares cannot be levied on under execution, although they may be attached and subsequently sold by execution in that suit. Code Civ. Pro., §§ 647, 649–651. See 4 Wait's Pr. 36, *j.* Stock may be reached, however, by supplementary proceedings. See, in general, Barnes *v.* Morgan, 3 Hun, 703 (1875)); O'Brien *v.* Mechanics', etc. Ins. Co., 56 N. Y. 52 (1874); Smoot *v.* Heim, 1 N. Y. Civ. Pro. 208 (1881)—cases arising under the attachment law. The statute may provide for the sale of stock at the place where the corporation exists, in case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). Under the English statutes, 1 & 2 Vict., c. 110, § 14, and 3 & 4 Vict., c. 82, § 1, stock in any public company standing in the name of any person against whom judgment shall have been obtained, whether "in his own right or in the name of any person in trust for him," may be charged by a judge's order with the payment of the amount of the judgment. The statute says: "The interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent," may be so reached. Cragg *v.* Taylor, L. R. 2 Exch. 131 (1867); Baker *v.* Tynte, 2 El. & E. 897 (1860).

[1] See preceding note.

[2] Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877), where stock was held to be included under the word "estate," and the procedure prescribed for garnishment was followed and upheld. So also Curtis *v.* Steever, 36 N. J. L. 304 (1873), where an attachment of stock was upheld though the statute merely allowed attachment of "rights and credits." In Haley *v.* Reid, 16 Ga. 437 (1854), however, an attachment of stock was not allowed where the statute allowed levy "upon the estate both real and personal." See also Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873). It has been held that there can be no attachment of stock under a statute which allows an attachment of "real and personal property." Foster *v.* Potter, 37 Mo. 525 (1866). Shares of stock are "personal property" subject to attachment, although the statutes provide only for levy of execution upon them. Union Nat. Bank *v.* Byram, 131 Ill. 92 (1889). The ordinary attachment statute authorizing the attachment of shares of stock is not applicable to shares of stock in a club organized for lawful sporting purposes and being more of the nature of a statutory joint-stock association than a corporation. Lyon *v.* Denison, 80 Mich. 371 (1890).

[3] Stamford Bank *v.* Ferris, 17 Conn. 259 (1845), where the attachment failed because the sheriff did not leave a copy of the writ, duly indorsed, with the corporation, even though the cashier of the corporation was absent. A transfer subsequent to such irregular attachment is valid and carries title. See also § 484, *infra.*

has been held that a state statute authorizing the levy of an attachment upon stock does not apply to stock in a national bank, and that it is doubtful whether a state statute may legally authorize an attachment on national-bank stock.[1] There are many decisions, however, where such an attachment or execution has been levied.[2]

§ 484. *Levy of attachment or execution upon stock held in pledge or by trustee, and on stock which the debtor has fraudulently transferred away.*— Whether or not an execution can be levied on stock which has been fraudulently transferred away by the judgment debtor depends upon the wording of the statute allowing the levy of execution on stock. If it allows a levy on all interests of the debtor, whether legal or equitable, then the fraudulent transfer may be disregarded and the stock seized as though still standing in the name of the judgment debtor.[3] If, however, the statute does not expressly provide for a levy on an equitable interest, the judgment creditor's remedy is not an execution, but a suit in equity to set aside the fraudulent transfer.[4] So also an attachment may be levied on shares of stock when the words of the attachment statute are so broad as to render subject to the attachment all equitable interests of the debtor whose stock is attached. Thus, it has been held in Ohio, New Jersey, and Rhode Island that, although the debtor has transferred his stock for the purpose of defrauding his creditors, an attachment of the stock will lie nevertheless.[5] The judg-

[1] Sowles *v.* National U. Bank, 82 Fed. Rep. 696 (1897). An attachment in accordance with a state statute may be levied upon stock in a national bank. Oldacre *v.* Butler, 23 S. Rep. 3 (Ala., 1898).

[2] See cases in notes to § 487, *infra*.

[3] Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868).

[4] Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881). See § 481, *supra*.

[5] Beckwith *v.* Burrough, 14 R. I. 366 (1884); New London Nat. Bank *v.* Lake Shore, etc. R'y, 21 Ohio St. 221 (1871), holding also that the attachment is good, even though the corporation deny that the defendant owns any stock therein; Curtis *v.* Steever, 36 N. J. L. Rep. 304 (1873), the court saying that the attachment is good, since the fraudulent transfer is void; and holding that the transferee may bring a suit for trespass, and that the attaching creditor may then set up the fraud in defense; Massey *v.* Yancey, 90 Va. 626 (1894). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). See also, § 482, *supra*. Where an insolvent debtor transfers all his property to trustees for the benefit of creditors, excepting certain shares of stock which are transferred to them in trust in order not to re-

ment creditor may also institute a suit in equity to set aside the fraudulent transfer and subject the stock to the payment of the judgment.[1] Under the usual statutes, an attachment or execution may be levied upon stock, where the stock has been mortgaged or pledged, and the attaching creditor is seeking to reach merely the equity of redemption.[2] An attachment is not the best remedy for a pledgee who wishes to subject the pledge to the payment of the debt.[3] His better remedy is by foreclosure or a public sale on notice to the pledgor. Dividends on the stock which is attached follow the stock, and are covered by the attachment.[4] An attachment on stock standing on the books in a debtor's name is not good where it is shown that in fact he held the stock as trustee for another.[5] Where the stock has been transferred on the corporate books to the pledgee,

der the trustees liable thereon, and ten years later a creditor levies on the equity in such stock, causes its sale, and purchases it at a nominal figure, equity will not compel the corporation to transfer the stock to such creditor on the corporate books. Randolph *v.* Quidnick Co., 135 U. S. 457 (1890).

[1] See § 481, *supra.*

[2] Foster *v.* Potter, 37 Mo. 525 (1866); Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Edwards *v.* Beugnot, 7 Cal. 162 (1857), holding also that, if the mortgage is recorded on the corporate books, notice must be served on the mortgagee also; and that, where one attachment was served on the corporation and another on the mortgagee, the latter attachment prevails and takes the surplus; Norton *v.* Norton, 43 Ohio St. 509 (1885), holding that the court will order the stock to be sold, the pledgee paid, and the balance held under the attachment. See also Vantine *v.* Morse, 104 Mass. 275 (1870); New England M. Ins. Co. *v.* Chandler, 16 Mass. 275 (1820). *Cf.* Cooke *v.* Hallett, 119 Mass. 148 (1875); Kyle *v.* Montgomery, 73 Ga. 337 (1884); Seeligson *v.* Brown, 61 Tex. 114 (1884). Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877), holds that an execution cannot reach an equity of redemption. See also § 491, *infra.* If a purchaser at an execution sale purchases merely a nominal equity of redemption and pays a fair price for the same, the court will order the corporation to allow a transfer to him in order that he may so redeem. See dictum in Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). As to marshaling the assets, see § 473, *supra.* As to the remedy of garnishment to reach stock or the equity of redemption in pledged stock, see § 491, *infra.*

[3] Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 312 (1872). See § 476, *supra.*

[4] Jacobus *v.* Monongahela, etc. Bank, 35 Fed. Rep. 395 (1888); Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875).

[5] Mowry *v.* Hawkins, 57 Conn. 453 (1889). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1890).

and afterwards the debt has been paid, the stock cannot be attached for debts due from the pledgee.[1] There can be no attachment of stock as the property of an unregistered holder through whom title has passed to another.[2] In Missouri an attachment may be levied on stock standing in the name of another.[3] But in Michigan an attachment cannot be levied on stock standing in a person's name as trustee, for a debt due from the real owner of the stock, even though the trustee is merely an agent. Attachment reaches a legal interest only.[4] A wife who allows stock bought with her money to stand for several years in her husband's name, in order to give him credit, is estopped to assert her ownership as against his creditors.[5] Where the corporation has a lien on stock for debts due from the stockholder to the corporation, it may enforce the lien by an attachment.[6]

§ 485. *Stock can be attached only in the state creating the corporation.*— Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created.[7] It is true that, for purposes of taxation and some

[1] Beckwith *v.* Burroughs, 13 R. I. 294 (1884).

[2] Thus, where A., the registered stockholder, transfers the certificate of stock to B., and B. transfers it to C., and C. obtains registry directly from A., there can be no attachment of the stock against B. Lippitt *v.* American, etc. Co., 15 R. I. 141 (1885). An attachment against a person who held the certificate of stock, but was not a stockholder of record, was upheld in Matusevitz *v.* Citizens', etc. Co., 48 Pac. Rep. 552 (Mont., 1897).

[3] Tufts *v.* Volkening, 122 Mo. 631 (1894).

[4] Gypsum, etc. Co. *v.* Kent Circuit Judge, 97 Mich. 631 (1893). Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequenty attached for a debt of such agent or trustee and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship. Hovey *v.* Bradbury, 112 Cal. 620 (1896). Where a judgment creditor levies on stock standing in the name of a "dummy" for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has jurisdiction in order to decree a transfer. Spencer *v.* James, 10 Tex. Civ. App. 327 (1895).

[5] Hamlen *v.* Bennett, 52 N. J. Eq. 70 (1893).

[6] Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849).

[7] Evans *v.* Monot, 4 Jones, Eq. (N. C.) 227 (1858). The fact that certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state. *Re* James, 144 N. Y. 6 (1894). As to the validity of a transfer of stock made in one state, while

other similar purposes, stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. All attachment statutes provide for the attachment of a non-resident debtor's property in the state, and generally, under such statutes, the stock owned by a non-resident in a corporation created by the state wherein the suit is brought may be attached and jurisdiction be thereby acquired to the extent of the value of the stock attached.[1] But a defendant's shares of stock cannot be reached by levy of attachment in an action commenced outside of the state wherein the corporation is incorporated. For purposes of attachment, stock is located where the corporation is incorporated and nowhere else.[2] The shares owned by a non-resident defendant in the stock of a foreign corporation cannot

the corporation issuing the stock is located in another state, the rule applies "that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary." Black *v.* Zacharie, 3 How. 483, 514 (1844), an attachment case. See also § 12, *supra*. A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication. Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). See also § 361, *supra*.

[1] New London Nat. Bank *v.* Lake Shore, etc. R'y, 21 Ohio St. 221 (1871); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). An attachment and sale of stock made on a debt not justly due will be enjoined as regards registry on the corporate books, and the sale declared void. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884).

[2] Quoted and approved in Smith *v.* Downey, 8 Ind. App. 179 (1893), where it was held that a citizen of Indiana could not attach certificates of stock owned by a non-resident in a Colorado corporation, even though the certificates of stock were in the state of Indiana, and within the jurisdiction of the court. Ireland *v.* Globe, etc. Co., 32 Atl. Rep. 921 (R. I., 1895); Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court saying that "stock in a corporation, for the purposes of an attachment, has its situs where the corporation is located." Under the statutes of Tennessee, however, requiring a foreign corporation doing business in that state to file its articles of incorporation with the secretary of state, it was held that it became a domestic corporation sufficiently to authorize an attachment of stock in that state. Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886). Bonds which are pledged by a non-resident cannot be attached by serving a notice on the pledgee. Tweedy *v.* Bogart, 56 Conn. 419 (1888). Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing a lien, even though the corporation is located in another state. Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897).

be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state engaged in carrying on the corporate business.[1] Nor can such an attachment be levied although the foreign corporation has a branch registry office in the state where the attachment is levied, and although the certificates of stock are also in such state.[2] Certificates of stock are not the stock itself — they are but evidence of the stock; and the stock itself cannot be attached by a levy of attachment on the certificate.[3] As was well said by the supreme court of Pennsylvania, stock cannot be attached by attaching the certificate, any more than lands situated in another state can be attached by an attachment in Pennsylvania levied on the title deeds to such land.[4] Even though certificates of stock in a West

[1] Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), reversing 29 Hun, 362, the court saying: "We do not doubt that shares, for the purpose of attachment proceedings, may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or country of its creation. . . . Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere." To same effect, Preston *v.* Pangburn, N. Y. L. J., March 7, 1892. Garnishment proceedings also will not apply. The defendant may move to have the attachment levy set aside. Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870), holds that a statute authorizing a foreign corporation to exercise certain powers does not make it a domestic corporation. Certificates of stock in a corporation of another state cannot be subjected to the payment of the stockholders' debts, either by attachment or a bill in equity. Morton *v.* Grafflin, 68 Md. 545 (1888). 46 S. W. Rep. 677 (Ky. 1898).

[2] Christmas *v.* Biddle, 13 Pa. St. 223 (1850), approved in Childs *v.* Digby, 24 Pa. St. 23 (1854). In this case the attachment was levied in Pennsylvania on certificates of stock in Pennsylvania, but belonging to a citizen of Mississippi, and the corporation was created by the laws of Mississippi. Certificates of stock in a corporation cannot be attached anywhere except in the state where the corporation is incorporated. Armour, etc. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12 (1892).

[3] Christmas *v.* Biddle, 13 Pa. St. 223 (1850); Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875).

[4] Christmas *v.* Biddle, 13 Pa. St. 223 (1850). In Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court well says: "While the certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be." Negotiable bonds, held outside of the jurisdiction of the court, cannot be

Virginia corporation are within the state of Massachusetts, yet a citizen of Massachusetts cannot attach the same in a suit in Massachusetts against a citizen of California, the owner of such certificates of stock.[1]

§ 486. *Rights of an unregistered transferee of a certificate of stock as against an attachment or execution levied on that stock.*— The most difficult and unsettled question connected with an attachment or execution levied on stock is the question of how far a purchaser of the certificate of stock from the stockholder and debtor is protected in his ownership where such purchaser does not have his transfer registered on the corporate books before the attachment or execution is levied. The question is especially important, since it affects the rights of a *bona fide* purchaser of stock in the open market, and constitutes one of the greatest dangers incurred in the purchase of certificates of stock. It has been held that if a stockholder whose stock has been already attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock, in contemplation of law, has already been seized by the levy, and the purchaser is bound to take notice of that fact.[2] The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase.

A different question, however, presents itself when the stockholder against whose stock an attachment or execution is levied has already and before such levy sold and transferred his certificate of stock, but that transfer has not been registered on the corporate books. The courts of the different states are in

attached by serving the attachment on the corporation which issued the bonds. Von Hesse *v.* Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y. 694. An attachment cannot be levied on bonds in a foreign corporation, the bonds not being in the state. Von Hesse *v.* Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y. 694. See also Tweedy *v.* Bogart, 56 Conn. 419 (1888).

[1] Pinney *v.* Nevills, 86 Fed. Rep. 97 (1898).

[2] Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877); Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882). *Cf.* Dudley *v.* Gould, 6 Hun, 97 (1875). The sheriff need not indorse on his levy a description of the stocks. A subsequent assignment is not prior in right. *Re* Braden's Estate, 165 Pa. St. 184 (1895).

irreconcilable conflict on this question of whether the unregistered transferee is protected in his purchase. The better rule, and the rule which ultimately will prevail, is that an unrecorded transfer of stock is in this respect like an unrecorded deed of land, and gives good title as against subsequent attachments or executions, even though the latter are levied in ignorance of the unrecorded transfer or deed.

§ 487. *In New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Tennessee, Kentucky, Louisiana, Mississippi, Texas, Washington, and in the federal courts passing upon the transfer of national-bank stock, it is held that by the common law the unregistered transferee of a certificate of stock is protected as against all subsequent attachments or executions levied on that stock.*— The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the attachment or execution is levied. Such is the rule prevailing in the federal courts and in the courts of the above-named states.[1]

[1] *New York:* The case of Smith *v.* American Coal Co., 7 Lans. 317 (1873), fully discusses and sustains this rule. See also De Comeau *v.* Guild Farm Oil Co., 3 Daly, 218 (1870), where the court says that the sheriff, "by the levy of such an attachment, could not acquire any better or greater title to the stock than a person would have done who had purchased this stock of the person in whose name it stood on the day of the levy of the attachment. And the principle is well settled in this state that such a purchaser would not acquire any interest whatever as against a prior purchaser for value." Where the corporation causes an attachment to be levied on the stock of a stockholder of record who has sold his certificates to another person and causes a sale to be made to deprive the latter of his stock, he may hold the corporation liable. Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884); Sims *v.* Bonner, 16 N. Y. Supp. 801 (1891). See also, in general, Dunn *v.* Star F. Ins. Co., 19 N. Y. Week. Dig. 531 (1884). An assignment of the certificates to a receiver in another state takes precedence of an attachment against the stock at the home of the corporation. The court will direct the corporation to register the transfer. Weller *v.* Pace Tobacco Co., 5 R'y & Corp. L. J. 5 (N. Y. Sup. Ct., 1888).

Pennsylvania: Eby *v.* Guest, 94 Pa. St. 160 (1880); Finney's Appeal, 59 Pa. St. 398 (1868); Commonwealth *v.* Watmough, 6 Whart. 117 (1840), holding also that the sheriff need not

Frequently this rule is justified and explained on the ground that registry and by-laws or charter provisions requiring registry of transfers on the corporate books are not for the purpose of notifying the creditors of the old registered stockholder

levy on stock which he knows has already been sold to an unregistered transferee. When the transferrer notifies the corporation of the transfer, a subsequent attachment of the stock as the property of the transferrer is not good, although the transfer was not recorded in the corporate book. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa., 1888); U. S. *v.* Vaughan, 3 Binn. 394 (1811), where the unregistered transferees resided in foreign lands.

New Jersey: Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); aff'd, *sub nom.* Hunterdon County Bank *v.* Nassau Bank, 17 N. J. Eq. 496 (1864); Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In this last case the purchaser at the execution sale knew that the certificates had been sold.

Michigan: May *v.* Thoman, 75 N. W. Rep. 129 (Mich., 1898).

Minnesota: A sale and transfer of corporate stock, although not entered on the books of the corporation, takes precedence of a subsequent attachment in behalf of a creditor of the vendor. Lund *v.* Wheaton, etc. Co., 50 Minn. 36 (1892). The court so held although the statute prescribed that no transfer should be valid except as between the parties until such transfer was registered on the corporate books.

Missouri: McClintock *v.* Central Bank, 120 Mo. 127 (1894). In this case it was held that an attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or have a sale subject to the pledge. The pledgee of the certificates was the corporation itself. In Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879), application had been made to the corporation for registry, but had been refused.

Kentucky: See the emphatic dictum in Thurber *v.* Crump, 86 Ky. 408 (1887).

Louisiana: Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878); Crescent City, etc. Co. *v.* Deblieux, 40 La. Ann. 155 (1888). The attaching creditor of one who appears on the books of a corporation as registered owner of shares of its stock cannot hold the stock against the true equitable owner, who holds the certificate of stock duly indorsed by the debtor. Kern *v.* Day, 45 La. Ann. 71 (1893). *Cf.* Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891), where the pledge had not been completed. See also Freidlander *v.* Slaughter House Co., 31 La. Ann. 523 (1879), holding that a company is not liable to the purchaser of the certificate where such purchaser did not make any claim or give notice of his rights until after the execution sale and until after the court had ordered the corporation to make a transfer to the purchaser at the execution sale.

Mississippi: Goyer, etc. Co. *v.* Wildberger, 71 Miss. 438 (1894); Clark *v.* German Security Bank, 61 Miss. 611 (1884), the court holding that the holder of the certificate was protected although the statute prescribed that stock should be transferable "only" on the books of the company.

Tennessee: Cornick *v.* Richards, 3 Lea, 1 (1879). *Contra*, State Ins. Co.

that he no longer owns the stock, nor for any similar purpose, but are for the purpose of protecting the corporation in paying dividends and allowing the stock to be voted. Another and stronger reason is that the law favors the transfer of stock cer-

v. Sax, 2 Tenn. Ch. 507 (1875). A subscriber's subscription may be attached before a certificate of stock is issued and delivered, and such attachment has precedence over a mortgage, even though the mortgage is recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896).

Texas: Seeligson *v.* Brown, 61 Tex. 114 (1884). A pledgee of the certificates is protected against a subsequent attachment, although the transfer is not recorded. Tombler *v.* Palestine Ice Co., 43 S. W. Rep. 896 (Tex., 1897).

Washington: Port Townsend Nat. Bank *v.* Port Townsend, etc. Co., 6 Wash. 597 (1893), the court so holding although the statute prescribed that the transfer should not be good except as between the parties until the same was registered on the corporate books.

Federal Courts: In regard to stock in national banks, the federal courts have firmly established the rule that the unregistered transferee is protected against a subsequent attachment or execution. Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881), with a full review of the authorities by Judge Lowell; Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886); Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883), where the rule was applied, although the national bank was in Connecticut, a state which strongly favors the opposite rule. The court said: "The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer as approximating to negotiable securities, though neither in form or character negotiable." The statute of the state wherein the national bank is located cannot change or interfere with this rule in regard to certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), where the court refused to give precedence to an attachment as against a prior unregistered transfer of a certificate of stock in a national bank. Even in Massachusetts, where the courts upheld at common law an opposite rule, the state courts will follow the above rule when the stock of a national bank is in question. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882). The decision in State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), is erroneous in various ways. See *Indiana*, § 490, *infra*, p. 884. Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); S. C., 29 Fed. Cas. 1376, is not in accord with the other federal decisions. Where an attachment is levied on stock which has already been pledged, the attachment reaches only the equitable title of the debtor pledgor. Black *v.* Zacharie, 3 How. 483, 511 (1844). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

In England the creditor of a registered stockholder cannot subject the stock to his debt as against the owner of the certificates, who has allowed the stock to remain in the name of the debtor in order to qualify the

tificates, and discountenances, so far as possible, all secret dangers incurred in their purchase.

By protecting the purchaser against subsequent attachments and executions, the law removes one of the chief risks incurred by holding certificates of stock without a registry, and thereby increases the safety and desirability of such investments.

§ 488. *In Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, West Virginia, Wisconsin, and Wyoming, the statutes have prescribed that an unregistered purchaser or pledgee of certificates of stock shall be protected against subsequent attachments or executions levied upon that stock.*[1] — The courts of Massachusetts were among the first to lay down the rule which places an attachment or

latter as a director. Cooper *v.* Griffin, [1892] 1 Q. B. 740.

In Canada the unregistered transferee is protected. Morton *v.* Cowan, 25 Ont. Rep. (Can.) 529 (1894). An execution has priority over an unrecorded transfer. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851). An execution levied on stock after a transfer has been entered on the stock ledger is not good, even though the transferee has not yet accepted the stock. Woodruff *v.* Harris, 11 Q. B. Rep. (Can.) 490 (1854).

For an able article by I. H. Hatfield in favor of the doctrine that the attaching creditor should be preferred to the unrecorded transferee, see 30 Am. Law Rev., p. 223. See also the detailed review of the cases on this subject in an article written by Chief Justice Corliss of North Dakota in 1 Am. & Eng. Corp. Cas. (N. S.), at the end of the volume. See also the table prepared by Lowell, Stimson, & Lowell for the Boston Clearing House Association.

[1] *Illinois:* Laws 1883, page 110. The case of People's Bank *v.* Gridley, 91 Ill. 457 (1879), had previously held that at common law an attachment or execution sale took precedence over a prior unregistered sale or pledge of certificates of stock. The statute was passed in 1883 to change this rule. 50 N. E. Rep. 1087.

Maine: Laws of 1897, chapter 293.

Maryland: In Maryland, by chapter 287, Laws of 1886, a pledgee or purchaser of certificates of stock is protected without any transfer on the books of the corporation as against subsequent attachments or executions. Morton *v.* Graffiin, 68 Md. 545 (1888), holding also that the attaching creditor cannot reach the equity by a bill in equity to obtain a receiver and to compel the pledgee to resort to other security first. In a transaction arising prior to the above statute, the pledgee made no effort to protect himself, and gave no notice of the pledge until seven years after the stock had been sold out on execution. It was held that the corporation was not liable to him. Noble *v.* Turner, 69 Md. 519 (1888).

Massachusetts: Chapter 229, Laws 1884. See also cases in notes below.

New Hampshire: Chapter 16, Laws 1887. The case of Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861), held that an attachment took precedence over a prior unregistered transfer of stock, except that the purchaser of the certificate of stock was to have a reasonable time to apply for registry. The case of Buttrick *v.* Nashua, etc.

execution levy ahead of an unregistered purchaser of the certificate of stock. The evil consequences of the rule, however, seem to have become apparent to her courts, and it was held that, although the unregistered purchaser was not protected where the charter of the corporation required registry,[1] yet, where only the by-laws or the certificate itself created such a requirement, the unregistered purchaser was protected and took precedence over the attachment or execution.[2] The legislature of Massachusetts seems to have had a still clearer perception of the demands of trade and of the interests of those who invest in certificates of stock, and in 1884 enacted a statute which will probably be construed to make an attachment or execution levied on stock no more effective than in New York state.[3] Similar statutory changes have been made in the other states mentioned above.

§ 489. *Rights and duties of the corporation in such cases.*— The corporation has a dangerous duty to perform when stock

R. R., 62 N. H. 413 (1882), held that the company itself might attach, even though one of its directors knew of a prior unregistered sale of the certificates of stock; such director, however, having taken no part in levying the attachment. The case of Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871), held that the attachment was not good as against a prior purchaser of the certificate of stock from the president himself, inasmuch as the president's knowledge of the sale was sufficient notice to the corporation itself. See also Stowe *v.* Meserve, 13 N. H. 46 (1842).

Rhode Island: Chapter 690, Laws 1888.

Virginia: Code of 1887, sec. 1133.

West Virginia: Section 37, chapter 53, Code 1887. In West Virginia an assignment of the certificates cuts off subsequent attachments obtained by creditors of the transferrer. Donnally *v.* Hearndon, 41 W. Va. 519 (1895).

Wisconsin: Annotated Statutes, chapter 85, section 1751, thereby changing the law as laid down in *Re* Murphy, 51 Wis. 519 (1881).

Wyoming: Rev. Stat., § 2779, protecting pledgees against executions.

[1] Fisher *v.* Essex Bank, 71 Mass. 373 (1855); Newell *v.* Williston, 138 Mass. 240 (1885); Central Nat. Bank *v.* Williston, 138 Mass. 244 (1885); Boyd *v.* Rockport, etc. Mills, 73 Mass. 406 (1856); Blanchard *v.* Dedham Gas Light Co., 78 Mass. 213 (1858).

[2] Sargent *v.* Essex, etc. R'y, 26 Mass. 202 (1829); Boston, etc. Assoc. *v.* Cory, 129 Mass. 435 (1880), holding that a delay of four years was not fatal to the unregistered purchaser's rights.

[3] "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or

has been attached or sold under levy of execution, and a registry is requested by the purchaser at such sale or by a purchaser of the outstanding certificate of stock. If the purchaser of the certificate demands registry before registry has been allowed to the purchaser at the execution sale, and if the former claims to have purchased the certificate before the attachment or execution was levied, the right of the corporation is clear. It may refuse to allow the registry, and when sued therefor may interplead and compel the claimants to litigate the matter between themselves.[1] But where the corporation does not know whether the outstanding certificate is in the hands of a purchaser or not, and a registry is demanded by a purchaser at an execution sale, the rights and duties of the corporation are not so clear. It has two courses open to it: it may refuse to allow a registry until compelled to do so by a court, or it may allow registry without being so compelled. The former is the safer course, since the corporation will probably be thereby protected from all liability to a possible purchaser of the outstanding certificate.[2] The corporation, it seems, is protected in its obedience

to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred." Mass. Acts. 1884, ch. 229. The enactment of a similar statute is respectfully recommended to the states mentioned in § 490, *infra*. Since the first edition of this work was printed, several states have enacted a statute similar to this Massachusetts statute. It has been held under the Massachusetts statute that where a father delivers stock to his son in order to qualify the latter as director, and the son transfers the certificate back to his father, the creditor of the son cannot attach the stock as against the father, although the stock stands on the corporate books in the name of the son. Andrews *v.* Worcester, etc. R. R., 159 Mass. 64 (1893).

[1] See § 387, *supra*. The proper remedy for the purchaser from the judgment debtor to pursue under such circumstances is to enjoin the corporation and the purchaser at the execution sale from registering the latter as a stockholder. Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878). If an attachment has been levied he should enjoin that. Cheever *v.* Meyer, 52 Vt. 66 (1879).

[2] "Where a judicial tribunal of competent jurisdiction of last resort, after a fair contest in good faith by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation cannot be liable to the holder of the certificate who took no steps to protect himself." Friedlander *v.* Slaughter-house Co., 31 La. Ann. 523 (1879). Where, also, the unregistered transferee contested in the courts the right of the purchaser at the execution sale, and was defeated in the lower court, and appealed without staying the decree below, the corporation is not liable for obeying the

to the decree of a court.[1] It is quite probable, also, that no court in any of the above-named states would require the corporation to issue new certificates of stock to a purchaser of stock at an execution sale, unless such purchaser give to the corporation a bond of indemnity, whereby an unknown purchaser of the outstanding certificate may be protected.[2] The other course open to the corporation, that of allowing a registry by the purchaser at the execution sale without being compelled to do so by a court, is pursued by the corporation at its peril. If it afterwards transpires that the outstanding certificate had been purchased before the attachment or execution was levied, the corporation is liable in damages to such purchaser for allowing the registry,[3] but not unless such purchaser gave a valuable consideration for the certificate and alleges that fact in his pleading.[4] Until such purchaser demands a reg-

decree of the lower court, although the appeal is successful. Chapman *v.* New Orleans, etc. Co., 4 La. Ann. 153 (1849). See Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884).

[1] See §§ 359, 388, *supra.*

[2] The supreme court of Ohio, in New London Nat. Bank *v.* Lake Shore, etc. R'y, 21 Ohio St. 221 (1871), very properly and very distinctly refused to compel a registry, although conceding that the execution purchaser is entitled to dividends. The court said: "Can it be that, because the defendant refused to assume the peril of deciding between the contending claimants by issuing other certificates for the same stock to the plaintiff upon demand, that it thereby became a wrong-doer and converted the plaintiff's stock to its own use, and rendered itself liable to respond in the full value of the stock to the claimant who could establish his right in a court of law? The mere statement of the proposition refutes it." Where the attachment is on stock that the plaintiff alleges was transferred in fraud of creditors, mandamus will not lie to compel the corporation to allow a registry under the execution sale. State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). As to the mode of pleading that the defendant company has been compelled to transfer the stock to a purchaser at an execution sale, see Wyoming Fair Assoc. *v.* Talbott, 3 Wyo. 244 (1889).

[3] Smith *v.* American Coal Co., 7 Lans. 317 (1873). If the purchaser at the execution sale still has the certificates, the purchaser of the old certificate may bring suit against him and the corporation to compel a retransfer. Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In a suit by a purchaser at an execution sale to cut off the rights of a judgment debtor the corporation is an indispensable party, since it alone can allow a transfer on the books. St. Louis, etc. R'y *v.* Wilson, 114 U. S. 60 (1885). See also the case of Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886), holding the corporation liable in damages to the purchaser of the outstanding certificate.

[4] Littell *v.* Scranton, etc. Co., 42 Pa. St. 500 (1862).

istry from the corporation, it may safely pay dividends to the execution purchaser.[1] These rules are complicated, but they protect all parties. If the statute prescribes that the corporation shall register as a stockholder the purchaser at the execution sale, the writ of mandamus will lie to compel the corporation to make such registry;[2] but the relator must allege that he presented to the corporation the required papers, and was refused such registry.[3] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale where the price paid at such sale is so small as to shock the conscience of the court.[4]

§ 490. *In Alabama, California, Colorado, Connecticut, Indiana, Iowa, New Mexico, and Vermont, the usual statutes requiring transfers of stock to be registered on the corporate books are so construed as to give an attachment or execution precedence over a prior unregistered sale or pledge of the certificates of stock — Notice of transfer without registry.*[5] — The courts of these states all hold that, where a statute exists

[1] Smith *v.* American Coal Co., 7 Lans. 317 (1873).

[2] Bailey *v.* Strohecker, 38 Ga. 259 (1868). See also § 390, *supra.*

[3] Lippitt *v.* American Wood Paper Co., 14 R. I. 301 (1883).

[4] Mississippi, etc. R. R. *v.* Cromwell, 91 U. S. 643 (1875); Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). Inadequacy of price is not sufficient cause for setting aside an execution sale of stock. Conway *v.* John, 14 Colo. 30 (1890).

[5] *Alabama:* By statute the attachment takes precedence over a prior transfer of the certificates, where such transfer is not recorded on the corporate books within fifteen days. Berney Nat. Bank *v.* Pinckard, 87 Ala. 577 (1888); Dittey *v.* First Nat. Bank, 112 Ala. 391 (1896). Under this statute the unregistered pledgee is not protected against attachments, but notice to the corporate officer of the attachment may be oral. Abels *v.* Planters', etc. Co., 92 Ala. 382 (1890). In Fisher *v.* Jones, 82 Ala. 117 (1886), the court held that the unregistered pledgee was protected where there was an entry made on the stub of the certificate book of the stock being held in pledge. Under this statute the attaching creditor takes title in preference to an unregistered transferee, and the same rule prevails where the registered holder is a mere "dummy" for another. White *v.* Rankin, 90 Ala. 541 (1890). The statute in Alabama prescribes that, unless a transfer is made on the corporate books within fifteen days after the transfer, it "shall be void as to *bona fide* creditors or subsequent purchasers without notice."

California: In this state the statute prescribes that "no transfer of stock shall be valid for any purpose whatever . . . until it shall be entered" on the corporate books. Under this statute an attachment takes precedence over an unrecorded prior transfer of a certificate of stock. See Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); Farmers', etc. Bank *v.* Wil-

requiring a transfer of stock to be registered on the corporate books in order to be effectual, an attachment or execution levied on stock standing in the defendant debtor's name will cut off the rights of a previous purchaser of the certificate who

son, 58 Cal. 600 (1881); Naglee *v.* Pacific Wharf Co., 20 Cal. 529 (1862). The case of Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856), holds that one who purchases stock at an execution sale, knowing that a certificate of stock had already been sold or pledged by the execution debtor, cannot claim a precedence over a sale of the certificates. To same effect, People *v.* Elmore, 35 Cal. 653 (1868). If the unregistered purchaser buys the judgment obtained under the attachment, the latter is merged. Strout *v.* Natoma Water, etc. Co., 9 Cal. 78 (1858). A sale of stock after an attachment suit has failed, and before that decision is reversed, gives the purchaser good title. Loveland *v.* Alvord, etc. Co., 76 Cal. 562 (1888).

Colorado: In this state the statute prescribes that "no transfer of stock shall be valid for any purpose whatever . . . unless it shall have been entered" on the corporate books within sixty days from the date of such transfer. See Conway *v.* John, 14 Colo. 30 (1890), giving a preference to the attachment. *Cf.* Weber *v.* Bullock, 19 Colo. 214 (1893), holding that the pledgee was protected where he had requested transfer and been wrongfully refused by the corporation. See also Supply Ditch Co. *v.* Elliott, 10 Colo. 327 (1887). Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc. *v.* Hastings, 7 Colo. App. 129 (1895). Where the purchaser of a certificate of stock files a bill in equity to enjoin an attaching creditor of the transferee from selling the stock on execution, and joins the corporation as a party defendant, and in the suit the court decides that the stock was originally legally issued, this decision is binding, even though it was not raised by the pleadings. Newman *v.* Bullock, 23 Colo. 217 (1896).

Connecticut: See Northrup *v.* Curtis, 5 Conn. 246 (1824); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827); Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840), where the recording of an assignment for the benefit of creditors in the probate office was held insufficient notice to the company as against attachments; Colt *v.* Ives, 31 Conn. 25 (1862), holding that, where a transfer is wrongfully refused by the clerk, a subsequent attachment does not take precedence. The United States court sitting in Connecticut held in the case of New York Com. Co. *v.* Francis, 83 Fed. Rep. 769 (1897), where stock in a Connecticut corporation stood on the books of the corporation in the name of a person who was really but a nominal holder for a copartnership, that an attachment levied on the stock as the property of such nominal holder was not good as against the real owner. The court distinguished such a case from a case where a purchaser allowed the stock to stand in the name of the vendor. The court sustained a bill in equity on the part of the real owner of the stock to enjoin its sale on execution.

Indiana: In this state the statute prescribing that stock should be transferable on the corporate books "and not otherwise" was held to give precedence to an attachment as against

has not completed his transfer by registry. Even in these states, however, it is well established that, if the person who levies the attachment or purchases at the execution sale has notice that the defendant debtor had transferred his certificate before the attachment or execution was levied, the purchaser of the outstanding certificate may have his remedy. If the attaching creditor has notice before the attachment is levied, the purchaser may obtain a permanent injunction against the

unregistered purchasers of certificates of stock. Coleman *v.* Spencer, 5 Blackf. 197 (1839). In State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), the court fell into the error that there could be no pledge of stock unless there was a transfer to the pledgee on the books of the company. Such of course is not the law. See § 465, *supra*. Moreover, the court did not consider the federal decisions on this subject, although national-bank stock was involved. However, the court held that the pledgee should have appeared and set up his claim.

Iowa: In Iowa the statute prescribes that transfers shall not be valid except as between the parties until a registry is had on the corporate books. The court holds that this statute gives an attachment priority over a prior unregistered sale or pledge of the certificates of stock. Fort Madison Lumber Co. *v.* Batavian Bank, 71 Iowa, 270 (1887). This case came up again in 1889, when it appears that after the decision of the lower court in favor of the pledgee, and before reversal by the upper court, the lower court ordered a sale and the pledgee bought in the stock, and afterwards the stock became worthless. The court now holds (77 Iowa, 393) that the pledgee need restore only the stock, although worthless. In Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 192 (1891), the attaching creditor took no title because a statutory notice as to attachments was not given.

Maine: In this state the statute formerly prescribed that no title should pass by sale of the certificates except as between the parties until registry had been had on the corporate books. This statute was held to give precedence to an attachment or execution sale. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Fiske *v.* Carr, 20 Me. 301 (1841). A statute in Maine has now changed the rule. See § 488, *supra*.

New Mexico: The statute in this state is substantially the same as in California, and the same decision is made by the courts. See Lyndonville Nat. Bank *v.* Folsom, 7 N. M. 611 (1894).

Vermont: No. 103, Laws 1884, provides that notice to the corporation of a transfer shall be the same as a transfer. The decisions in this state are to the effect that the attaching creditor takes precedence over an unregistered purchaser or pledgee of the certificates of stock. Sabin *v.* Bank of Woodstock, 21 Vt. 353, 362 (1849); Warren *v.* Brandon Mfg. Co. (1874), cited in 52 Vt. 75; Cheever *v.* Meyer, 52 Vt. 66 (1879), the court holding, however, that the attachment in this case did not take precedence, inasmuch as the party knew about the prior sale of the certificates of stock.

For a lurid and yet just invective against the decisions of California, Indiana, Colorado, and other states allowing attachments in those states to have priority against a prior transfer of stock, see 12 Ry. & Corp. L. J. 145.

attachment.[1] Moreover, if the purchaser at the execution sale has notice, he may be prevented from obtaining registry and claiming the stock.[2]

Actual notice of an unrecorded pledge of the certificate is sufficient, even though the statute requires a transfer on the books or the filing of a power of attorney. The company has actual notice if its treasurer learns of it at a bank.[3] In Delaware it seems that mere notice to the corporation of a transfer is insufficient.[4]

Where the unregistered transferee of the certificate of stock has notified the corporation thereof and demanded registry, which is not granted, any attachment or execution levied subsequently to the improper refusal by the corporation to register

[1] Cheever *v.* Meyer, 52 Vt. 66 (1879); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871); Black *v.* Zacharie, 3 How. 483 (1845). A purchaser at an execution sale takes no title as against a prior purchaser of the certificate where the former knew of the latter's purchase when the execution sale took place. Wilson *v.* St. Louis, etc. R'y, 103 Mo. 588 (1891). If the purchaser at the execution sale buys with knowledge that the judgment debtor does not own the stock at the time of the sale, he takes no title to the stock. Blakeman *v.* Puget Sound Iron Co., 72 Cal. 321 (1887).

[2] People *v.* Elmore, 35 Cal. 653 (1868); Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856); Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887); Farmers' Nat. Gold Bank *v.* Wilson, 58 Cal. 600 (1881), holding also that the execution sale will not be enjoined, since the claimant may attend and give notice of his claim; Newberry *v.* Detroit, etc. Mfg. Co., 17 Mich. 141, 158 (1868), per Cooley, J. Where the corporation bought for itself at the execution sale and had notice, it is liable in tort to the unregistered purchaser of the old certificates. Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8 (1885). Jones *v.* Latham, 70 Ala. 164 (1881), holds that, if the execution is levied without notice of an unrecorded transfer, a subsequent notice before the sale to the purchaser at the sale is ineffectual, and does not affect the latter. Where the creditor of the vendor knows of the pledge of the certificates at the time he sells the stock on execution, he, the creditor, is not protected in such sale. George, etc. Co. *v.* Range, etc. Co., 50 Pac. Rep. 630 (Utah, 1897). In Iowa the attaching creditor has priority even though he knew at the time of his attachment that the certificates of stock had been sold by his debtor and that notice thereof had been given to the corporation. Ottumwa, etc. Co. *v.* Stodghill, 72 N. W. Rep. 669 (Iowa, 1897).

[3] Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

[4] In Trimble *v.* Vandegrift, 7 Houst. (Del.) 451 (1887), the court ordered stock to be sold, although the corporation stated at the time of the attachment that it had received notice that the stock had already been sold. Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc. *v.* Hastings, 7 Colo. App. 129 (1895).

does not take precedence over such purchaser.[1] If the corporation improperly refuses to allow the transferee of stock to register his transfer, and the stock is afterwards attached by a creditor of the stockholder, the transferee may, if he chooses, hold the corporation liable in damages for its refusal to allow the registry.[2] Where the transferee of the certificate has repeatedly demanded a transfer of the company, but been refused, a subsequent attachment by a creditor of the transferrer does not take precedence, even though the statutes require a registry within sixty days.[3] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee" or "as collateral security," or similar words.[4] Where the unregistered purchaser is cut off by an attachment, he cannot compel a purchaser from him to pay for the stock which is made valueless by the attachment.[5]

It may be added, in regard to this whole subject, that the decisions and statutes of the various states show conclusively that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various states to establish the rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in

[1] Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; Colt *v.* Ives, 31 Conn. 25 (1862); State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874); Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). *Contra*, Ficke *v.* Carr, 20 Me. 301 (1841). But not if the transferee merely sends a letter to the corporation requesting a transfer, without sending the evidences of his title and the old certificate. Newell *v.* Williston, 138 Mass. 240 (1885). The corporation is liable in damages if it levies the attachment under such circumstances. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). Where registry is allowed it cuts off a subsequent attachment, even though the transferee has not formally accepted the stock as required by statute. Woodruff *v.* Harris, 11 U. C. (Q. B.) 490 (1854). A memorandum on the stock book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890).

[2] Robinson *v.* National Bank of New Berne, 95 N. Y. 637 (1884). See also Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830).

[3] Weber *v.* Bullock, 19 Colo. 214 (1893).

[4] See §§ 247, 466, *supra*.

[5] Rock *v.* Nichols, 85 Mass. 342 (1862).

the stock. In the great commercial centers, where certificates of stock pass from hand to hand and are pledged to banks and financial institutions daily to secure great sums of money, the necessity of such a rule is imperative, and the fact that so many states have, by legislative enactment, adopted the New York rule, while no state has changed from the New York rule to the New England rule, demonstrates in itself the justice and advisability of the rule which prevails in New York state.

In Delaware,[1] North Carolina,[2] and North Dakota,[3] the question of the precedence of attachments over unregistered sales or pledges of certificates of stock has arisen only in an incidental way.

§ 491. *Shares of stock cannot be subjected to the payment of the stockholder's debts by the process of garnishment.*—The pro-

[1] *Delaware:* In Trimble *v.* Vandegrift, 7 Houst. 451 (1887), the court ordered stock to be sold on an execution, although the corporation stated at the time of the attachment that it had received notice that the stock had already been sold. It appeared, however, that the statement made by the corporation did not tell to whom the sale had been made, and did not state that a transfer had been made on the corporate books, and it appeared also that the attaching creditor had no way of testing his right to priority, unless the sale was allowed to take place, and that the sale would not necessarily cut off the right of the holder of the certificate of stock to litigate the priority of his title. In Wilmington, etc. Turnp. Co. *v.* Bush, 1 Harr. 44 (1832), the court held that the company could not defend against a suit for dividends on the ground that an attachment had been levied against the stock as the property of a former registered owner of the stock, it appearing that the corporation had issued new certificates of stock without a transfer on the books being made by the former owner of the stock.

[2] *North Carolina:* In Morehead *v.* Western N. C. R. R., 96 N. C. 362 (1887), there is a dictum to the effect that the attachment has precedence. There was no proof that the sale of the certificate was prior to the attachment, and moreover the court said that the purchaser of the certificate might thereafter litigate his rights in another suit, inasmuch as he was not a party to the suit at bar.

[3] *North Dakota:* In *Re* Argus Printing Co., 1 N. Dak. 434, 444 (1891), there is a dictum giving priority to an attachment. In Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), the court declined to pass upon the question, inasmuch as national-bank stock was involved, and the court followed the decisions of the federal courts on this subject. In a decision in Dakota Territory the court held that where an attaching creditor knew of the priority of the certificates of stock he was not protected. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887).

Arkansas: In Arkansas, in business corporations, an attachment takes precedence by statute, unless a certificate of transfer is filed with the county clerk. R. S., § 970; Masury *v.* Arkansas Nat. Bank, 87 Fed. Rep. 381 (1898).

cess of garnishment is proper only where a debt is due from a third person to the defendant debtor. It is not a proper remedy for reaching shares of stock owned by the debtor.[1] The corporation owes the stockholder no debt, and by no fiction of law can it be held to be a debtor of the defendant debtor. Consequently, where the sheriff levies an attachment, not according to the procedure governing attachments, but according to the procedure of garnishment, the whole proceeding is void, and a subsequent transfer of the stock by the defendant debtor is valid.[2]

[1] Planters', etc. Bank *v.* Leavens, 4 Ala. (N. S.) 753 (1843); Foster *v.* Potter, 37 Mo. 525 (1866); Ross *v.* Ross, 25 Ga. 297 (1858), where the court said: "Is stock in this railroad such a debt ('indebtedness') of the railroad to the stockholder that a garnishing creditor of the stockholder can enter up judgment for it against the railroad? It is not; it is a debt which the railroad dares not pay, even to the stockholder himself. The road may pay him *dividends* on it, but that is all." Stock held as collateral is property subject to garnishment under the statutes of Texas. Smith *v.* Traders' Nat. Bank, 74 Tex. 457 (1889), and § 484, note, *supra*. In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables the latter to reach the equity in the stock. Old Second Nat. Bank *v.* Williams, 71 N. W. Rep. 150 (Mich., 1897).

[2] Mooar *v.* Walker, 46 Iowa, 164 (1877). *Cf.* Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). But see Harrell *v.* Mexico Cattle Co., 73 Tex. 612 (1889). Garnishee process must conform to the statute relative to attachments, and if served on the holders of the certificates instead of on the corporation it is ineffectual. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891).

CHAPTER XXVIII.

CONSTITUTIONALITY OF AMENDMENTS TO CHARTERS — RIGHT OF A STOCKHOLDER TO OBJECT.

§ 492. A corporate charter is a contract between three parties — the state, the corporation, and the stockholders.
493. The charter as a contract between the corporation and the stockholders.
494. Charter as a contract between the state and the corporation.
495, 496. Charter as a contract between the state and the stockholders.
497. Charter amendments imposed upon the stockholders.
498. Charter amendments offered to the stockholders.
499. Auxiliary and incidental amendments are constitutional, though some of the stockholders dissent.
500. Material amendments offered to the stockholders can be accepted only by a unanimous vote.
501. Amendments under the reserved power of the state to alter or amend the charter.
502. Dissenting stockholder's remedy against an illegal amendment.
503. Assent and acquiescence as a bar to the stockholder's remedy.

§ 492. *A corporate charter is a contract between three parties — the state, the corporation, and the stockholders.* — The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts.[1] The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.

§ 493. *The charter as a contract between the corporation and the stockholders.* — That the charter is a contract between the corporation and the stockholders has within the last fifty years

[1] See State Bank *v.* Knoop, 16 How. 369 (1853); Port Edwards, etc. R'y *v.* Arpin, 80 Wis. 214 (1891); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Cooley, Const. Lim. (5th ed.), p. 337, where the learned author says: "Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself."

been firmly established, and is now unquestioned law. The cases of Natusch *v.* Irving[1] in England, and Livingston *v.* Lynch[2] in this country, followed by a long line of supporting decisions, distinctly hold that the charter is a contract prescribing to the corporation that it shall not attempt to materially change, extend, alter, or abandon the particular business which that charter authorizes the corporation to do. Any attempt of the corporation to make such a change, extension, alteration, or abandonment of that business is called an *ultra vires* act. It is an act which a single stockholder may prevent by injunction or set aside by a suit in equity. This subject, however, is fully treated in another part of this work.[3]

§ 494. *Charter as a contract between the state and the corporation.*— As between the state and the corporation the corporate charter is a contract, protected by that provision of the United States constitution which prohibits a state from passing any law which will impair the obligation of the contract.[4] Hence it is beyond the power of the state to repeal or materially annul such a corporate charter, unless the power of amendment and repeal has been expressly reserved by the state, or unless all the parties to the contract consent to the change. All the franchises, privileges, and express and implied powers necessary and essential to carrying out the corporate purposes are protected by this contract.[5] This branch of the

[1] This case, decided by Lord Eldon in 1824, is reported in Gow on Partnership, 398; also 2 Cooper's Ch. 358.

[2] 4 Johns. Ch. 573 (1820); Clearwater *v.* Meredith, 1 Wall. 25 (1863).

[3] See ch. XL, *infra*.

[4] This rule of law, first enunciated in the case of Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819), by Marshall, C. J., has become thoroughly established. As early as 1806 a court said: "We are also satisfied that the rights legally vested in this or in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Wales *v.* Stetson, 2 Mass. 143 (1806). In England the unwritten constitution is not superior to the powers of parliament, and consequently the rule is different. In that country, as is said by Lord Coke, "the power and jurisdiction of parliament is so transcendental and absolute that it cannot be controlled or confined, either for causes or purposes, within any bounds." Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857); Dartmouth College *v.* Woodward, 4 Wheat. 518, 643 (1819). Consequently, the English authorities are of little use in this chapter.

[5] State Bank *v.* Knoop, 16 How. 369 (1853); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857), per Redfield, C. J. The latter case discusses the nature of the privilege thus protected.

law is important to stockholders in cases where the corporation neglects or refuses to protect itself against legislative amendments or repeals violating the charter contract between the corporation and the state. In such cases the stockholder may enjoin or remedy the wrong by bringing an action in place of and on behalf of the corporation, making it a party defendant, together with the parties who, under the authority of the state, have violated the contract.[1] A stockholder's action to prevent the payment of a tax levied upon the corporation in violation of a statutory exemption from taxation is an action of this character.[2] Corporate charters, however, are subject to constitutional provisions enacted subsequently to the granting of the charters, unless there is a clear contract to the contrary.[3] Thus, although a special charter gives the right to a railroad corporation to consolidate with other roads, yet a subsequent general statute may take away this power except so far as the same has been already exercised.[4] But a statute cannot turn over the property of an educational institution to another educational institution.[5]

[1] Greenwood *v.* Union Freight R. R., 105 U. S. 13 (1881). See also §§ 900, 901, *infra*, on this subject. The character of such an action, also the parties, pleadings, and rules of relief, are explained in Part IV, *infra*.

[2] Dodge *v.* Woolsey, 18 How. 331 (1855); State Bank *v.* Knoop, 16 How. 369 (1853). See also Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873). See also § 562, *infra*.

[3] Pennsylvania R. R. *v.* Miller, 132 U. S. 75 (1889). Where by an amendment an insurance charter is changed into a banking charter, an exemption from taxation may be lost thereby by reason of a constitutional provision enacted after the original charter was granted but before the amendment was granted. Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

[4] Pearsall *v.* Great Northern R'y, 161 U. S. 646 (1896). Mr. Justice Brown's opinion in this case contains a clear exposition of the law on this subject, and on the various and far-reaching applications and restrictions of the Dartmouth College case. In this case the court spoke of the Dartmouth College case as follows (p. 660): "The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been re-affirmed and applied so often as to have become firmly established as a canon of American jurisprudence." An amendment which grants to a street railway company an exclusive right to certain streets may be amended or repealed, even though it was granted at the session of the legislature which granted the original charter. Philadelphia, etc. R'y's Appeal, 102 Pa. St. 123 (1883). The statute authorizing a corporation to amend its articles without changing substantially its purposes does not authorize a gas and power company to change itself into a street railway company. State *v.* Steubenville, etc. Co., 44 N. E. Rep. 513 (Ohio, 1896).

[5] Ohio *v.* Neff, 52 Ohio St. 375 (1895).

§§ 495, 496. *Charter as a contract between the state and the stockholders.*— As between the state and the stockholders, also, the corporate charter is a contract protected by the United States constitution.[1] In consequence thereof the state cannot materially amend the charter, except by the unanimous consent of the stockholders, unless the power of amendment is expressly reserved by the state at the time of granting the charter. It is this contract which constitutes the subject of the present chapter.

§ 497. *Charter amendments imposed upon the stockholders.*— The right of the legislature to amend a charter against the will of the stockholders has been the subject of much litigation. Such amendments are clearly divisible into two kinds. The first are those which, by their terms, are absolute and compulsory, and become a part of the charter irrespective of the action or willingness of the corporation or the stockholders to accept them. Such amendments, excepting those which are made as police regulations,[2] are unconstitutional and void, unless made under a reserved power to amend.[3] Of such a kind are amend-

[1] "A charter of incorporation granted by a state creates a contract between the state and the corporators which the state cannot violate." This has been held so often by this court that it is "a work of supererogation" to repeat it. Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871). It "has been the settled law of this court since the decision in the Dartmouth College case." Delaware R. R. Tax, 18 Wall. 206 (1873). To the same effect, see Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). "An act granting corporate privileges to a body of men is, when accepted, a contract between the state and the corporators. . . . It is sustained by everything that we are bound to regard as authority,"— by the courts, by the opinion of the legal profession, and by the acquiescence of the people. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856), per Jeremiah Black, J. See also Sinking Fund Cases, 99 U. S. 700 (1878). "That an act of incorporation is a contract between the state and the stockholders is held for settled law by the federal courts and by every state court in the Union. All the cases on the subject are saturated with this doctrine. It is sustained not by a current but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established." "If anything is settled it is this rule of construction that a corporation takes nothing by its charter except what is plainly, expressly, and unequivocally granted." Per Black, J., Bank of Pennsylvania *v.* Commonwealth, 19 Pa. St. 144 (1852).

[2] See § 901, *infra*.

[3] Such as an amendment changing the route and terminus. Ames *v.*

ments repealing an exemption of stockholders from taxation.[1] So, also, a statute passed subsequently to the granting of a charter, and increasing the liability of a stockholder on his stock for the debts already incurred, is unconstitutional and void unless the legislature has reserved the right to alter or amend the charter.[2] Under such a reservation the statute is

Lake Superior, etc. R. R., 21 Minn. 241 (1875). Amendment under reserved right cannot affect rights of previous creditors against the corporation. Bank of Old Dominion *v.* McVeigh, 20 Gratt. 457 (1871). A corporate charter right to take a certain rate of interest is a contract and is protected against subsequent legislation. Hazen *v.* Union Bank, 1 Sneed (Tenn.), 115 (1853). See also dictum in Philadelphia, etc. R'y's Appeal, 102 Pa. St. 123 (1883), that an amendment to a charter which enlarges it without imposing any new or additional burden upon it is a mere license and may be revoked, citing Johnson *v.* Crow, 87 Pa. St. 184 (1878); Christ Church *v.* Philadelphia County, 24 How. 300 (1860). The legislature may subsequently authorize the sale of the corporate franchises, etc., to pay debts. Louisville, etc. Co. *v.* Ballard, 2 Metc. (Ky.) 165 (1859).

The case of Cross *v.* Peach Bottom R'y, 90 Pa. St. 392 (1879), holds that "the legislative reservation is in the nature of a police power, designed for the protection of the public welfare; and where such protection becomes necessary, the law-making power may act without consulting either the interests or will of the company; and in such case it may well be that not only the company but its stockholders must submit. . . . The reservation . . . was only intended to enable the legislature to act without the consent and against the will of the corporation." Under its reserved power to amend, the legislature may require several railroads to acquire, build to, and use a union depot. Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871).

[1] Thus, a statute authorizing the taxation of stock which by the corporate charter is exempt is unconstitutional. Gordon *v.* Appeal Tax Court, 3 How. 133 (1845); Farrington *v.* Tennessee, 95 U. S. 679 (1877). An exemption from taxation which is a gift may be repealed. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171 (1890). See § 568, *infra*.

[2] It certainly is as regards corporate debts already incurred. Commonwealth *v.* Cochituate Bank, 85 Mass. 42 (1861); Wheeler *v.* Frontier Bank, 23 Me. 308 (1843). And has been held to be so as regards future corporate debts. Ireland *v.* Palestine, etc. Co., 19 Ohio St. 369 (1869). *Contra*, Stanley *v.* Stanley, 26 Me. 191 (1846); Coffin *v.* Rich, 45 Me. 507 (1858); Shufeldt *v.* Carver, 8 Ill. App. 545 (1881); Fogg *v.* Sidwell, 8 Ill. App. 551 (1881); Child *v.* Coffin, 17 Mass. 64 (1820), dictum; Gray *v.* Coffin, 63 Mass. 192, 200 (1852); Hathorn *v.* Calef, 53 Me. 471 (1866). See Weidenger *v.* Spruance, 101 Ill. 278 (1881). And it is said that a stockholder may restrain by a proper proceeding the acceptance by the corporation of an unconditional amendment to the charter by which the liability of the shareholders is increased. Owen *v.* Purdy, 12 Ohio St. 73 (1861); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930; Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858);

legal and binding, although there are limits even to this reserved power, as will be shown hereafter.[1]

A statute imposing additional liability upon the shareholders cannot be repealed so as to affect those who were corporate creditors previously to the repeal.[2] But, whenever the statute imposing the liability is penal in its nature, a repeal of it, even so as to affect existing debts, is constitutional at any time before the corporate creditor obtains judgment on his claim.[3] An important exception to the general rules stated above exists in regard to amendments under the police power of the state. The state may amend the charter of a railroad corporation by reducing its traffic charges, requiring it to build fences, and in various other ways for the protection of the public.[4] An amend-

Hamilton, etc. Ins. Co. v. Hobart, 68 Mass. 543 (1851); Gardner v. Hamilton Mut. Ins. Co., 33 N. Y. 421 (1865). Where the incident of individual liability was repealed by an amendment to the state (Missouri) constitution after the debt accrued, but before the increase of stock was issued, the holders of the new stock were held not liable under the former constitution. Ochiltree v. Railroad Co., 21 Wall. 249 (1874).

[1] See § 501, *infra*.

[2] Hawthorne v. Calef, 2 Wall. 10 (1864); Conant v. Van Shaick, 24 Barb. 87 (1857); Norris v. Wrenschall, 34 Md. 492 (1871); Provident Sav. Inst. v. Jackson Place, etc. Co., 52 Mo. 552 (1873); St. Louis, etc. Co. v. Harbine, 2 Mo. App. 134 (1876); Central, etc. Assoc. v. Alabama, etc. Ins. Co., 70 Ala. 120 (1881); Woodruff v. Trapnall, 10 How. 190 (1850); McDonnell v. Alabama, etc. Ins. Co., 85 Ala. 401 (1888). See also Story v. Furman, 25 N. Y. 214 (1862); Rochester v. Barnes, 26 Barb. 657 (1858); Sinking Fund Cases, 99 U. S. 700 (1878). *Cf.* Jerman v. Benton, 79 Mo. 148 (1883); Woodhouse v. Commonwealth Ins. Co., 54 Pa. St. 307 (1867); *Re* State Ins. Co., 14 Fed. Rep. 28 (1882); Palfrey v. Paulding, 7 La. Ann. 363 (1852); *Re* Telegraph Constr. Co., L. R. 10 Eq. 381 (1870); Cooper v. Frederick, 9 Ala. (N. S.) 738 (1846); *Re* Credit Foncier, L. R. 11 Eq. 356 (1871); Coffin v. Rich, 45 Me. 507 (1858). Registered transferees are liable the same as their transferrers, even though before the transfer the statutory liability was decreased by statute. The liability to old creditors follows the stock. National Com. Bank v. McDonnell, 92 Ala. 387 (1890). A statute giving the corporation a summary remedy against a stockholder for non-payment of calls may be repealed. *Ex parte* Northeast, etc. R. R., 37 Ala. 679 (1861).

[3] Breitung v. Lindauer, 37 Mich. 217 (1877); Union Iron Co. v. Pierce, 4 Biss. 327 (1869); S. C., 24 Fed. Cas. 583; Gregory v. German Bank, 3 Colo. 332 (1877); Cooley, Const. Lim. (5th ed.), pp. 444, 474. See § 223, *supra*.

[4] See § 901, *infra*. The court in Pearsall v. Great Northern R'y, 161 U. S. 646, 666 (1896), in speaking of the police power, said: "So important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the legislature; and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion."

ment to a charter forbidding any consolidation with a competing line is a legitimate exercise of the police power of the state, and it is immaterial whether the power to amend was reserved or not.[1]

§ 498. *Charter amendments offered to the stockholders.*— The second class of amendments to a charter — the amendments which occur most frequently and give rise to many difficulties — are those which allow the corporate directors or a majority of the stockholders in corporate meeting assembled to engage in a new or different or more extensive or more contracted business than that authorized by the original and unamended charter. This is the subject of the remainder of this chapter.

§ 499. *Auxiliary and incidental amendments are constitutional, though some of the stockholders dissent.*— An amendment made to a corporate charter is either a material and fundamental change from the original plan, or it is an auxiliary and incidental change, consistent with the carrying out of the original plan.[2] The latter class of amendments are constitutional and valid. The acceptance of an auxiliary amendment, however, should be by the stockholders in meeting assembled instead of by the board of directors.[3] But acceptance may arise from user;[4] and hence it generally happens that an incidental or auxiliary amendment to a charter is deemed to have been accepted by user and a vote of acceptance by the directors or by user alone.[5] An amend-

[1] Louisville, etc. R. R. *v.* Kentucky, 161 U. S. 677 (1896). To same effect, Pearsall *v.* Great Northern R'y, 161 U. S. 646 (1896).

[2] The general principle of law governing this branch of the subject is well expressed in Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488 (1866). "The contract or charter, after acceptance, is inviolable between the state and the corporation, as it is also between the corporation and stockholders. Neither the one nor the other can disregard its obligations or alter its essential franchises without the unanimous concurrence of the stockholders. . . . If the alterations proposed in the charter of a private corporation by legislative enactment are merely auxiliary and not fundamental, they may be accepted by a majority of the corporators; and when so assented to they are binding on the whole; but it is otherwise . . . when the alterations are fundamental, radical, and vital. The acceptance must then be unanimous."

[3] Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Brown *v.* Fairmount, etc. Co., 10 Phila. 32 (1873); Hope Ins. Co. *v.* Beckman, 47 Mo. 93 (1870).

[4] See § 503, *infra*, and § 2*a*, *supra*.

[5] Illinois, etc. R. R. *v.* Zimmer, 20 Ill. 658 (1858). See also Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) 434 (1869); *Re* Excelsior F. Ins. Co., 16 Abb. Pr. 8, 14 (1862). In Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886), it was

ment may be said to be auxiliary and incidental when it merely grants new powers or authorizes new methods and new plans for the purpose of carrying out the original plan and effecting the real object of that plan. The individual motives and interests of a stockholder are disregarded. Whatever is for the benefit of the corporation is conclusively presumed to be for the benefit of each stockholder. A change not fundamental to the corporation is not fundamental to each and every stockholder.[1]

Whether an amendment materially changes the corporate plans or not is a question of law for the court.[2] Accordingly each case is to be decided according to the peculiar circumstances of that case, and no general rules can be laid down which will apply to all cases.[3]

held that the directors are the proper persons to accept an amendment under the circumstances of that case.

[1] Delaware R. R. *v.* Tharp, 1 Houst. (Del.) 149 (1855); Irvin *v.* Turnpike Co., 2 Pen. & W. (Pa.) 466 (1831); Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); Sprague *v.* Illinois, etc. R. R., 19 Ill. 174 (1857); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851). *Cf.* Hester *v.* Memphis, etc. R. R., 32 Miss. 378 (1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859). The cases of Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855), and Central R. R. *v.* Collins, 40 Ga. 617 (1869), repudiate the distinction between the material and immaterial changes. All changes are held to be equally material.

[2] Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876). *Cf.* Southern, etc. R. R. *v.* Stevens, 87 Pa. St. 190 (1878).

[3] Certain changes in the route of a railroad have been held to be immaterial, Wilson *v.* Wills Valley R. R., 33 Ga. 466 (1863); Johnson *v.* Pensacola, etc. R. R., 9 Fla. 299 (1860); Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851); Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896); building branch lines, Peoria, etc. R. R. *v.* Preston, 35 Iowa, 115 (1872); Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118 (1851); issuing preferred stock, Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Curry *v.* Scott, 54 Pa. St. 270 (1867); or more common stock, Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69 (1873); Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856). *Cf.* Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); extending the time for completing the road, Agricultural Branch R. R. *v.* Winchester, 95 Mass. 29 (1866); Poughkeepsie, etc. Co. *v.* Griffin, 24 N. Y. 150 (1861); Bailey *v.* Hollister, 26 N. Y. 112 (1862), power to amend being reserved; Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); consolidations that take the place of part of the line as laid out, Sprague *v.* Illinois River R. R., 19 Ill. 174 (1857); Hanna *v.* Cincinnati, etc. R. R., 20 Ind. 30 (1863); change of corporate name, Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Clark *v.* Mononga-

§ 500. *Material amendments offered to the stockholders can be accepted only by a unanimous vote.*— On the other hand, a material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any stockholder who does not assent to such an amendment. Considerable difficulty is experienced in determining what is a material and fundamental change. Each case

hela Nav. Co., 10 Watts (Pa.), 364 (1840); changing the terminus, Pacific R. R. *v.* Renshaw, 18 Mo. 210 (1852); Ross *v.* Chicago, etc. R. R., 77 Ill. 127, 134 (1875); reduction of capital stock and shortening of the road, Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854); Joslyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). *Cf.* Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); or enlarging the capital stock and extending the road, such changes not appearing on the record to be detrimental, Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Rice *v.* Rock Island, etc. R. R., 21 Ill. 93 (1859); and minor changes in general, Union Agric. etc. Assoc. *v.* Mill, 31 Iowa, 95 (1870); also extensive changes, Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); such as extending the road, Cross *v.* Peach Bottom R'y, 90 Pa. St. 392 (1879); purchasing another railroad, Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886); or increasing the number of directors, Mower *v.* Staples, 32 Minn. 284 (1884). An amendment increasing the capital stock and authorizing a branch road does not release subscribers. Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Child *v.* Coffin, 17 Mass. 64 (1820); Longley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greenville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony R. R., 87 Mass. 221 (1862). An increase of the capital stock as allowed by the charter does not release subscribers. Port Edwards, etc. R'y *v.* Arpin, 80 Wis. 214 (1891). An amendment may authorize the directors to change the location of toll gates. Bardstown, etc. Co. *v.* Rodman, 13 S. W. Rep. 917 (Ky., 1890). In Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886), an amendment authorizing a corporation to buy the stock of another railroad corporation and to guarantee its bonds was held to be valid. An amendment authorizing a dam company to raise the height of its dam is not a fundamental charge. Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156 (Pa., 1841). So also of an amendment shortening notices of calls from ninety to twenty days. Illinois River R. R. *v.* Beers, 27 Ill. 185 (1862); and an amendment making subscriptions payable five per cent monthly instead of twenty-five per cent annually. Burlington, etc. R. R. *v.* White, 5 Iowa, 409 (1857). The legislature may authorize a seminary for girls to lease a part of the premises to school commissioners. Webster *v.* Cambridge Female Seminary, 78 Md. 193 (1893). An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). The legislature may authorize a water-works company to sell its property to a municipality. Peabody *v.* Westerly Water-works, 37 Atl. Rep. 807 (R. I., 1897).

is decided upon its own facts, and consequently the best light as to the spirit of what constitutes a material change is obtained by a study of the facts of cases which have been decided.[1]

[1] Under the circumstances of the cases it has been held a material change to shorten and vary the route, Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); to vary the route, Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Hester *v.* Memphis, etc. R. R., 32 Miss. 378 (1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Champion *v.* Memphis, etc. R. R., 35 Miss. 692 (1858); Simpson *v.* Denison, 10 Hare, 54 (1852); changing a terminus, Manheim, etc. Co. *v.* Arndt, 31 Pa. St. 317 (1858); Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859); Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); permitting a railroad to go into water transportation business, Hartford, etc. R. R. *v.* Croswell, 5 Hill, 383 (1843), a leading case; Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859); shortening the line, First Nat. Bank *v.* Charlotte, 85 N. C. 433 (1881); allowing business to be commenced before the full capital stock is subscribed, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); dividing the line and forming two or more corporations, Indiana, etc. Turnp. Co. *v.* Phillips, 2 Pen. & W. (Pa.) 184 (1830); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859); Carlisle *v.* Terre Haute, etc. R. R., 6 Ind. 316 (1855); transferring a railroad subscription from one railroad to another, Pittsburg, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858); making the charter perpetual and increasing power to hold property, Union Locks & Canals *v.* Towne, 1 N. H. 44 (1817); allowing a life-insurance company to insure against fire and marine loss, Ashton *v.* Burbank, 2 Dill. 435 (1873); S. C., 2 Fed. Cas. 26; extending the line, Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). See also Noesen *v.* Port Washington, 37 Wis. 168 (1875), where there was an amendment authorizing the purchase of a railroad running at right angles to the old, but a release was upheld; increasing the par value of the stock, Mahan *v.* Wood, 44 Cal. 462 (1872); consolidating the corporation with another corporation, Illinois, etc. R. R. *v.* Cook, 29 Ill. 237 (1862); McCray *v.* Junction R. R., 9 Ind. 358 (1857); Shelbyville, etc. Turnp. Co. *v.* Barnes, 42 Ind. 498 (1873); Booe *v.* Junction R. R., 10 Ind. 93 (1857); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854); Clearwater *v.* Meredith, 1 Wall. 25 (1863); Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884); Kean *v.* Johnson, 9 N. J. Eq. 401 (1853); Black *v.* Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873). *Cf.* Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), criticised in Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930; Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). Until, however, the corporation accepts such amendment the stockholders cannot complain. To same effect, Delaware, etc. R. R. *v.* Irick, 23 N. J. L. 321 (1852). Amendments which have not been acted upon do not release the subscriber. Taylor *v.* Supervisors, 86 Va. 506 (1889). See, in general, Pearce *v.* Madison, etc. R. R., 21 How. 441 (1858); Tuttle *v.* Michigan Air Line R. R., 35 Mich. 247 (1877); New Jersey Mid. R'y *v.* Strait, 35 N. J. L. 322 (1872). In all these cases neither a mandatory statute, nor a vote of the directors, nor a majority of the stockholders, can compel a dissenting stockholder to accept the change. It would be unconstitutional. The stockholder

§ 501. *Amendments under the reserved power of the state to alter, amend, or repeal the charter.*— The extent of the power of the legislature to amend a charter, where it has reserved that power, is not yet fully settled, and is full of difficulties.

may say: "I have agreed to become interested in a railroad company, and have contracted in view of the profits to be expected, and the perils and losses incident to that description of business; but I have not agreed that those to be entrusted with the capital I contribute shall have power to use it in a business of a different character, and attended with hazards of a different description." Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859). Even though the legislature, after a turnpike corporation is organized, authorizes it to issue stock in payment for another turnpike, yet a dissenting stockholder may prevent the purchase by showing that it decreases the value of his stock. Shaw *v.* Campbell, etc. Co., 15 S. W. Rep. 245 (Ky., 1891). Where the statutes under which the company is organized allow the objects of the company to be changed on a vote of the stockholders, a dissenting stockholder is not released from his subscription by such change. Mercantile Statement Co. *v.* Kneal, 51 Minn. 263 (1892). Acts relative to a corporation may be so radical as to constitute a new charter instead of amendments to the old one. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). Where a municipality has subscribed for stock and issued its bonds indorsed by the railroad company to raise money to pay the subscription, the legislature cannot authorize the company to apply its assets to the payment of such bonds. A stockholder may enjoin it. Hill *v.* Glasgow R. R., 41 Fed. Rep. 610 (1888). The legislature cannot, in the amendment itself, authorize the majority to bind the minority herein. New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854). Where a charter authorizes a lease, if assented to by the stockholders, an amendment authorizing such lease by the directors would be unconstitutional, unless accepted by the stockholders. *Re* Opinion of the Judges, 28 S. E. Rep. 18 (N. C., 1897). Where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote. Tucker *v.* Russell, 82 Fed. Rep. 263 (1897). An amendment cannot deprive the members of the corporation of the privilege of electing its directors. The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational corporation. Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642 (1855). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7 (1834). *Cf.* § 603, *infra*. For a valuable argument against the power of a majority of the stockholders to accept an amendment of the charter so as to give the company the power to lease its railroad, see 8 Harvard L. Rev. 396. In Loewenthal *v.* Rubber, etc. Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. On the right of a dissenting stockholder in general, see also Printing House *v.* Trustees, 104 U. S. 711 (1881);

There is a strong tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the legislature to amend a charter under this reserved power. It should be restricted to those amendments only in which the state has a public interest. Any attempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and the spirit of justice. Under such reserved power the legislature has only that right to amend the charter which it would have had in case the Dartmouth College case had decided that the federal constitution did not apply to corporate charters.[1] In fact the historical origin of this reservation of the right to amend was due to the effort of the various states of the Union to escape from the decision in the Dartmouth College case.[2] By this reserved right the restraint of the federal constitution is done away with. But the power to make a new contract for the stockholders is not thereby given to the legislature. The legislature may repeal the charter, but cannot force any stockholder into a contract against his will.

The power to make amendments, and to repeal and alter charters, has been reserved in most of the states of the Union.[3]

Hoey *v.* Henderson, 32 La. Ann. 1069 (1880); *Re* St. Mary's Church, 7 Serg. & R. (Pa.) 517 (1822).

[1] Sinking Fund Cases, 99 U. S. 700, 720 (1878); Miller *v.* State, 15 Wall. 478, 495 (1872); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238, 279 (1882); Detroit *v.* Detroit, etc. Co., 43 Mich. 140 (1880). The reserved right to amend or repeal a charter "leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." Smith *v.* Lake Shore, etc. Co., 72 N. W. Rep. 328 (Mich., 1897).

[2] See Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 352 (1884).

[3] See Part VII, *infra*. The following special references are made to some of the constitutional provisions on this subject: Constitution of Alabama, XIII, 1; Arkansas, V, 48; California, IV, 31; 1879, XII, 1; Colorado, 1876, XV, 3; Delaware, II, 17; Iowa, VIII, 12; Kansas, XII, 1; Maine, Laws of 1831; Maryland, III, 48, par. 2; Massachusetts, St. 1830, ch. 81; R. S., ch. 44, § 23; Gen. St., ch. 68, § 41; Michigan, XV, 1, 8; Missouri, VIII, 14; Nebraska, 1875, XI; Nevada, VIII, 1; New Jersey, Amend. IV, 7, par. 11,

It is clearly established that the legislature cannot, under this reserved power, amend the charter so as to change the whole character of the enterprise and compel the corporation to proceed under the amended charter.[1] The restrictions of the state constitution still exist, and individuals cannot be forced by the

cl. 11; New York, VIII, 1, R. S., pt. 1, ch. XVIII, title 3, § 8; North Carolina, VIII, 1; Ohio, XVIII, 2; Oregon, XI, 2; Pennsylvania, XVI, 10; South Carolina, XII, 1; Tennessee, XI, 8; Texas, 1875, XII, 5, 7; Wisconsin, XI, § 1; *Re* New York Elevated R. R., 70 N. Y. 327 (1877); Johnson *v.* Hudson River R. R., 49 N. Y. 455 (1872); Bank of Chenango *v.* Brown, 26 N. Y. 467 (1863); Ashuelot R. R. *v.* Elliot, 58 N. H. 451, 454 (1878).

[1] In Pennsylvania it is held that the reserved power, when used so as to make an amendment compulsory on the corporation, "is in the nature of a police power, designed for the protection of the public welfare." Cross *v.* Peach Bottom R'y, 90 Pa. St. 392 (1879). Under its reserved power to amend, the state may give a remedy against a mill-dam corporation for injuries by flood. Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379 (1847), holding also that, by accepting an amendment which is granted on condition that the reserved power to amend shall apply to the corporation, it is subject to such power; Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854). In Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884), the court said: "It was not competent for the legislature to do more in this respect than to waive the public rights. It could not divest or impair the rights of the shareholders, as between themselves, as guaranteed by the company's charter, without their consent. It was upon the faith of the stipulations contained in said charter that the shareholders subscribed to the capital stock, and thereby made themselves members of the corporation." In Orr *v.* Bracken County, 81 Ky. 593 (1884), an amendment under the reserved power, changing the method of voting, was decided to be of no effect until the stockholders accepted it. The court said: "The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property." See also § 609*a*, ch. XXXVII, *infra*, as to amendments affecting the right to vote. Query, whether a mandatory consolidation would be legal. Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930. When legal, a mandatory change does not require acceptance by the stockholders. Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). But when the mandatory amendment goes beyond the legal limits, it must be accepted by the corporation as though it were made optional with the corporation. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), the court saying that the power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely with reference to questions between the corporation and the state, where the latter desired to make compulsory amendments against the will of the former. The corporation cannot be compelled to proceed. All the state "can do is to grant it the power, and then it is for the corporation to accept it or not, as it pleases." See also § 497, *supra*.

state into new contracts.[1] Moreover the amendment must not be foreign to the purposes and objects of the original charter. The power of amendment has its limits. "It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. . . . The power to alter and modify does not give power to make any substantial additions to the work."[2] The best view taken of this reserved power of the state is that under it a fundamental amendment to the charter does not authorize a majority of the stockholders to accept the amendment and proceed, but that unanimous consent of the stockholders is necessary.[3]

Under this reserved power, however, the legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated and have gone into business under a charter which does not impose such liability. The exercise

[1] Cooley, Const. Lim. (5th ed.), p. 454. As to repeals of charters under this reserved power, see ch. XXXVIII, *infra*.

[2] Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." Shields *v.* Ohio, 95 U. S. 319 (1877); Spring Valley Water-works *v.* San Francisco, 61 Cal. 3 (1881). The amendment must "not defeat or substantially impair the object of the grant, or any rights vested under it." Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See also Miller *v.* State, 15 Wall. 478 (1872); Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871). The motives of the legislators cannot be inquired into. Northern R. R. *v.* Miller, 10 Barb. 260 (1851); *Re* N. Y. Elevated R. R., 70 N. Y. 327, 351 (1877). See Astor *v.* Arcade R'y, 113 N. Y. 93, 111 (1889).

[3] Mills *v.* Central R. R., 41 N. J. Eq. 1, 4 (1886), where a statute subsequent to the charter authorized the consolidation of railroad companies. The court said: "The legislature did not intend to affect the rights of stockholders *inter sese*, and the act does not do so, either expressly or by implication. . . . After shareholders had entered into a contract among themselves, under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the plan could not, even by virtue of legislative enactment, be radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking, because such action would impair the obligation of the dissenting stockholders' contract with their associates and the state." The court said also, that, under its reserved power to amend a charter, the state cannot give "a power to one part of the corporators as against the other which they did not have before." On this subject see also § 497, *supra*, and the notes thereto.

of this power by the legislature, in such a case, is held to be only a repeal of part of the corporate franchises.[1] So, also, it is said that under this reserved power the legislature may impose a statutory liability for the future debts and obligations of the corporation.[2]

The constitutionality of various amendments to charters in which the legislature reserved the right to amend or repeal is considered in the notes below.[3]

[1] McGowan *v.* McDonald, 111 Cal. 57 (1896); Bissell *v.* Heath, 98 Mich. 472 (1894); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849); Sleeper *v.* Goodwin, 67 Wis. 577 (1887). *Cf.* Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See §§ 242, 280, 497, *supra.*

[2] Sherman *v.* Smith, 1 Black, 587 (1861), aff'g *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Sinking Fund Cases, 99 U. S. 700 (1878); Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); Green *v.* Biddle, 8 Wheat. 1, 84 (1823); Gardner *v.* Hope Ins. Co., 9 R. I. 194 (1869). Such increased liability may be imposed by a new constitution of the state. *Re* Reciprocity Bank, 22 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858); *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); aff'd *sub nom.* Sherman *v.* Smith, 1 Black, 587 (1861). In Consolidated Assoc. *v.* Lord, 35 La. Ann. 425 (1883), the court refused to uphold an amendment which imposed further liability on the stockholder. The statutory liability in California does not apply to stockholders in corporations existing at the time the statute was enacted. United States *v.* Stanford, 69 Fed. Rep. 25 (1895); aff'd, 161 U. S. 412 (1896). A legislature may by statute create a statutory liability of stockholders for existing debts of the corporation, although the original charter did not contain such liability. Lincoln *v.* Carroll, 73 N. W. Rep. 173 (Minn., 1897). See also § 497, *supra.*

[3] The case of Sinking-Fund Com'rs *v.* Green, etc. Co., 79 Ky. 73 (1880), holding that the right to take tolls cannot be abolished where the company has maintained and kept in repair the rivers, relying upon the right to take toll, is referred to in Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). Concerning this subject, see § 900, *infra.* In Ohio, etc. R'y *v.* People, 123 Ill. 467 (1888), the court referred to but did not decide the question whether a state could withdraw its consent to a consolidation after the consolidation had been made. The legislature cannot, under its reserved power, compel a dam company to erect new fish-ways after it has compelled them to pay damages to fish owners. Commonwealth *v.* Essex Co., 79 Mass. 239 (1859). Under its reserved right the legislature may amend the charter of a college which has private stockholders, but to which the state contributes funds, so that instead of the state having four directors out of eleven the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892); but see Sage *v.* Dillard, 15 B. Mon. (Ky.) 340, 357 (1854); State *v.* Adams, 44 Mo. 570 (1869); Allen *v.* McKean, 1 Sumn. 276 (1833); S. C., 1 Fed. Cas. 489. Under its reserved right to amend or repeal a charter, the legislature may authorize a change in the location of a college, even though the citizens of the place where it was first located donated largely to its funds. Bryan *v.* Board of Education, 151 U. S. 639 (1894).

The supreme court of the United States has said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."[1] Under the reserved power to amend a charter the legislature may authorize the consolidation of railroads.[2] A general statute reserving the power to

Where a gas company has an exclusive right to supply gas to a city, subject to the right of the legislature to alter or revoke the same, the legislature may authorize the city to construct its own gas-works. A municipal ordinance is not such a contract as is protected by the constitution of the United States in regard to impairing the validity of contracts. It is a contract that is protected in the same way as contracts of individuals. Hamilton, etc. Co. *v.* Hamilton City, 146 U. S. 258 (1892). As to the latter point, see *contra*, City R'y *v.* Citizens' Street R. R., 166 U. S. 557 (1897). Where an amendment exempts the company from taxation and provides that it shall furnish the city with water free of cost, a repeal of the exemption repeals the obligation as to water. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). An exemption from taxation may be repealed under the reserved right to amend, etc. Pearsall *v.* Great Northern R'y, 161 U. S. 646, 663 (1896); Wagner Free Institute *v.* Philadelphia, 132 Pa. St. 612 (1890). As to such repeals see § 572*b*, *infra*. Under the reserved power to amend or repeal a charter the legislature may compel the corporation to pay wages weekly to its employees. State *v.* Brown, etc. Mfg. Co., 18 R. I. 16 (1892). Under the reserved right to amend the charter the legislature may amend so as to confine the road to a particular route, and outstanding contracts of the company do not prevent such an amendment. Macon, etc. R. R. *v.* Gibson, 85 Ga. 1 (1890). In regard to the question of the constitutionality of a radical amendment to a charter under the reserved right to amend, see Shields *v.* Ohio, 95 U. S. 319 (1877); Sinking Fund Cases, 99 U. S. 700 (1878); Pennsylvania College Cases, 13 Wall. 190 (1871); Miller *v.* State, 15 Wall. 478 (1872); Spring Valley Water-works *v.* Schottler, 110 U. S. 347 (1884); Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). Authorizing one railroad to subscribe for stock in another railroad has been held legal. White *v.* Syracuse, etc. R. R., 14 Barb. 559 (1853). Also borrowing money and building branches. Northern R. R. *v.* Miller, 10 Barb. 260 (1851). Also reducing capital stock. Jordyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). See also White Hall, etc. R. R. *v.* Myers, 16 Abb. Pr. (N. S.) 34 (1872); State *v.* Accommodation Bank, 26 La. Ann. 288 (1874). The extension of the line from six to seventeen miles was held to require a unanimous acceptance in Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867).

[1] New York & New England R. R. *v.* Bristol, 151 U. S. 556 (1894).

[2] Market Street R'y *v.* Hellman, 109 Cal. 571 (1895); Hale *v.* Cheshire R. R., 161 Mass. 443 (1894); Bishop *v.* Brainerd, 28 Conn. 289 (1859). *Contra*, Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), a dictum. Mowrey *v.* Indian-

amend or repeal charters is a part of all special charters passed subsequently.[1]

§ 502. *Dissenting stockholder's remedy against an illegal amendment.*— Where an unauthorized and illegal amendment has been accepted by a corporation and is about to be acted upon, a stockholder has two remedies. If he has not paid his subscription, he may consider himself released from his liability to pay the subscription, or he may begin suit in equity to obtain an injunction against or to set aside any action by the corporation under the amendment.[2] If the stockholder has

apolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930. See also § 896, *infra*. A subscription for stock is not released by a subsequent consolidation of the company with another, unless such consolidation is a fundamental alteration of the organization. Morrill *v.* Smith County, 89 Tex. 529 (1896). It has been held that, under its reserved power, the legislature may authorize a road to lease to another. Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862). Under the reserved right to amend the charter, an amendment authorizing a lease is not valid except with the unanimous consent of the stockholders. Dow *v.* Northern R. R., 36 Atl. Rep. 510 (N. H., 1887), giving an exhaustive discussion of the question.

[1] See § 2, *supra*. A general antecedent statute reserving the right to amend does not apply to subsequent amendments to an old charter where it was not so intended. A new charter may be so drawn as to be free from such a general antecedent statute. New Jersey *v.* Yard, 95 U. S. 104 (1877), rev'g 37 N. J. L. 228. Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal. But any amendment should be "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserved power. (Approving Tomlinson *v.* Jessup, 15 Wall. 454 — 1872, and Railroad Co. *v.* Maine, 96 U. S. 499 — 1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892).

[2] This rule is recognized and applied in most of the cases of this chapter. See also Clearwater *v.* Meredith, 1 Wall. 25 (1863), holding that the stockholder was released, and saying: "Clearwater could have prevented this consolidation had he chosen to do so;" Nugent *v.* Supervisors, 19 Wall. 241 (1873). An amendment to the charter materially changing the terminus releases a dissenting subscriber for stock from his subscription. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863). A change of the termini under an amendment to the charter releases previous subscribers, there being no reserved right to make such amendment. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). A fundamental change in the corporation releases subscribers. Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893); Buffalo, etc. R. R. *v.* Pottle, 23 Barb. 21 (1856). A change in the plan of organization so as to have a larger capital stock than was originally in-

already paid his subscription, then his only remedy is an injunction or a suit to set aside.[1] In Pennsylvania it has been held that the stockholder may have an injunction herein, but only until the corporation shall have purchased his interest in

tended releases a subscriber. Norwich, etc. Co. v. Hockaday, 89 Va. 557 (1895). A change of route releases the subscriber. Champion v. Memphis, etc. R. R., 35 Miss. 692 (1858). A charter amendment enlarging the corporate objects from fire and accident to fire, marine, and inland insurance releases dissenting stockholders. Ashton v. Burbank, 2 Dill. 435 (1873); S. C., 2 Fed. Cas. 26. A legislative amendment not accepted by the company is no defense to a subscription. Chattanooga, etc. R. R. v. Warthen, 98 Ga. 599 (1896). In England cases arise releasing the subscriber when the memoranda of association vary from the prospectus. Stewart's Case, L. R. 1 Ch. App. 574 (1866); Webster's Case, L. R. 2 Eq. 741 (1866); Ship's Case, 2 De G., J. & S. 544 (1865); Downes v. Ship, L. R. 3 H. L. 343 (1868). *Cf.* Nixon v. Brownlow, 3 H. & N. 686 (1858); Norman v. Mitchell, 5 De G., M. & G. 648 (1854). See also Dorris v. Sweeney, 60 N. Y. 463 (1875). Where, prior to incorporation, a person agrees to take stock in a corporation to furnish incandescent electric lighting, a corporation to furnish electricity and power cannot enforce his subscription. Marysville, etc. Co. v. Johnson, 109 Cal. 192 (1895). Where the charter varies from the subscription paper in that the capital stock is doubled and the objects changed, a subscriber is not bound, even though he delays several months in repudiating the contract. Baker v. Fort Worth Board of Trade, 8 Tex. Civ. App. 560 (1894). A subscription to a joint-stock association or partnership cannot be enforced by a corporation subsequently organized. Knottsville, etc. Co. v. Mattingly, 85 S. W. Rep. 1114 (Ky., 1896). If the statute requires the profile and estimates to be made before municipal aid is given, a subsequent variation releases the subscription. State v. Morristown, 93 Tenn. 239 (1893). After a winding-up has commenced there can be no release herein. Oakes v. Turquand, L. R. 2 H. L. 325 (1867). In opposition to the above rule of law, there are some decisions holding that the subscribers' only remedy is an injunction. Were it not that the great weight of authority holds otherwise, this view would be commended as the only logical result of the law. There is no reason why a stockholder who has not paid his subscription should be better off than he who has met that obligation. See § 187, *supra;* also Hays v. Ottawa, etc. R. R., 61 Ill. 422 (1871); Pacific R. R. v. Hughes, 22 Mo. 291 (1855); Martin v. Pensacola R. R., 8 Fla. 370, 389 (1859); Ware v. Grand Junction Water Works, 2 Russ. & M. 470 (1831); First Nat. Bank v. Charlotte, 85 N. C. 433 (1881). The plea of release must allege acceptance by the corporation, and injury to the defendant sued on his subscription. Hawkins v. Mississippi, etc. R. R., 35 Miss. 688 (1858).

[1] This remedy also is supported by a large number of the cases in this chapter. See Stevens v. Rutland, etc. R. R., 29 Vt. 545 (1851); Black v. Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873); Mowrey v. Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930; Ware v. Grand Junction Water Works, 2 Russ. & M. 470 (1831). The stockholder cannot enjoin parties from applying to the legislature for the amendment. Story v. Jersey City, etc. Co., 16 N. J. Eq. 13 (1863),

the corporation.[1] This decision, however, has been doubted, and hardly seems consistent with well-established principles protecting persons in their right to retain their property except as taken from them under the power of eminent domain.[2]

§ 503. *Assent and acquiescence as a bar to the stockholder's remedy.*— A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit.[3] Acquiescence may sometimes grow out of his silence or delay, under circumstances that called on him to dissent if he so intended.[4] His assent, however, is not

reviewing the cases; Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851).

[1] Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), approved in State *v.* Bailey, 16 Ind. 46 (1861). *Cf.* Ship *v.* Crosskill, L. R. 10 Eq. 73 (1870); Stewart *v.* Austin, L. R. 3 Eq. 299 (1866), holding that the recovery back cannot be in a court of equity.

[2] Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930.

[3] Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). Long delay may constitute a ratification herein. Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854). No formal acceptance of an amendment is necessary. Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859); State *v.* Sibley, 25 Minn. 387 (1879); Hope Mut. F. Ins. Co. *v.* Beckman, 47 Mo. 93 (1870); Covington *v.* Covington, etc. Co., 10 Bush (Ky.), 69 (1874); Kenton County Court *v.* Bank Lick Turnp. Co., 10 Bush (Ky.), 529 (1875); Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27 (1867); Smead *v.* Indianapolis, etc. R. R., 11 Ind. 104 (1858). *Cf.* Pingry *v.* Washburn, 1 Aiken (Vt.), 264 (1826). See, in general, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); Houston *v.* Jefferson College, 63 Pa. St. 428 (1869); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); Vermont, etc. R. R. *v.* Vermont Central R. R., 34 Vt. 2 (1861); Hayworth *v.* Junction R. R., 13 Ind. 348 (1859); Mills *v.* Central R. R., 41 N. J. Eq. 1 (1886); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); *Ex parte* Booker, 18 Ark. 338 (1857); Upton *v.* Jackson, 1 Flip. C. C. 413 (1874); S. C., 28 Fed. Cas. 844; Goodin *v.* Evans, 18 Ohio St. 150 (1868); also § 640 and ch. XLIV, *infra*. If the stockholder subscribed after the amendment was made he cannot complain. Eppes *v.* Mississippi, etc. R. R., 35 Ala. 33, 54 (1859); McClure *v.* People's Freight R'y, 90 Pa. St. 269 (1879). If a stockholder does not object to an amendment, it is not for a person whose land is being taken under eminent-domain proceedings to object. Ames *v.* Lake Superior, etc. R. R., 21 Minn. 241, 291 (1875). Changes and amendments as to the route do not release the subscriber where he took part therein. Owenton, etc. Co. *v.* Smith, 13 S. W. Rep. 426 (Ky., 1890). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. Johnson *v.* Mercantile, etc. Co., 94 Ga. 324 (1894).

[4] Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Martin *v.* Pensacola, etc. R. R., 8 Fla. 370 (1859); Owen *v.* Purdy, 12 Ohio St. 73 (1861). *Contra*, Hamilton Mut. Ins. Co. *v.* Hobart, 68 Mass. 543 (1854). Parties taking part

to be presumed, but must be proven.[1] A court of equity will go far to aid a dissenting stockholder, where he applies promptly and before large investments and many changes are made on the faith of the acts complained of. But laches will not be tolerated by the courts, especially where important interests are involved.[2]

in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones *v.* Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892). Although a radical change in the location of a railroad after a subscription has been made releases the subscription, yet the subscriber may by his acts be bound by such change. Lowell *v.* Washington Co. R. R., 37 Atl. Rep. 869 (Me., 1897). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. Rabe *v.* Dunlap, 51 N. J. Eq. 40 (1893). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky., 1890). Where stockholders in a college exchange their stock for scholarships, a removal of the college to another location under an amendment to the charter, such amendment having been made twenty-five years prior to such removal, will not be enjoined. Bryan *v.* Board of Education, 90 Ky. 322 (1890).

[1] March *v.* Eastern R. R., 43 N. H. 515 (1862); Union Locks & Canals *v.* Towne, 1 N. H. 44 (1817); Ireland *v.* Palestine, etc. Turnp. Co., 19 Ohio St. 369 (1869).

[2] See ch. XLIV, *infra*.

CHAPTER XXIX.

"TRUSTS" AND UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

A. "TRUSTS."

§ 503*a*. Definition and legality of a "trust" — Decisions in the various states on this subject.
503*b*. Further inquiry as to the legality of a "trust."
503*c*. Liability of trustee and certificate-holders.
503*d*. Qualifications, powers, etc., of the trustees and of certificate-holders.

B. UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 504. Definitions — Joint-stock companies, clubs, exchanges, etc. — Ownership of land.
505. Statutory joint-stock companies.
506. Joint-stock companies may arise by implication of law.
507. How a person becomes a member — Transfers.
508. Liability of members to creditors and to the company.
509. Actions by members against officers and the company.
510. Dissolution.

§ 503*a*. *Definition and legality of a "trust" — Decisions in the various states on this subject.*— The word "trust" was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees and to receive therefor trust certificates from the trustees. The stockholders thereby consolidate their interests and become trust-certificate holders. The trustees own the stock, vote it, elect the officers of the various corporations, control the business, receive all the dividends on the stock, and use all these dividends to pay dividends on the trust certificates. The trustees are periodically elected by the trust-certificate holders. The purpose of the "trust" is to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton-Seed Oil Trust, and the Sugar Trust were examples of this method of combination.[1]

[1] The committee of the House of Representatives at Washington, in their report, explain the nature of the Standard Oil Trust and Sugar Trust very clearly. The committee reports "that there exist a certain number of corporations organized under the laws of the different states and subject to their control; that these corporations have issued their stock to various individuals, and that these individual stockholders have surrendered their stock to the trustees named in the agreements creating these trusts, and accepted in lieu thereof certificates issued by the

But the word "trust" has a wider and more popular meaning. It is used to designate any combination of producers for the purpose of controlling prices and suppressing competition. In this sense of the word, all contracts, agreements, and schemes, whereby those who were competitors combine to regulate prices, are "trusts."

During the past ten years trusts have come into great prominence. They have multiplied rapidly and have extended into many branches of business. They became the object of great popular opposition, and their legality has been fiercely assailed, both in the courts and by means of prohibitory statutes.

The courts have held with great uniformity that these combinations are illegal if their purpose is to restrict production, raise prices, or restrain trade. The law is clear that any combination of competing concerns for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. This principle of law has been applied with great rigor to trusts, the recent combinations in trade. The two leading cases on the subject are the Sugar Trust decision in New York[1] and the Standard Oil Trust decision in Ohio.[2] Many cases showing the different circumstances under which this rule has been applied are given in

trustees named therein. The agreements provide that the various corporations whose stock is surrendered to the trustees shall preserve their identity and carry on their business." See 4 R'y & Corp. L. J. 98. Mr. S. C. T. Dodd, the general solicitor and originator of the Standard Oil Trust, defines a trust as "an arrangement by which the stockholders of various corporations place their stocks in the hands of certain trustees, and take in lieu thereof certificates showing each shareholder's equitable interest in all the stock so held. The result is twofold: 1. The stockholders thereby become interested in all the corporations whose stocks are thus held. 2. The trustees elect the directors of the several corporations." See 7 R'y & Corp. L. J. 236.

[1] The state will, at the instance of the attorney-general, forfeit the charter of a corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations for the purpose of forming a monopoly in and raising the price of sugar. People v. North River, etc. Co., 121 N. Y. 582 (1890). This case broke up the "Sugar Trust" and drove it into transferring all its property to a New Jersey corporation organized for that purpose.

[2] The next important case was State v. Standard Oil Co., 49 Ohio St. 137 (1892). This case declared illegal the Standard Oil Trust. That trust is now in process of liquidation. These two cases are now the leading authorities on this subject.

the notes below, arranged in the alphabetical order of the various states.[1]

These cases indicate the complicated questions and impor-

[1] *California:* Master stevedores may form an association for the purposes of fixing charges and agreeing that all business done by them shall be for the benefit of the association. Herriman *v.* Menzies, 115 Cal. 16 (1896). "Monopoly signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place." San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). A contract whose effect is to give a monopoly in the sale of bags, by the vendor agreeing to sell to one party exclusively, is illegal, and no damages can be collected. Pacific Factor Co. *v.* Adler, 90 Cal. 110 (1891). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where all the manufacturers of lumber at a certain point contracted to sell to a corporation all the product of the mills so far as such product was sold in four counties, and the mills agreed not to sell to any other parties in those counties except upon a forfeit to the corporation, the court held that any one of the mills could repudiate the contract. In a suit brought by the corporation against one of the mills for refusing to live up to the contract, the court held that the corporation could not recover. Santa Clara, etc. Co. *v.* Hayes, 76 Cal. 387 (1888).

Illinois: Where a person conveys property to a corporation, the object being to place the stock of that corporation in the hands of trustees to create a trust, such person, having recovered possession of his property, may defend against his contract to convey. Bishop *v.* American, etc. Co., 157 Ill. 284 (1895). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The Illinois statute of 1891 against trusts is constitutional. Ford *v.* Chicago, etc. Assoc., 155 Ill. 166 (1895). The state may forfeit the charter of a live-stock corporation where it limits the number of agents which each of its stockholders may employ. People *v.* Chicago L. S. Exchange, 48 N. E. Rep. 1062 (Ill., 1897). A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. Coquard *v.* National L. S. Co., 49 N. E. Rep. 563 (Ill., 1898). Although the general statute authorizes incorporation for any "lawful purpose," yet an incorporation to buy a majority of the stock of each of four competing gas corporations in a city is illegal where the purpose is to create a monopoly. The state may by suit have the charter forfeited. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). All gas companies owe a duty to the public. An agreement of two companies in one city to keep out of each other's territory is void. Chicago Gas L. Co. *v.* People's Gas L. Co., 121 Ill. 530 (1887). In Illinois all the grain deal-

tant litigation that have arisen by reason of the trusts. It is believed, however, that the volume of such litigation will decrease rather than increase in the future. Most of the great

ers in a town secretly combined and made contracts by which they controlled the price of grain and the local store-house accommodations. The parties succeeded, but disagreed in their division of the profits. An action for an accounting was brought by one against another. The court refused to aid either party. The law will leave the guilty conspirators as it finds them. Craft *v.* McConoughy, 79 Ill. 346 (1875).

Iowa: The Iowa statute against trusts applies to an agreement of insurance companies to charge uniform rates. Beechley *v.* Mulville, 70 N. W. Rep. 107 (Iowa, 1897).

Kansas: Where an association of live-stock commission merchants is formed for the purpose of regulating commissions, with a penalty for violation of the same, a member cannot enjoin the association from expelling him for non-payment of the penalty. Greer *v.* Payne, 4 Kan. App. 153 (1896). Insurance business is not interstate commerce. Foreign insurance companies that combine to control and increase the rates of insurance on property inside the state violate the statute against trusts, and their local agents are subject to prosecution therefor. State *v.* Phipps, 50 Kan. 609 (1893).

Kentucky: The agreement of two rival boats to divide their cardings in a certain proportion, and if either owner sells he shall not go into the business again for a year, is void. The party who has sold and then returned at once to the business is not liable in damages. Anderson *v.* Jett, 89 Ky. 375 (1889).

Louisiana: Where a draymen's union has obtained a monopoly, and dictates who shall receive a particular contract, and a contract is let to one by a business firm, and then another member claims the contract, which the firm lets to him, and then the firm gives the business to the first member, the second cannot collect damages. Fabacher *v.* Bryant, 46 La. Ann. 820 (1894). A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the American Cotton Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote, as allowed by statute, although the directors as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). A pooling contract between two railroads competing for business between the same points is void as against public policy. The court will leave the parties where they are. The arrangement in this case was for a division of earnings. Texas, etc. R'y *v.* Southern Pac. R'y, 41 La. Ann. 970 (1889). In Louisiana, where several firms owned a large quantity of India bagging, and combined and agreed not to sell except upon the consent of a majority of those who were parties to the agreement, the court refused both to uphold the agreement and to enforce the penalty for a violation of the compact. India Bagging Assoc. *v.* Kock, 14 La. Ann. 168 (1859).

Massachusetts: The combination of two parties who each claim a patent on an article not a prime necessity nor a staple commodity in the market is legal and may be specifically enforced. Gloucester, etc. Co. *v.* Russia Cement Co., 154 Mass. 92 (1891). In Central Shade-Roller Co. *v.* Cushman, 143 Mass. 353 (1887), where certain shade-roller manufacturers formed a

trusts have been driven from their original mode of organization and have reorganized by conveying all their property to a corporation organized for the purpose of taking over the prop-

corporation to sell their product, the court enjoined one of the parties from repudiating the agreement, but said: "The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market. . . . It does not look to affecting competition from outside — the parties have a monopoly by their patents — but only to restrict competition in price between themselves. . . . When it appears that the combination is used to the public detriment, a different question will be presented from that now before us."

Michigan: In ascertaining the market price of articles sold, the price as fixed by a combination in the trade will not be considered. Lovejoy *v.* Michels, 88 Mich. 15 (1891). A contract of a concern not to manufacture a certain line of articles in some states for five years is void. Western, etc. Assoc. *v.* Starkey, 84 Mich. 76 (1890). Where three persons interested in a match factory agreed to unite their property with that of their competitors in one large corporation, a monopoly — the Diamond Match Company — the courts will not enforce the contract between these three persons which specifies the proportion in which each of the three was to participate in the profits coming to them jointly from the monopoly. The history, character and purpose of the match monopoly are fully stated in this decision. Richardson *v.* Buhl, 77 Mich. 632 (1889).

Minnesota: It is legal for a large number of retail lumber dealers to form a voluntary association, and agree that they will not deal with any manufacturing or wholesale dealer who sells directly to customers, and thereby deprives the retail dealer of business, and the by-laws of their association may provide that the secretary shall notify all members of the names of wholesalers who sell in this manner to consumers. An injunction against the secretary giving such notices will not be granted. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223 (1893). By-laws of an exchange restricting the freedom of members to reduce prices and establish offices for selling are void. Kolff *v.* St. Paul Fuel Exchange, 48 Minn. 215 (1892).

Mississippi: Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires*. Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893). As to the Mississippi statute, see also American F. Ins. Co. *v.* State, 22 S. Rep. 99 (Miss., 1897).

Missouri: See Skrainka *v.* Scharringhausen, 8 Mo. App. 522 (1880), upholding a pooling contract of certain owners of stone quarries located in St. Louis, on the ground that the restraint was local in its effect.

Nebraska: Where the stockholders of a distilling corporation transfer their stock to trustees, for the purpose of entering into a trust, such trustees being the holders of the stock of various other corporations engaged in the same business, and trust certificates are issued by them in place of the stock, the state, at the instance of the attorney-general, will cause the charter to be annulled on the ground of misuser, the corporation being no longer engaged in a lawful business. Although the corporate property was transferred just before judgment, the court will not allow

erty. Such has been the case with the Sugar Trust and the Cotton-seed Oil Trust. The decisions of the New York court of appeals against the Sugar Trust and of the supreme court of

its decree to be evaded. State *v.* Nebraska Distilling Co., 29 Neb. 700 (1890).

New Jersey: A corporation formed to create a monopoly in the pottery business cannot enforce an agreement of one of the parties not to engage in the business. Trenton, etc. Co. *v.* Oliphant, 39 Atl. Rep. 923 (N. J., 1898). An injunction does not lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so. The remedy, if any, is by *quo warranto*. The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 36 Atl. Rep. 971 (N. J., 1897). Where a contract between a domestic railroad company and a foreign railroad company is declared illegal and void by the court on the ground that it seeks to create a monopoly in the coal business, and the court orders the domestic railroad company to cease complying with such contract, the court will appoint a receiver of such company if it attempts to evade the decree; but on proof that no evasion has been attempted the court will refuse to appoint a receiver. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 489 (1892). It is not illegal for one stockyard company to buy out another stockyard company. Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892); Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891).

New York: See People *v.* North River, etc. Co., 121 N. Y. 582 (1890). It is no defense to an action to enforce a subscription that after incorporation the company proceeded to form an illegal combination of competitors in trade. U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58 (1895). A person who buys a trust certificate, the certificate containing a stipulation binding the holder to all the terms of the trust agreement, thereby becomes a party to the illegal transaction, and such person has no standing in court to obtain an accounting and distribution of the property or profits. The whole agreement and transaction being illegal, the court will leave the parties where it finds them. The court pointed out that there was no proof in this case that the defendant trustees were seeking to derive any personal advantage from the agreement, but, on the contrary, were endeavoring to carry out the wishes of nearly all of the certificate-holders. Unckles *v.* Colgate, 148 N. Y. 529 (1896). A corporation formed by milk dealers to fix the price to be paid to farmers, etc., for milk is illegal. People *v.* Milk Exchange, 145 N. Y. 267 (1895). Where an Illinois corporation sues in New York on a subscription to its stock, it is no defense to allege that the company was to create a monopoly, where the only proof was certain prospectuses, etc., issued before the company was organized. The defense is not good unless the company "was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations." U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537 (1894). It is legal for a party who contemplates constructing waterworks to abandon the project and enter the employ of a competitor; and he may collect compensation therefor, although a part of the compensation was due to his having

Ohio against the Standard Oil Trust have convinced the trusts that their original mode of organization was illegal and must be abandoned. The result has been that the trusts for the

abandoned his own enterprise. Oakes *v.* Catteraugus Water Co., 143 N. Y. 430 (1894). A carrier may by special agreement give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not able or willing to so stipulate, provided that the charge exacted from those others is not excessive or unreasonable. Lough *v.* Outerbridge, 143 N. Y. 271 (1894). Where manufacturers form an illegal association to which they pay a certain sum, which they are to forfeit if they disobey its regulations and are expelled, one of them cannot enjoin the association from expelling him. This action was to enforce the agreement, and not to recover back his money. Phœnix Bridge Co. *v.* Keystone Bridge Co., 142 N. Y. 425 (1894). In People *v.* Sheldon, 139 N. Y. 251 (1893), the defendant was convicted of the crime of conspiracy under the Penal Code of New York, where he and others combined to raise the price of coal at retail and destroy free competition, even though no excessive price was charged.

A combination between dealers in sheep, to sell only to certain butchers, the butchers agreeing to buy only from them, excepting that such commissions as were received from business transacted with others should be paid into a common pool, is illegal. A penalty for violating the agreement cannot be collected. Judd *v.* Harrington, 139 N. Y. 105 (1893). The purchaser of a trust certificate issued by the trustees, the certificate being in a form similar to that of certificates of stock, may compel the trustees to transfer the same to him on their books, although he is a competitor of the trust and has opposed it in all ways possible. Rice *v.* Rockefeller, 134 N. Y. 174 (1892). In this case the court, speaking of the nature of a trust, said: "The agreement constituted not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it, by the agreement, took some of the attributes of a corporation, in so far that, through its trustees, certificates of shares in the equity to the property held by them were issued, and were transferable in like manner apparently as are those of corporations." Where several carbon manufacturers have formed a combination by leasing their several concerns to a trustee, and also assigning to him their orders for carbons, and subsequently one of them withdraws, the withdrawing concern cannot sue for and claim the amount due upon one of the orders assigned to and filled by such trustee. The defendant having interpleaded, the trustee takes the money. Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46 (1890). Where a manufacturer of a peculiar kind of machinery under a patent agrees with a trustee for several corporations that he, the manufacturer, will sell his machinery to them alone, and they agree to give him a percentage of their profits, the agreement is legal and may be enforced by him. Good *v.* Daland, 121 N. Y. 1 (1890). A person agreeing not to engage in a certain business within a certain territory cannot evade the contract by setting up that the other party is an illegal combination. National Wall Paper Co. *v.* Hobbs, 90 Hun, 288 (1895). The members of a retail coal dealers' association formed to prevent and actually preventing competition are liable criminally under the New York statutes. Drake *v.* Siebold, 81

most part have reorganized and reappeared in the form of gigantic corporations. How far the law will interfere with this class of corporations remains to be seen. In the Chicago Gas

Hun, 178 (1894). The holder of trustees' certificates, where the trust is organized on the plan of trustees holding the shares of stock of the various corporations, is denied all relief by the courts as against the trustees. He cannot compel them to pay dividends or have the property in their hands divided upon the dissolution of the trust. The combination being illegal, the courts will not aid any of the parties. So far as the law is concerned, the trustees can appropriate the property to their own use, and the holders of the trustees' certificates will not be granted any relief. Rice *v.* Rockefeller, Supr. Ct. Sp. T., N. Y. L. J., April 26, 1894. An agreement of dealers in stone that all sales shall be made by a certain corporation and shall then be apportioned among the dealers in a certain way is illegal. Cummings *v.* Union, etc. Co., 15 N. Y. App. Div. 602 (1897). Where many manufacturers under various patents form a corporation and convey to it their patents and take back licenses under which the corporation regulates the price, and they agree not to use any new patents and not to manufacture any new kind of harrow, the combination is illegal. Any one of the parties may by suit in equity be relieved from its terms. Strait *v.* National Harrow Co., 18 N. Y. Supp. 224 (1891). The harrow trust was again declared illegal in National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290 (1897). It is established "that no contracts are void as being in general restraint of trade where they operate simply to prevent a party from engaging or competing in the same business." Hence, an agreement of one steamship company to pay another company a certain sum for withdrawing its line of boats was upheld as against the dissent of a stockholder in the former company. Leslie *v.* Lorillard, 110 N. Y. 519 (1888). A large number of the proprietors of boats on the canals made a combination. The income from every boat, over and above a certain amount allowed to the boat for expenses for wear and tear, was turned into the "pool." At certain times the fund in the "pool" was to be divided among the parties according to the number of their boats. In an action to enforce payment under the agreement the court held that the whole arrangement was illegal, void, and not enforceable. Stanton *v.* Allen, 5 Denio, 434 (1848). The proprietors of five lines of boats engaged in canal transportation agreed to combine and do business at certain rates for freight and passage. The net earnings were to be divided among themselves in a fixed proportion. One of the parties sued another to compel him to make payment. The court held that the combination was void under the statutes of New York, and said: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." Hooker *v.* Vandewater, 4 Denio, 349 (1847).

A coal company bought coal from several corporations upon their contract not to sell to any other parties in that locality. The purpose was to enable the purchaser of the coal to have a monopoly of the market. The party which purchased the coal did not pay for it. The coal company which had sold brought suit for the price, but the court held that the suit must fail. The company had taken part in an illegal contract and com-

Company case the supreme court of Illinois forfeited the charter of the company on the ground that it was formed to bring about an illegal combination. New Jersey, on the other hand,

bination. In such cases the parties are outside of the pale and protection of the law. The courts will not aid either party. Arnot *v.* Pittston, etc. Co., 68 N. Y. 558 (1877). Many salt manufacturers in New York state combined to limit the production and control the price of salt. They formed a corporation, and each of the parties leased to the corporation his manufactory of salt. Each of the parties was, however, to continue the manufacture of salt in his manufactory, but only to a limited extent, and was to sell the product to a corporation at a fixed price. The agreement was carried out. One of the parties could not collect from the corporation the price for the salt delivered to it, and accordingly he brought suit. But the court decided that he could not collect. He lost his salt, and also the price of it. The law declares such combinations illegal, and will not aid any of the parties. Clancey *v.* Onondaga, etc. Co., 62 Barb. 395 (1862). The agreement of the various members of the "Wire Trust" not to sell at less than a certain price is void. A forfeit cannot be recovered back by one of the parties. De Witt, etc. Co. *v.* New Jersey, etc. Co., 9 R'y & Corp. L. J. 314 (N. Y. C. P., 1891). The receiver of one of the corporations forming a "trust" may enjoin it from reorganizing in the shape of one large corporation. Gray *v.* De Castro, etc. Co., 10 N. Y. Supp. 632 (1890). Although the charter of one of the corporations whose stock is held by a "trust" is forfeited, yet the receiver cannot have a receiver appointed of the "trust" property. This would amount to a receivership of all the property of a person who happened to be a stockholder in an insolvent corporation. Gray *v.* Oxnard, etc. Co., N. Y. L. J., June 6, 1890. The receiver of the company whose charter is forfeited has no right to an accounting from the other corporations as partners. He is confined to the property of his own company. Gray *v.* Oxnard, etc. Co., 11 N. Y. Supp. 118 (1890); affirmed in 59 Hun, 387 (1891), on the ground that an illegal contract cannot be enforced. A receiver of an insolvent corporation may recover money due it from an illegal "trust," though the corporation was a party to the "trust." Pittsburg Carbon Co. *v.* McMillin, 53 Hun, 67 (1889). A contract whereby the stockholders of one corporation were to buy only from the stockholders of another, and the stockholders of the latter were to sell only to the stockholders of the former, was upheld in Live-Stock Assoc. etc. *v.* Levy, 3 N. Y. St. Rep. 514 (1886). A trust being illegal, a certificate-holder may have a receiver appointed of all the stock and assets held by the trustees, and may have an accounting by the trustees. Cameron *v.* Havemeyer, 12 N. Y. Supp. 126 (1890). Where a "trust" passes into a receiver's hands by reason of insolvency, the receiver may recover debts due the "trust" from the constituent corporations. Pittsburg Carbon Co. *v.* McMillin, 53 Hun, 67 (1889). The case of Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887), was not a "trust" case.

Ohio: See State *v.* Standard Oil Co., 49 Ohio St. 137 (1892). The Candle Manufacturers' unincorporated association, formed to control prices, etc., is illegal. A member cannot recover his share of the profits. Emery *v.* Ohio Candle Co., 47 Ohio St. 320 (1890). Many salt manufacturers formed a "trust," by agreeing to sell all their product to an unincorporated joint-

grants broad charters to the combinations and receives a heavy toll for the privileges and immunities granted. The past five years have changed but little the status of the whole question.

stock association. The latter was composed of, and its directors were elected by, the manufacturers. The purpose of the combination was to have the association buy the salt from the manufacturers and sell it to the public. Competition would thereby be prevented. The court held that the combination was void, and enjoined the association from seizing the product of one of the manufacturers. Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880).

Pennsylvania: A combination of brewers to control the price of beer within a city is illegal, and the court will not enforce the agreement. Nester v. Continental Brewing Co., 161 Pa. St. 473 (1894). Five Pennsylvania coal corporations, which together controlled a certain kind of coal, combined and agreed that sales should be made through a committee and a general agent, and that thereby prices should be fixed, freights made, and sales and deliveries adjusted. If any company sold more than a fixed proportion it was to pay a certain amount to the others. The combination was made and carried out in New York. In the course of time one of the companies sued another to recover its proportion of the amount which the latter was to pay for the excess of coal sold by it. The Pennsylvania court held that it could not recover; that the combination was illegal and void; and that it was a conspiracy under the New York statute against the commission, by two or more persons, of "any act injurious . . . to trade or commerce." Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173 (1871). The courts will refuse a charter to a company whose business is to be "to promote the business of such retail coal dealers as become members thereof, and to protect them," etc., the intent being to combine the retail coal dealers. *Re* Richmond Retail Coal Co., 9 R'y & Corp. L. J. 31 (Phila., 1890).

Rhode Island: Three out of four oleomargarine companies in New England may legally agree to consolidate into one company in order to stop sharp competition. They may also agree not to do business separately for five years anywhere. Oakdale Mfg. Co. v. Garst, 18 R. I. 484 (1894).

Tennessee: It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Marble Co. v. Harvey, 92 Tenn. 115 (1892). A combination of four cotton-seed oil corporations, by an agreement that the possession and use of all their property should be turned over to certain persons to run, is a partnership, and contrary to the rule of law that a corporation cannot become a partner. One of the four corporations sued and recovered possession of its property. Mallory v. Hanaur Oil Works, 86 Tenn. 598 (1888).

Texas: In Waters, etc. Oil Co. v. State, 14 S. W. Rep. 936 (Tex., 1890), the state forfeited the right of a foreign corporation organized under the laws of Missouri to do business in Texas, the corporation having agreed with various merchants and other dealers in oils in Texas so that such parties should not sell any oils except those of that corporation. The Texas stat-

The supreme court of the United States have declared illegal railroad pooling contracts as being contrary to the anti-trust act of congress of 1890. But aside from this, the law has interfered but little with these great combinations.

utes against combinations was declared unconstitutional in *Re* Grice, 79 Fed. Rep. 627 (1897), as violating the right of contract guaranteed by the federal constitution. A contract between a brewer and a dealer by which certain territory is given exclusively to the dealer, and the dealer agrees not to buy of others, is contrary to the Texas statute. Texas Brewing Co. *v.* Templeman, 90 Tex. 277 (1896). A manufacturer of windmills may grant an exclusive territory for their sale to a firm, even though such firm agrees not to handle any other kind of windmill. Welch *v.* Phelps, etc. Co., 89 Tex. 653 (1896). An agreement or combination of brewers as to sales of beer to dealers is legal at common law, but void under the Texas statute. Anheuser, etc. Assoc. *v.* Houck, 88 Tex. 184 (1894). The attorney-general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893), holding also that a statute against trusts and combinations does not apply to a combination of fire insurance companies to fix uniform rates and commissions.

Wisconsin: A combination of mason builders by which they pay to their association six per cent on all contracts, and all bids are submitted to the association before they are made, and six per cent added to the lowest bid, is illegal. Milwaukee, etc. Assoc. *v.* Niezerowski, 95 Wis. 129 (1897). A purchaser of goods cannot defeat an action for the price on the ground that the vendor is an illegal trust or combination. National Distilling Co. *v.* Cream City Imp. Co., 86 Wis. 352 (1893). See Kellogg *v.* Larkin, 3 Pin. (Wis.) 123 (1851).

The United States Courts: Where a car-manufacturing corporation leases all its property to another corporation for a term of years and agrees not to engage in business during that time, "the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy." Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 53 (1891), quoting from and approving of Alger *v.* Thacher, 36 Mass. 51 (1837). A person may purchase at foreclosure even though he represents the stockholders, and even though the intention may be to organize a new company to continue an illegal combination in trade. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895). In McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 786 (1896), several corporations agreed to turn over their property to one corporation and to take stock and bonds in payment, the price to be thereafter fixed by appraisers. After the stock was issued one of the companies withdrew, and the court held that the company withdrawing could file a bill to cancel the agreement on the ground that the company had no power to hold stock in other corporations. An illegal combination cannot maintain a bill to enjoin infringement upon its patents. National Harrow Co. *v.* Quick, 67 Fed. Rep. 130 (1895). Rent may be collected on a lease of a manufacturing plant to a competing concern, even though the intent was

The fact is that the industrial movement of the age is irresistibly towards consolidation and combination, in connection with the expansion and extension of trade at home and abroad.

to decrease competition. An agreement of the lessor not to engage in the business during the term of the lease is valid. U. S. Chemical Co. v. Provident Chemical Co., 64 Fed. Rep. 946 (1894). A contract by a manufacturing company not to manufacture for a certain period if it is paid a certain percentage on sales made by others is illegal and void. Oliver v. Gilmore, 52 Fed. Rep. 562 (1892). It is no defense to an infringement suit that the complainant has formed a monopoly of all patents bearing upon the matter. Strait v. National Harrow Co., 51 Fed. Rep. 819 (1892). An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of $6,000 per year and this salary has not been paid. Bracher v. Hat Sweat Mfg. Co., 49 Fed. Rep. 921 (1892). A person who has sold his bakery to a corporation which is a "trust," taking stock in the corporation in payment, may tender back the stock and retake possession of his bakery. The act of congress against combinations applies. American, etc. Co. v. Klotz, 44 Fed. Rep. 721 (1891). Where the stockholders of a corporation enter into a contract for and in behalf of the corporation and for its benefit, and the corporation accepts that benefit, the latter is bound and affected by the contract and subject to the liabilities of the contract the same as though it had directly entered into it. Hence it is that a corporation is guilty of entering into a "trust" in a case where its stockholders enter into the "trust." American Preservers' Trust v. Taylor Mfg. Co., 46 Fed. Rep. 152 (1891). In this case the court held that the trustees were agents, and that the corporations were among the principals, and that it was *ultra vires* of the corporations to purchase stocks, bonds, and various properties through these agents, the trustees. Hence one of the corporations cannot be enjoined from breaking the contract. Where, in order to enter into a combination, one of the corporations assigns all its property to its stockholders, and they assign it to the new consolidated and absorbing corporation, and also agree with that corporation not to compete with it in business, the first-named corporation may be started in the business anew and will not be enjoined. American Preservers' Co. v. Norris, 43 Fed. Rep. 711 (1890).

In controversies between a certificate-holder and the trustees the court will not consider the legality of the "trust." Gould v. Head, 41 Fed. Rep. 240 (1890). A certificate-holder cannot enjoin an *ultra vires* or illegal act of the trustees where he obtains service on only four out of the nine trustees. Each trustee is liable personally for past breaches of trust, but an injunction against future acts can only be where all the trustees are made parties. Wall v. Thomas, 41 Fed. Rep. 620 (1890). A bill in equity to restrain a live-stock exchange from carrying out certain by-laws which tended to monopolize the business was sustained in United States v. Hopkins, 82 Fed. Rep. 529 (1897). The arrangement of the harrow trust, whereby seventy per cent of the manufacturers assigned their patents and good will to a corporation, and then acted as agents or licensees of such corporation to manufacture and sell on the terms prescribed by it, is illegal.

The law is designed to check any abuses in this tendency, and has been successful in so doing. The law, however, is not intended to interfere with the legitimate demands of trade, and

National Harrow Co. *v.* Hench, 83 Fed. Rep. 36 (1897). A corporation created to form a monopoly in the manufacture of harrows cannot maintain a suit for infringement. National Harrow Co. *v.* Hench, 84 Fed. Rep. 226 (1898). Various decisions have been made under the act of congress against monopolies. The act of congress of July, 1890, against unlawful monopolies applies to a contract between railroads regulating traffic rates. U. S. *v.* Trans-Missouri Freight Assoc., 166 U. S. 290 (1897). The federal statute against trusts and monopolies applies only so far as interstate and international trade is concerned. It does not apply to the sugar-refining business. U. S. *v.* E. C. Knight Co., 156 U. S. 1 (1895), which also (p. 9) gives a definition of the word "monopoly." Where six iron-pipe manufacturing companies combined in such a way that whenever a large contract for pipe was to be given out anywhere in certain territory a committee fixed on the price to be demanded, and then auctioned off among the six companies the privilege of competing, the sum named by the highest bidder being called the "bonus," and this highest bidder at the secret auction then bid the committee's price at the public competition, while the other companies, to conceal their combination from the public, put in slightly higher "protecting bids," and if successful the bonus was then paid into the general treasury, the combination is in violation of the anti-trust act of congress of 1890. The court held that inasmuch as the six companies were in four different states there was a restriction on a corporation in each of these states in regard to manufacturing and selling pipe to be delivered in another state. U. S. *v.* Addyston Pipe & Steel Co., 85 Fed. Rep. 271 (1898). The United States government may file a bill in equity to enjoin importers and dealers in coal in a certain city from combining so as to regulate the retail prices arbitrarily. U. S. *v.* Coal, etc. Assoc., 85 Fed. Rep. 252 (1898). A combination of coal dealers to regulate prices and provide for the division of prices with the miners of the coal is contrary to the act of congress, where the coal-mining companies operate chiefly in one state, and the contract is made and carried out in a city in another state. U. S. *v.* Jellico, etc. Co., 46 Fed. Rep. 432 (1891). A suit for damages, based on the federal anti-trust law, failed in Bishop *v.* American Preservers' Co., 51 Fed. Rep. 272 (1892). The statute applies to illegal trusts of stock to unite competing railroads. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894). In U. S. *v.* Patterson, 55 Fed. Rep. 605 (1893), the federal statute was held to apply in certain particulars, and not to apply in others. The act of congress relative to monopolies does not authorize an injunction except on the part of the government. Blindell *v.* Hagan, 54 Fed. Rep. 40 (1893). An indictment of a number of lumbermen for raising the price of lumber fifty cents a thousand feet will not lie under the federal statute. U. S. *v.* Nelson, 52 Fed. Rep. 646 (1892). Indictments under the federal law against monopolies were quashed in *Re* Corning, 51 Fed. Rep. 205 (1892); *Re* Terrell, 51 Fed. Rep. 213 (1892); *Re* Greene, 52 Fed. Rep. 104 (1892); U. S. *v.* Patter-

if such interference is attempted it will be demonstrated, just as it was demonstrated in England in regard to statutory prohibitions against the consolidation of railroads, that the laws of trade are stronger than the laws of men.[1]

son, 55 Fed. Rep. 605, and 59 Fed. Rep. 280 (1893).

England: The House of Lords, the highest court in England, in 1891, affirmed the decisions of the courts below in Mogul Steamship Co. *v.* McGregor, L. R. 17 App. Cas. 25, affirming L. R. 23 Q. B. D. 598, and L. R. 21 Q. B. D. 544, and held that an action of conspiracy would not lie against a company that gave lower rates of freight to parties who shipped exclusively by them, there being in the transaction no desire to injure others and no ill-will. The defendant shipping companies and owners had combined together and formed a "conference" or "ring," and their agents in China had issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members of the "conference" should be allowed a certain rebate, payable half-yearly, on the freight charged. The court held that the "conference," being formed by the defendants with the view of keeping the trade in their own hands, and not with the view of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable. Lord Coke, in the great and leading "Case of the Monopolies," 11 Coke, 84*b* (1602), declared that a monopoly was illegal and void. Lord Coke said that a monopoly led to three results: an increase in price, a decrease in quality, and the impoverishment of artisans and others. An agreement of manufacturers that one shall not employ the discharged hands of any other except upon the written consent of the latter is void. Mineral Water, etc. Soc. *v.* Booth, L. R. 36 Ch. D. 465 (1887). A company which is organized in violation of a statute cannot collect debts which are due to it. Jennings *v.* Hammond, L. R. 9 Q. B. D. 225 (1882), the company in this case being organized in violation of a statute which prohibited more than twenty persons uniting in an association or partnership except under certain conditions. In another case many manufacturers, in consequence of troubles between themselves and their employees, entered into an agreement and gave a bond that they all would abide by the rates of labor, hours of work, and other regulations which a majority of those who entered into the combination should decide upon. The court held that the compact was in restraint of trade; that it was illegal and void, and that the bond could not be enforced. Hilton *v.* Eckersley, 6 El. & Bl. 47 (1856). *Cf.* Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant (U. C.) Ch. 540 (1871), where a Canadian "pool" on salt was sustained; Wickens *v.* Evans, 3 Y. & J. 318 (1829). The word "monopoly" originally meant an exclusive privilege granted by the crown. The courts held that the crown could not grant it. See Case of the Monopolies, 11 Coke, 84 (1602); Mitchel *v.* Reynolds, 1 P. Wms. 181, 187 (1711).

[1] In England, for more than thirty years, parliament legislated against the consolidation of railroads. This legislation proved to be utterly ineffective, and in 1872 a parliamentary committee made an elaborate and exhaustive report on the subject, and said, among other things, that consolidation "had not brought with it the evils that were anticipated, but

In England the genuine "trust" has been used for legitimate investment purposes. The trustees are authorized to invest the funds of the "trust" in the stocks and bonds of miscellaneous corporations. Generally, however, they are limited in the amount which they may invest in any one direction. That which is lost in one investment is expected to be made up by large profits in another. It is a mode of investment on a large scale, and is made on the principle of an average gain and loss.[1] In England it has been held that a workman who has been discharged by his employer at the instance of a delegate of a workmen's organization, because he, the workman, had at a previous time done work other than that which was his regular trade, cannot hold the delegate liable in damages, even though the discharge was caused by threats of the delegate to the employer that unless the discharge was made all the men would quit work.[2]

The American "Car Trust" is practically an agreement of several owners of cars to place them in the hands of an agent to sell on the instalment plan, the agent having the power to issue certificates representing an interest in the instalments.[3]

§ 503*b*. *Further inquiry as to the legality of a "trust."*— There are other things to be considered in determining whether or not a "trust" is legal. Does it vest personal property or real estate in a trustee for a longer period than is allowed by law? Is the formation of a trust for the purpose of carrying on business authorized by law? Is the shifting of the parties interested — that is, the certificate-holders — allowed in cases of trusts? These questions will be considered in the order named.

It is the policy of the law to limit the time during which a

that, in any event, long and varied experience had fully demonstrated the fact that, while parliament might hinder and thwart it, it could not prevent it."

[1] See Healey, Company Law and Practice (2d ed.), p. 191. For the form of articles of agreement of this kind of a "trust," and for a detailed statement of the various provisions that are made, varying according to the character of the enterprise and the purposes of the participants, see Sykes *v.* Beadon, L. R. 11 Ch. D. 170 (1879); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870), the last case being a "trust" created to construct a railroad, the *cestui que trust* being the stockholders of a designated corporation.

[2] Allen *v.* Flood, 77 L. T. Rep. 717 (1897). *Cf.* Curran *v.* Galen, 152 N. Y. 33 (1897).

[3] See ch. L, *infra*.

person may tie up his personal property or real estate. Generally this time is fixed as the life-time of the survivor of any two persons then living and designated by the person creating the trust. Each state, by its statutes, generally limits the time during which property may be tied up by a trust, and if a trust is formed for a period longer than that allowed by statute the trust itself is void.[1] There is little doubt that merchandise, land, and shares of stock may be placed in trust. The law is clear that "every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust."[2]

A different question arises, however, in determining whether a trust may be created to carry on business and trade, or to control a concern which carries on business.[3]

At common law the placing of personal property in trust for the purpose of carrying on business in the name and under the management of the trustees is legal and allowable.[4] The stat-

[1] Gerard, Titles to Real Estate (3d ed.), p. 223. Moreover, if the time is to be measured by the life of a person then living, a trust which is to exist for a fixed period, however short, without reference to the life of a person then living, is void. Gerard, Titles to Real Estate (3d ed.), pp. 224, 225. In New York the suspension can be for only two lives in being, and, in certain cases, twenty-one years thereafter. 1 R. S. 773, § 1; L. 1896, ch. 547, § 32. These statutes apply to real and personal property. Gerard, Titles to Real Estate (3d ed.), p. 235; Hone *v.* Van Schaick, 7 Paige, 221 (1838); Bean *v.* Bowen, 47 How. Pr. 306 (1874); Holmes *v.* Mead, 52 N. Y. 332, 344 (1873). The statutory prohibition against the accumulation of the income of trust property, except in the case of infants, applies both to real estate and personalty. Gerard, Titles to Real Estate (3d ed.), pp. 233, 235.

[2] 1 Perry, Trusts, § 67.

[3] Under the statutes of New York a trust of property consisting of *real estate* is void, unless the purpose of the trust is to sell the land for the benefit of creditors; or to sell, mortgage, or lease it for the benefit of annuitants or for satisfying a lien on the land; or to receive the rent and use it for the support of a certain person; or to accumulate the rent for a certain person. L. 1896, ch. 547, § 76. Accordingly a modern "trust," whose property consists of real estate in New York, would be void. But as to personal property the law is generally different. As to New York, see Gerard, Titles (3d ed.), p. 235.

[4] For decisions at common law to the effect that property may be vested in trustees for the purpose of carrying on business, see *Ex parte* Garland, 10 Ves. Jr. 110 (1804); Scott *v.* Izon, 34 Beav. 434 (1865). In Holmes *v.* Mead, 52 N. Y. 332, 344 (1873), the court said: "A trust in personal property, which is not in conflict with the statute regulating the accumulation of interest and protecting the suspension of absolute ownership in property of that character, is valid when the trustee is competent to take, and a trust is for a lawful purpose well defined, so as to be capable of being

utes of the various states, however, must be consulted in reference to this point.[1]

There is little difficulty in determining the question whether it is allowable in law to create a trust where the *cestuis que trust* — that is, the certificate-holders — change and fluctuate in their identity. The law does not require the *cestui que trust* to remain continuously one and the same person. He is not indefinite, even though by transfer of interest his identity may change.[2]

A more formidable objection to the legality of a "trust" is that it is similar to an unincorporated joint-stock association, and that the latter is illegal, inasmuch as it assumes the powers, privileges, and name of a corporation. It was on this ground that the decision in Louisiana declared that the American Cotton Oil Trust was illegal, and was disqualified to do business within that state. The court held that, under the statutes of Louisiana, an unincorporated joint-stock association is illegal; that a "trust" was one kind of an unincorporated joint-stock association, and consequently that it was illegal and void.[3]

specifically executed by the court. . . . Trusts of personal property are not affected by the statute of uses and trusts, which applies only to trusts in real property." In Gott *v.* Cook, 7 Paige, 521, 534 (1839), the chancellor said: "The Revised Statutes have not attempted to define the objects for which express trusts of personal estate may be created, as they have done in relation to trusts of real estate. Such trusts, therefore, may be created for any purposes which are not illegal." See also Graff *v.* Bonnett, 31 N. Y. 9 (1865), In Power *v.* Cassidy, 79 N. Y. 602, 613 (1880), the court said: "The law does not limit or confine trusts as to personal property except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law." To same effect, Bucklin *v.* Bucklin, 1 Keyes (N. Y.), 141 (1864); Goebel *v.* Wolf, 113 N. Y. 405 (1889).

[1] Many of them, including Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky, and Vermont, have statutes expressly specifying the objects for which a trust may be created. See Stimson, American Statute Law, § 1703.

[2] See Harrison *v.* Harrison, 36 N. Y. 543 (1867), affirming 42 Barb. 162; Holmes *v.* Mead, 52 N. Y. 332, 343 (1873); Conkling *v.* Washington University, 2 Md. Ch. 497 (1849); 1 Perry, Trusts, § 66. In regard to this matter, a "trust" is legal on the same principle that it is legal for a bondholder secured by a railway trust deed or mortgage to sell and transfer his interest to another.

[3] State of Louisiana *v.* American Cotton Oil Trust, 1 R'y & Corp. L. J. 509 (1887), the court saying: "A joint-stock company is not known to the laws of Louisiana."

But this view of the law would not be sustained elsewhere in this country; nor would it be sustained under the old common law of England. Unincorporated joint-stock companies have existed for years and are common throughout all the other states of the Union. They are legal methods of carrying on business.[1]

§ 503c. *Liability of trustee and certificate-holders.*— The law is clear that a trustee who carries on any kind of business is liable personally, and to the entire extent of his private fortune, for all the debts incurred in the management and execution of the trust.[2] It is possible, however, that the use of the words "as trustee," in the contract entered into, will protect him against this liability.[3] And there is little doubt that the creditors of the trust may collect their debts from its property. This has been a doubtful point, but is now reasonably well settled. It matters not whether the trustees have expressly bound the trust property to pay the debts. Where the trustee is insolvent, a creditor of the trust may proceed against its property to

[1] See § 504, *infra*. In England there formerly was doubt upon this subject, but this doubt was due to the "Bubble Act." This statute was passed in 1720 for the purpose of suppressing unincorporated companies. At that time they were regarded as "dangerous, mischievous, and, in short, public nuisances." But the statute was repealed in 1826, and Lindley, the great English judge and jurist, says of it: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented." Lindley, Company Law (5th ed.), p. 132. Moreover, a careful examination of the English authorities up to the present day shows conclusively that at common law an unincorporated joint-stock association is legal and valid. Lindley, Company Law (5th ed.), p. 133. *Cf.* Greene *v.* People, 21 N. E. Rep. 605 (Ill., 1889).

[2] Thompson *v.* Brown, 4 Johns. Ch. 619 (1820); Wild *v.* Davenport, 48 N. J. L. 129 (1886); Stephens *v.* James, 77 Ga. 139 (1886); Rogers *v.* Wheeler, 43 N. Y. 598 (1871); Jones *v.* Seligman, 81 N. Y. 190 (1880).

[3] Contracts entered into by the trustees of a trust deed for many shareholders bind the latter but not the former personally, where the trustees were authorized to make the contracts and did so as trustees. It is immaterial that the contracts are under seal. Cook *v.* Gray, 133 Mass. 106 (1882). But see Stevenson *v.* Polk, 71 Iowa, 278 (1887); 1 Pars. Cont. (6th ed.), *122. As to the mode of compelling payment of a debt incurred by a trustee who has issued scrip to represent the property, see Mayo *v.* Moritz, 151 Mass. 481 (1890), holding that the remedy is not for a receiver to wind up the trust.

procure payment of a debt incurred in the execution of the trust.[1]

But a different rule prevails as regards the *cestui que trust*, the beneficiary. The *cestui que trust* cannot be held liable for the debts created by the trustees or for debts incurred in the execution of the trust. This question has arisen chiefly in cases where trustees have carried on the business of an insolvent person for the benefit of the creditors of the latter.[2] And the same conclusion is reached in cases where an executor, administrator, or trustee carries on a business for the benefit of a beneficiary.[3]

It has been held also that the trustee cannot render the *cestui que trust* liable, even though the trustee contracts with the creditor to that effect.[4]

There is little doubt that these old principles of law are applicable to "trusts." The courts of England have decided that a modern "trust" is not a partnership or mere association, but

[1] Cater *v.* Eveleigh, 4 Desaus. (S. C.) 19 (1809); James *v.* Mayrant, 4 Desaus. (S. C.) 591 (1815); Montgomery *v.* Eveleigh, 1 McCord Ch. (S. C.) 267 (1826); Magwood *v.* Johnston, 1 Hill (S. C.) Ch. 228 (1833); Gaudy *v.* Babbitt, 56 Ga. 640 (1876); Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 243 (1845); Wylly *v.* Collins, 9 Ga. 223 (1851); Frost *v.* Shackleford, 57 Ga. 261 (1876); Ferrin *v.* Myrick, 41 N. Y. 315 (1869). *Contra*, Worrall *v.* Harford, 8 Ves. Jr. 4 (1802); Mulhall *v.* Williams, 32 Ala. 489 (1858); Jones *v.* Dawson, 19 Ala. 672 (1851). See also New *v.* Nicoll, 73 N. Y. 127 (1878); Noyes *v.* Blakeman, 6 N. Y. 567 (1852).

[2] Storrs *v.* Flint, 46 N. Y. Super. Ct. 498 (1880); Cox *v.* Hickman, 8 H. L. Cas. 268 (1860); *Re* Stanton Iron Co., 21 Beav. 164 (1855); Selwyn *v.* Harrison, 2 Johns. & H. 334 (1862). See Bingaman *v.* Hickman, 115 Pa. St. 420 (1887).

[3] In *Ex parte* Garland, 10 Ves. Jr. 110 (1804), where a testator directed that a certain sum be used to carry on a business, and the executor so used it, and the business became insolvent, *held*, per Lord Eldon, that no other part of the testator's property was liable for the debts thereby incurred; overruling Hankey *v.* Hammond, 1 Cooke's Bankr. Law, 67 (1785). Lord Eldon further said: "On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, . . . though he is but a trustee. But he places himself in that situation by his own choice." In *Re* Johnson, L. R. 15 Ch. D. 548 (1880), the cases are reviewed. Lord Eldon's decision that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business, is stated to be still the law. See also Strickland *v.* Symons, L. R. 26 Ch. D. 245 (1884). An estate is not liable for debts created by a partnership continued by order of the will. Stewart *v.* Robinson, 115 N. Y. 328 (1889).

[4] Stanton *v.* King, 8 Hun, 4 (1876); aff'd, 69 N. Y. 609. See 15 Am. L. Rev. 456; Burch *v.* Breckinridge, 16 B. Mon. (Ky.) 488 (1855); New *v.* Nicoll, 12 Hun, 431 (1877); aff'd, 73 N. Y. 127.

is similar to an old common-law trust estate. This conclusion was reached in construing an English statute which prohibits certain partnerships or associations from doing business.[1]

Such being the case, it seems to be clear that the trustees and the property of a modern "trust" are liable for all debts incurred by it, but that the holders of the trust certificates are not in any way liable therefor, unless they have expressly agreed to assume that liability.

§ 503*d*. *Qualifications, powers, rights, and duties of the managers and certificate-holders of a "trust."*— Any person may

[1] In England a statute exists which forbids any company, association, or partnership consisting of more than twenty persons from carrying on any business for the acquisition of gain, unless it is registered as a company under the Joint-stock Companies Act, and complies therewith as regards reports, etc. It has been held that a "trust" is not a "company, association, or partnership," and consequently is not affected by this statute. Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Crowther *v.* Thorley, 32 W. R. 330 (1884); *Re* Siddall, L. R. 29 Ch. D. 1 (1885); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The last case cited was an action to have the "trust" dissolved on the ground that it was a partnership, and was doing business in violation of the statute. The court refused to grant the relief desired, and said that the certificate-holders were not partners and did not form an association. "There has never been anything creating any mutual rights or obligations between those persons. They are from the first entire strangers, who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the certificate-holders as between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the certificate-holders either as between themselves or as between themselves and anybody else. . . . If there is any business at all, it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees." And Cotton, L. J., said: "The trustees here are the only persons who are dealing with the investments, and they are dealing, not as agents for some principal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where the executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those persons have no right whatever as against the persons beneficially entitled." This case was one involving a "trust." See also dicta to the same effect in Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870).

serve as a trustee, provided that person is competent to take the legal title to the property.[1]

The trustees of a "trust" correspond somewhat to the directors of a corporation. They generally are elected annually by the certificate-holders in a regularly called meeting of themselves. The instruments creating the "trust" usually provide for the election of trustees, and for their succession and term of office. There is nothing in the old law of trust estates which forbids this change of trustees.[2]

Where, by the trust deed, a majority of the *cestuis que trust* have power to fill a vacancy caused by the incapacity or inability of the trustee, they may substitute a new trustee when the old trustee removes to and becomes a resident of a foreign country.[3]

[1] 1 Perry, Trusts, § 39.

[2] "The person who creates the trust may mould it into whatever form he pleases; he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power, and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuation of the trust." Perry, Trusts, § 287. In England, under the vesting acts, the court held that it had power to vest the estate of a modern "trust" in new trustees where one of the old trustees was dead, another was insane, and under the trust agreement the certificate-holders had elected new trustees. *Re* Siddall, L. R. 29 Ch. D. 1 (1885). A similar power was given to the court in regard to trusts of personal property in New York by L. 1882, ch. 185. As regards the common-law rules and powers of the courts herein, see Perry, Trusts, § 276 *et seq.* At common law, upon the death of the surviving trustee, his executor or administrator became the trustee. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 87 (1881); De Peyster *v.* Beekman, 55 How. Pr. 90 (1877). In the cost-book company case of Johnson *v.* Goslett, 18 C. B. 728 (1856), the following provision appears: "The trustees of the said lease shall, when and if required by the directors, execute a deed declaring that they hold the said mine under and by virtue of such lease as trustees for the benefit of the shareholders in the said company, according to their respective shares and interests therein; and if any or either of the said trustees, or any future trustees, shall resign, or die, or become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning, or dying, or becoming incapable or unwilling to act, as aforesaid; and the said premises shall be forthwith assigned to and vested in the said new trustee or trustees jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company."

[3] Farmers' L. & T. Co. *v.* Hughes, 11 Hun, 130 (1877). In this case the

The extent of the powers of the trustees of a "trust" is a matter of great interest to the public and the certificate-holders. Especially is this the case since in many cases the extent of the trustees' powers is kept a secret from all except the favored few. Often the certificate-holders are not allowed to examine and know the contents of the trust instrument which defines the powers of trustees. The law, however, guards jealously against any assumption of powers by the trustee beyond those which are expressly conferred by the trust instrument.[1]

The trustees who hold the stock in the various corporations which make up the "trust" are trustees and not vendees of the stock.[2] The trustee ordinarily has no power to sell the stock.[3]

There are other incidents which explain the position of the trustee. He may sue and be sued in his own name on all matters and contracts pertaining to the trust.[4]

He is not liable to the *cestui que trust* for losses incurred by his management of the property of the trust. He is bound merely to exercise ordinary discretion and to obey the direc-

deed of trust provided that the trustees or their survivor might be removed by the vote of a majority in interest of the holders of the bonds referred to in the trust deed, at any meeting called for that purpose; and further, by a separate and distinct provision, that in case of the death, removal, resignation, incapacity, or inability of both or either of said trustees to act in the execution of the trust, then a majority of the holders of such bonds might designate and select, in writing, one or more competent persons to fill the vacancy so occurring. The property may be made to vest in new trustees without transfer, if the trust instrument is so drawn. 1 Perry, Trusts, § 284.

[1] 1 Perry, Trusts, §§ 454, 460.

[2] People v. North River, etc. Co., 121 N. Y. 582 (1890).

[3] See ch. XIX, *supra*. The trustees of the American Cattle Trust cannot sell shares of stock which they hold. Gould v. Head, 38 Fed. Rep. 886 (1889); S. C., 41 Fed. Rep. 240 (1890).

[4] In this respect the trustee is not the same as the director of a corporation. "A trustee is a man who is the owner of the property, and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. . . . The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal; that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be the broad distinction between trustees and directors." Smith v. Anderson, L. R. 15 Ch. D. 247 (1880).

tions of the instrument creating the trust. It is only for a breach of trust that he may be made to account to the *cestui que trust*.[1]

In the case of the modern "trust" it has been doubted whether the consent of all the trustees is essential to its contracts and acts, as is the case with the old common-law trust.[2] But in general these matters are regulated and provided for by the instrument which creates the "trust."

The compensation of the trustee is usually fixed by the trust deed. If not, it falls within the provisions of the statutes, or a reasonable compensation is allowed by the common law.[3]

The property of the "trust" cannot be seized for the individual debts of the trustee,[4] but the interest of the certificate-holder may be reached so as to subject it to the payment of his debts.[5] In this respect the certificates resemble shares of stock.

The trust property, where it consists of personal property in the nature of bonds, stocks, notes, or evidences of indebtedness, or corresponds to the capital stock of the corporation, may be taxed at the place where the main office or place of business of the "trust" exists. The extent of the taxation depends, of course, upon the statutes of the state wherein the tax is laid.[6]

There is more difficulty in determining whether a certificate-

[1] Simonton *v.* Sibley, 122 U. S. 220 (1887). Where a railroad construction contract is assigned to trustees to be carried out and the profits to be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. Hazard *v.* Dillon, 34 Fed. Rep. 485 (1888).

[2] Mills *v.* Hurd, 29 Fed. Rep. 410 (1887).

[3] 2 Perry, Trusts, § 917.

[4] Gibson *v.* Stevens, 7 N. H. 352 (1834), where a trustee was authorized to continue the testator's business. The property was held not subject to the trustee's personal debts.

[5] As to the rule at common law, see 2 Alb. L. J. 261, 288. In New York, by statute, all transfers of personal property made in trust, for use of the person making the same, are void as against his creditors, existing or subsequent. 2 R. S. 135, § 1 (7th ed., p. 2327, and cases there cited). See also Graff *v.* Bonnett, 31 N. Y. 9, 14, 18 (1865).

[6] Ricker *v.* American Loan, etc. Co., 140 Mass. 346 (1885). See also People *v.* Albany Assessors, 40 N. Y. 154 (1869); *Re* Jefferson, 35 Minn. 215 (1886), citing many cases on this subject. It is well settled in New York state that under its statutes no shares of stock in either domestic or foreign corporations are subject to taxation except shares of stock in banks. See § 565, *infra*.

holder may terminate his interest in the "trust" and demand his proportion of the property. In certain "trusts," whose property consists of shares of stock, he undoubtedly may.[1] But in general a single certificate-holder cannot have the whole "trust" dissolved and wound up before the time fixed by the trust agreement for its dissolution has arrived.[2]

If the "trust" itself is forbidden by the statutes of the state wherein it exists, it never will be wound up by the courts. The law will not compel a trustee to account for property or transactions which grow out of a contract which is prohibited by statute. The courts leave the parties where they are found. They are outside of the protection of the law.[3]

If, however, the "trust" is legal, it may be terminated at any time by a decree of a court, upon the consent of all the parties who are interested in it.[4] But a "trust" will not be dissolved and wound up merely because the trustees have been guilty of a breach of trust. The remedy in such a case is to enjoin or remove the trustees.[5] Where, however, the trust is insolvent and incapable of proceeding, a dissolution and winding up of its business will be decreed by a court.[6]

B. UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 504. *Definitions — Joint-stock companies, clubs, exchanges, etc.— Ownership of land.*— A joint-stock company may be defined to be an association of persons for the purpose of business,

[1] See § 503*b*, *supra*.

[2] Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The same rule prevails in unincorporated joint-stock associations. See Smith *v.* Virgin, 33 Me. 148 (1851). See also Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867), holding that such company will not be wound up merely because the directors have been guilty of a breach of trust.

[3] *Re* Padstow, etc. Assoc., L. R. 20 Ch. D. 137 (1882).

[4] Perry, Trusts, § 920.

[5] 2 Perry, Trusts, §§ 816-853.

[6] See Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Jennings *v.* Baddeley, 3 K. & J. 78 (1856), where insolvent copartnerships were wound up, though the time for which they were to exist had not yet expired. See also Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871); Brien *v.* Harriman, 1 Tenn. Ch. 467 (1873); Halladay *v.* Elliott, 8 Oreg. 84 (1879); Bagley *v.* Smith, 10 N. Y. 489 (1853). In Sibley *v.* Minton, 27 L. J. (Ch.) 53 (1858), the court held that, in an action by an adventurer in a cost-book mining company to wind up the company and adjust the losses, all the co-adventurers were necessary parties.

having a capital stock divided into shares, and governed by articles of association which prescribe its objects, organization, and procedure, and the rights and liabilities of the members, except that the articles cannot release the members from their liability as partners to the creditors of the company.[1]

A joint-stock company lies midway between a corporation and a copartnership. It is, however, to be distinguished from

[1] In Hedge's Appeal, 63 Pa. St. 273 (1869, following the statute 8 & 9 Vict., c. 110), it is defined to be "a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners." In the statutes of Massachusetts the words "joint-stock company" are used to mean a corporation organized under the general incorporation act of the state. Attorney-General *v.* Mercantile Ins. Co., 121 Mass. 524 (1877). But this is not an accurate use of the term. "The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company; they regulate the duties of the officers and the duties and obligations of the members of such a company among themselves; they specify the capital, limit the duration, and define the business of the company." Bray *v.* Farwell, 81 N. Y. 600 (1880), per Earl, J. See also White *v.* Brownell, 4 Abb. Pr. (N. S.) 162, 193 (1868). In Robbins *v.* Butler, 24 Ill. 387, 426 (1860), it is said that joint-stock companies "have none of the rights and immunities of . . . a regularly incorporated company. These stock companies are nothing more than partnerships; and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be." To the same effect, see Moore *v.* Brink, 4 Hun, 402 (1875); Skinner *v.* Dayton, 19 Johns. 513 (1822); Wells *v.* Gates, 18 Barb. 554 (1854); Keasley *v.* Codd, 2 Car. & P. 408 (1826). "The term 'joint-stock company' appears to have originated in England in comparatively recent times. Joint-stock companies may be said to be partnerships, or individuals associated for some specified purpose, under a designated name or description, to which, by some general or special statute, when they have been formed or composed in a specified manner, some of the powers or proper attributes of a corporation have been given." Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84, 90 (1855). Factors', etc. Ins. Co. *v.* New Harbor, etc. Co., 37 La. Ann. 233, 239 (1885), speaks of a joint-stock company as "a nondescript organization, composed of the owners of certificates showing the proportion of their respective interest in its assets and liability for its obligations, and who are co-owners or proprietors in common. As no one is bound to own property in indivision, it follows that such owners who wish a division have a right to have that property sold, and after a liquidation of the affairs of the concern to have the residue distributed ratably among themselves." At common law a partnership or joint-stock association may do business under any name that it chooses. See § 233, note, *supra;* Preachers' Aid Soc. *v.* Rich, 45 Me. 552 (1858); 2 Perry, Trusts, § 730; Swasey *v.* American Bible Soc., 57 Me. 523 (1869).

them,[1] and also from clubs,[2] from social, benevolent,[3] and mutual-aid[4] organizations, and from associations formed for business purposes, but without a capital stock,[5] especially in respect to

[1] It differs from a corporation in that a joint-stock company has no limited liability as regards its stockholders; and it cannot sue or be sued in the name of the association. It differs from a copartnership in that it is not dissolved by a transfer of stock; and each member has not the same powers of transacting business and disposing of the assets as in a partnership. See Cox *v.* Bodfish, 35 Me. 302 (1853). A company organized under the statutes of Pennsylvania and having mixed characteristics of a partnership and corporation is a corporation so far as removal to the federal court is concerned. Bushnell *v.* Park, 46 Fed. Rep. 209 (1891). The ordinary attachment statute authorizing the attachment of shares of stock does not apply to a club organized for lawful sporting purposes and being more of the nature of a statutory joint-stock association than a corporation. Lyon *v.* Denison, 80 Mich. 371 (1890). In Illinois it is a criminal offense for individuals or an unincorporated association to use a name that implies incorporation. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892).

[2] Park *v.* Spaulding, 10 Hun, 128 (1877); Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118 (1842); Loubat *v.* Le Roy, 40 Hun, 546 (1886); Flemyng *v.* Hector, 2 M. & W. 172 (1836); *Re* St. James Club, 2 De G., M. & G. 383 (1852); Ewing *v.* Midlock, 14 Ala. (O. S.) 82 (1857); Todd *v.* Emly, 8 M. & W. 505 (1841); Reynell *v.* Lewis, 15 M. & W. 517 (1846); Wood *v.* Finch, 2 F. & F. 447 (1861); Cross *v.* Williams, 10 W. R. 302 (1862); Cockerell *v.* Aucompte, 5 W. R. 638 (1857); Koehler *v.* Brown, 31 How. Pr. 295 (1866); Waller *v.* Thomas, 42 How. Pr. 337 (1871); Hopkinson *v.* Marquis of Exeter, 16 W. R. 266 (1867); Gardner *v.* Fremantle, 19 W. R. 256 (1870); Delauney *v.* Strickland, 2 Stark. 416 (1818); Caldicott *v.* Griffiths, 8 Exch. 898 (1853); Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. 300 (1878).

[3] Penfield *v.* Skinner, 11 Vt. 296 (1839); Beaumont *v.* Meredith, 3 Ves. & B. 180 (1814). See also Thomas *v.* Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844). Or Masonic lodges. See Ash *v.* Guie, 97 Pa. St. 493 (1881). See also Cohn *v.* Borst, 36 Hun, 562 (1885); Goodman *v.* Jedidjah Lodge, 67 Md. 117 (1887); Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490 (1886). A by-law of a benevolent society that, for non-payment of dues, the names of members shall be dropped, is legal and self-executing. Rood *v.* Railway, etc. Assoc., 31 Fed. Rep. 62 (1887). See McCallion *v.* Hibernia, etc. Soc., 70 Cal. 163 (1886), involving a secession from a benevolent association. Benevolent associations are not necessarily copartnerships. Brown *v.* Stoerkel, 74 Mich. 269 (1889).

[4] Lafond *v.* Deems, 81 N. Y. 507 (1880); Fritz *v.* Muck, 62 How. Pr. 69 (1881); Pipe *v.* Bateman, 1 Iowa, 369 (1855). *Cf.* Thomas *v.* Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844); Olery *v.* Brown, 51 How. Pr. 92 (1875). See also Boone, Corp., § 338.

[5] Such as stock exchanges. See White *v.* Brownell, 2 Daly, 329 (1868); Clute *v.* Loveland, 68 Cal. 251 (1885); Leech *v.* Harris, 2 Brewst. (Pa.) 571 (1869); State *v.* Chamber of Commerce, 20 Wis. 63 (1865); Weston *v.* Ives, 97 N. Y. 222 (1884), relative to sale of a seat by the exchange to pay the member's debts. See also Platt *v.* Jones, 96 N. Y. 24 (1884). As to a levy of execution on a seat in an exchange, see Bowen *v.* Bull, 12 N. Y. Supp. 325 (1890); Powell *v.* Waldron, 89 N. Y.

the right of expulsion.[1] In the matter of the expulsion of a member from an incorporated exchange, the court may pass upon the question of the jurisdiction of the board of directors to expel a member, and also as to whether there was any evi-

328 (1882); Ritterband *v.* Baggett, 4 Abb. N. Cas. 67 (1877); Londheim *v.* White, 67 How. Pr. 467 (1884). A seat in the exchange is property which may be reached by creditors. But if an assignee in bankruptcy refuses to take it and pay the dues, the bankrupt who pays them may retain the seat. Sparhawk *v.* Yerkes, 142 U. S. 1 (1891). It is legal for an exchange to have and enforce a by-law providing that the seat of a member shall be sold in case of his failure to fulfill his contracts. Rorke *v.* San Francisco Stock, etc. Board, 99 Cal. 196 (1893). A seat in a stock exchange cannot be sold under levy of execution. The purchaser takes nothing. Lowenberg *v.* Greenebaum, 99 Cal. 162 (1893). The seat of a member of an exchange may be reached by judgment creditors of the owner, although the by-laws provide otherwise. Habenicht *v.* Lissak, 78 Cal. 351 (1889). Where, under a by-law of a board of trade, differences between members are arbitrated, a court of equity may review the decision in regard to the measure of damages. Ryan *v.* Cudahy, 157 Ill. 108 (1895). Associations may be for improving a water-power. Troy Iron, etc. Factory *v.* Corning, 45 Barb. 231 (1884). For building a school-house. Marston *v.* Durgin, 54 N. H. 347 (1874). For protecting business interests. Caldicott *v.* Griffiths, 8 Exch. 898 (1853). See also Tenney *v.* New Eng-

[1] A member of a union cannot bring a suit in equity to declare void and illegal a by-law that members shall be fined for accepting employment in connection with non-union persons, and to enjoin the infliction of a fine upon himself. His remedy is at law or by application to the attorney-general. Thomas *v.* Musical, etc. Union, 121 N. Y. 45 (1890). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. Matthews *v.* Associated Press, 61 Hun, 199 (1891). See also notes *supra*. Where a member of a lodge was expelled for entering into a conspiracy to blackball applicants for admission, the court refused to restore him by mandamus, and said that such a case was different from one where property rights or money demands are involved. State *v.* Grand Lodge, 53 N. J. L. 536 (1891). Where the expelled member has the right by by-law to appeal from the decision to a corporate meeting, the courts will not interfere until such appeal is taken. Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552 (1890). As to expulsion of a member from a club under a by-law, see Commonwealth *v.* Union League, 135 Pa. St. 301 (1890). An action is not maintainable to compel an unincorporated voluntary political association to admit a person to membership. McKane *v.* Adams, 123 N. Y. 609 (1890). Such organizations as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may, however, sue for its dues instead of forfeiting the membership. Denver, etc. Commerce *v.* Green, 8 Colo. App. 420 (1896). As to expulsion of members from unincorporated associations, see Otto *v.* Journeymen Tailors' Union, 75 Cal. 308 (1888). See also § 700*b*, *infra*.

dence at all justifying the expulsion.[1] A mutual insurance company may pay dividends.[2] A joint-stock company, although it exercises the power to issue stock, the same as a corporation, yet, when organized for the purpose of transacting any lawful business, is itself a lawful means of carrying on business.[3]

land Protection Union, 37 Vt. 64 (1864); Abels *v.* McKeen, 18 N. J. Eq. 462 (1867); Henry *v.* Jackson, 37 Vt. 431 (1865); Frost *v.* Walker, 60 Me. 468 (1872). Building associations. Strohen *v.* Franklin, etc. Assoc., 115 Pa. St. 273 (1887); Quein *v.* Smith, 108 Pa. St. 325 (1885); Jackson *v.* Cassidy, 68 Tex. 282 (1887); Auld *v.* Glasgow, etc. Soc., L. R. 12 App. Cas. 197 (1887). A building association has power to borrow money and give security for it. North Hudson, etc. Assoc. *v.* Hudson Nat. Bank, 79 Wis. 31 (1891). A building and loan association can foreclose a mortgage irrespective of payments by the mortgagor on his stock in the association. People's, etc. Assoc. *v.* Furey, 47 N. J. Eq. 410 (1890). For a full explanation of the character and mode of business of a mutual benefit building association or corporation, where regular dues are paid and the money loaned to the members on mortgages without interest, see People *v.* Lowe, 117 N. Y. 175 (1889). As to the stockholder's right in a building association to withdraw and sue for his payments under a by-law providing therefor to the extent of one-third of the funds in the treasury, see Texas, etc. Assoc. *v.* Kerr, 13 S. W. Rep. 1020 (Tex., 1890). Concerning a building-association stock complication and the rights of creditors of a stockholder, see Wilson *v.* Schoenlaub, 99 Mo. 96 (1889). The nature of full-paid stock in building associations is considered in Towle *v.* American Bldg. etc. Assoc., 75 Fed. Rep. 938 (1896). As to rights upon the insolvency of a building association, see Gibson *v.* Safety, etc. Assoc., 48 N. E. Rep. 580 (Ill., 1897). In Pennsylvania by statute the law against usury does not apply to building co-operative associations. Albright *v.* Lafayette, etc. Assoc., 102 Pa. St. 411 (1883). See also Winget *v.* Quincy, etc. Assoc., 128 Ill. 67 (1889). In a Michigan co-operative savings and loan corporation, if a member sells his stock to the company, he cannot afterwards redeem or sell it. It is not a loan, as other authorities have held. Michigan Bldg. etc. Assoc. *v.* McDevitt, 77 Mich. 1 (1889). See Atwood *v.* Dumas, 149 Mass. 167 (1889).

[1] People *v.* New York Produce Exch., 149 N. Y. 401 (1896). See also *Re* Haebler, 149 N. Y. 414 (1896), holding that a by-law giving the board of managers power to discipline members is legal. A stock exchange may expel a member who does not fulfill his contracts made within the exchange, due notice, etc., being given to him in the matter. Lewis *v.* Wilson, 121 N. Y. 284 (1890). Stock exchanges cannot expel members for carrying cases into courts instead of arbitrating. People *v.* New York Cotton Exch., 8 Hun, 216 (1876). As to the power of a board of trade to expel a member, see Pitcher *v.* Chicago Board of Trade, 121 Ill. 412 (1887).

[2] In McKean *v.* Biddle, 37 Atl. Rep. 528 (Pa., 1897), where a mutual insurance company for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over $4,000,000, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

[3] "It is too late to contend that partnerships with transferable shares

The earlier cases declaring that joint-stock companies were illegal were so decided largely because of the Bubble Act, which was in force from 1720 to 1826.[1]

Very high English authority, after a thorough review of the English cases, gives the opinion that at common law joint-stock associations are legal.[2]

are illegal in this commonwealth. . . . The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times." Phillips *v.* Blatchford, 137 Mass. 510 (1884). "These companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it." Greenwood's Case, 3 De G., M. & G. 459, 477 (1854); Townsend *v.* Goewey, 19 Wend. 424 (1838). A laboring men's association for the purpose of opposing capitalists has been upheld. Snow *v.* Wheeler, 113 Mass. 179 (1873).

[1] Enacted 6 Geo. I, c. 18, § 18; repealed, 6 Geo. IV, c. 91. Lindley says of this act: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented."

[2] Lindley, Company Law (5th ed.), p. 130. In a thorough and exhaustive note on this subject the learned author refers to Rex *v.* Dodd, 9 East, 516 (1808), holding that a company with a prospectus limiting the liability of subscribers is illegal, as a trap to ensnare the unwary; Josephs *v.* Pebrer, 3 B. & C. 639 (1825), holding that unincorporated companies with transferable shares are illegal; and Buck *v.* Buck, 1 Campb. 547 (1808), and Rex *v.* Stratton, 1 Campb. 549, n. (1809), to same effect. He states that Kinder *v.* Taylor, Coll. Partn. 917 (2d ed., 1835); S. C., 3 L. J. Ch. 69; Duvergier *v.* Fellows, 5 Bing. 248 (1828); aff'd, 10 B. & C. 826, and Blundell *v.* Winsor, 8 Sim. 601 (1837), contained dicta only, so far as they passed on the legality of these companies. The following cases clearly establish the legality of joint-stock associations: Harrison *v.* Heathorn, 6 Man. & G. 81 (1843); Garrard *v.* Hardey, 5 Man. & G. 471 (1843); Barclay's Case, 26 Beav. 177 (1858); *Re* Aston, 27 Beav. 474 (1859); Grisewood's Case, 4 De G. & J. 544 (1859); Sheppard *v.* Oxenford, 1 K. & J. 491 (1855); Rex *v.* Webb, 14 East, 406 (1811); Walburn *v.* Ingilby, 1 M. & K. 61 (1832); and see Pratt *v.* Hutchinson, 15 East, 511 (1812); Ellison *v.* Bignold, 2 Jac. & W. 510 (1821); Nockels *v.* Crosby, 3 B. & C. 814 (1825); Kempson *v.* Saunders, 4 Bing. 5 (1826); Brown *v.* Holt, 4 Taunt. 587 (1812). And the learned jurist comes to this conclusion: "The case of Blundell *v.* Winsor, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the bench, nor has it ever been followed. Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown to be of a dangerous and mischiev-

In Louisiana and Illinois a contrary conclusion has been arrived at.[1]

The real estate of an unincorporated joint-stock association is generally held in the names of trustees for its benefit.[2] A deed of land to certain grantees as trustees for an unincorporated association is not void, but is upheld by the court. The trust is an active one, and is not executed at once by force of the statute.[3] A deed to persons as trustees, the beneficiaries being the members of an association, take title, and the New York statute does not vest the title in the beneficiaries, the

ous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

[1] See § 503*b*, *supra;* Greene *v.* People, 21 N. E. Rep. 605 (Ill., 1889). A mutual insurance company may be sufficiently a corporation, or assuming to be such, to sustain *quo warranto* against it. Greene *v.* People, 150 Ill. 513 (1894); State *v.* Ackerman, 51 Ohio St. 163 (1894).

[2] Where an association holds land in the name of trustees for the benefit of certificate-holders, the certificates constitute an equitable lien on the proceeds from the sale of the lands, and even a consolidation with another association does not disturb this lien. Crawford *v.* Gross, 140 Pa. St. 297 (1891). A conveyance of land to certain individuals as trustees for the members of an unincorporated association is not void by the statute of uses and trusts. Turner *v.* Ontonagon, etc. Co., 77 Mich. 603 (1889). In matters of deeds, usage and long lapse of time may validate deeds made out by an unincorporated association as a corporation. Baeder *v.* Jennings, 40 Fed. Rep. 199 (1889). Where an unincorporated association owns land which is held in trust for it by individuals, it may, upon becoming incorporated, compel the trustees to deed to it the land. Organized Labor Hall *v.* Gebert, 48 N. J. Eq. 393 (1891). A deed to a corporation not in existence is void. Provost *v.* Morgan's, etc. R. R., 42 La. Ann. 809 (1890). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. Fisk *v.* Patton, 7 Utah, 399 (1891). A new unincorporated association cannot claim the land of the one which it succeeds, where the members are not the same. Allen *v.* Long, 80 Tex. 261 (1891). Although the association has been dormant for many years, yet a new association formed of part of the members of the old cannot convey the land of the old one. Allen *v.* Long, 80 Tex. 261 (1891). A deed to an unincorporated association vests title in it as soon as it is incorporated. Clifton, etc. Co. *v.* Randell, 82 Iowa, 89 (1891). *Cf.* ch. XLI, *infra.* An absolute deed to an individual may nevertheless be construed as in trust, where there is a declaration in writing by him that he holds it in trust for a church. Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894). If the trustees have no power to sell the land except on the vote of the stockholders, a conveyance without that consent is void. Willis *v.* Greiner, 26 S. W. Rep. 858 (Tex., 1894). An unincorporated association may be made the recipient of a bequest. Hadden *v.* Daudy, 51 N. J. Eq. 151 (1893).

[3] Hart *v.* Seymour, 147 Ill. 598 (1893).

trustees being beneficiaries also.[1] The English cost-book mining companies were organized on this principle.[2]

§ 505. *Statutory joint-stock company.*— There is an essential difference between a joint-stock company as it exists at common

[1] King *v.* Townshend, 141 N. Y. 358 (1894).

[2] These mining companies existed in the counties of Cornwall and Devonshire. They were first heard of in the courts about the year 1850. Their plan of organization and operation arose from custom. Their organization and mode of business were as follows: Many persons, desirous of working a mine, would cause the title or lease thereto to be taken in the names of one or more persons called trustees. The business was then carried on by an agent called a "purser," or by a board of managers elected by the participants, who were called the "adventurers." The latter, of course, were the beneficiaries of the "trust." Any adventurer had a right to transfer his interest to a transferee. There was no fixed capital stock. Calls for money were made on the adventurers, according to their shares, as often as it was needed. For a full statement of the character of these mining companies, see Kittow *v.* Liskeard Union, L. R. 10 Q. B. 7 (1874). See also *Re* Bodmin, etc. Co., 23 Beav. 370 (1857), holding that the court would not take judicial notice of the nature of a cost-book mining company. Hybart *v.* Parker, 4 C. B. (N. S.) 209 (1858), holding that the purser could not sue at law on an unpaid call; *Re* Wrysgan, etc. Co., 28 L. J. (Ch.) 894 (1859), as to right to relinquish shares, also describing the functions of the purser and managing directors; Johnson *v.* Goslett, 18 C. B. 728 (1856), affirmed in 3 C. B. (N. S.) 569 (1857), giving the full terms of the articles of agreement; Thomas *v.* Clark, 18 C. B. 662 (1856), where the court said: "Every partnership has a right to make its own regulations as to the mode of transferring shares or interests therein;" *Re* Prosper, etc. Co., L. R. 7 Ch. 286 (1872), relative to rights upon a resignation; Mayhew's Case, 5 De G., M. & G. 837 (1854), holding that by a transfer of his share "the liability of the transferrer is entirely divested from him and passes to the transferee;" *Re* Wrysgan Co., 5 Jur. (N. S.) 215 (1859), where the court said: "The various phases of absurdity which these joint-stock companies display are such that the marvel in my mind is daily increasing how any man can become a member of a joint-stock company;" Northey *v.* Johnson, 19 L. T. Rep. (O. S.) 104 (1852), holding that after transfer the transferrer is not liable for the debts incurred.

It is clearly established that the adventurers in a cost-book mining company are personally and individually liable as partners for the debts incurred in the enterprise. Peel *v.* Thomas, 15 C. B. 714 (1855); Newton *v.* Daly, 1 F. & F. 26 (1858); Harvey *v.* Clough, 8 L. T. Rep. (N. S.) 324 (1863); Tredwen *v.* Bourne, 6 M. & W. 461 (1840); Ellis *v.* Schmoeck, 5 Bing. 521 (1829); Lanyon *v.* Smith, 3 B. & S. 938 (1863), holding a transferrer liable for debts incurrrd previous to the transfer. To same effect, Geake *v.* Jackson, 15 W. R. 338 (1867). They are liable, also, to indemnify the directors or trustees. *Ex parte* Chippendale, 4 De G., M. & G. 19, 52 (1854). See also Birch's Case, 2 De G. & J. 10 (1857), and Fenn's Case, 4 De G., M. & G. 285 (1854), where the members who had exercised their right to withdraw were held not liable. In Hart *v.* Clarke, 6 De G., M. & G. 232 (1854), an adventurer compelled the

law and a joint-stock company having extensive statutory powers conferred upon it by the state within which it is organized. The latter kind of joint-stock companies are found in England and in the state of New York. To such an extent have these statutory powers been conferred on joint-stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company. Accordingly, joint-stock companies, both those of England and New York, have been held to be corporations in many respects, although expressly declared by statute not to have that character.[1] A limited partnership

company to account to him for his share of the profits. The adventurers have no interest in the land, and consequently a transfer of their shares is not a transfer of an interest in land. Sparling *v.* Parker, 9 Beav. 450 (1846); Powell *v.* Jessopp, 18 C. B. 336 (1856); Hayter *v.* Tucker, 4 K. & J. 243 (1858). The cost-book mining company was frequently spoken of as a species of joint-stock company. *Re* Wrysgan Co., 5 Jur. (N. S.) 245 (1859); Geake *v.* Jackson, 15 W. R. 338 (1867); Watson *v.* Spratley, 10 Exch. 222 (1854), where the court said: "The interest of the shareholder in the great incorporated joint-stock companies, and in the smallest mine conducted upon the cost-book principle, is, in its essential nature and quality, identical. For an American mining case applying similar principles, see Treat *v.* Hiles, 68 Wis. 344 (1887). It is well settled that the shareholders in an unincorporated association cannot convey or dedicate to the public any land that may be held by trustees for its benefit. Ward *v.* Davis, 3 Sandf. 502 (1850). The interest of one of the *cestuis que trust* of such a trust, consisting of real estate, is personalty, and descends as such upon his death. Mallory *v.* Russell, 71 Iowa, 63 (1887). As to the effect of a deed, grant, or bequest of real estate to an unincorporated association, see Webb *v.* Weatherhead, 17 How. 576 (1854); Gerard, Titles to Real Estate (3d ed.), p. 420; Owens *v.* Missionary Soc., 14 N. Y. 380 (1856); 3 Washb. Real Prop. 264 (4th ed.); Holmes *v.* Mead, 52 N. Y. 332 (1873); Goesele *v.* Bimeler, 5 McLean, 223 (1851); S. C., 10 Fed. Cas. 528; German Land Assoc. *v.* Scholler, 10 Minn. 331 (1865); Peabody *v.* Eastern Methodist Soc., 87 Mass. 540 (1863); Towar *v.* Hale, 46 Barb. 361 (1866); 1 Dart, Vend. & P. (5th ed.) 21; Chapin *v.* Chicopee Universalist Soc., 74 Mass. 580 (1857); African M. E. Church *v.* Conover, 27 N. J. Eq. 157 (1876); Leonard *v.* Davenport, 58 How. Pr. 384 (1877); Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864); McKeon *v.* Kearney, 57 How. Pr. 349 (1878); Gibson *v.* McCall, 1 Rich. L. (S. C.) 174 (1844); Byam *v.* Bickford, 140 Mass. 31 (1885), holding that, although a deed to the association is ineffectual, yet that it passes title to the members of the association. They cannot take by devise in New York. White *v.* Howard, 46 N. Y. 144 (1871); Philadelphia Bapt. Assoc. *v.* Hart, 4 Wheat. 1 (1819).

[1] See Thomas *v.* Dakin, 22 Wend. 9 (1839); Warner *v.* Beers, 23 Wend. 103 (1840); Parmly *v.* Tenth Ward Bank, 3 Edw. 395 (1840); People *v.* Watertown, 1 Hill, 616 (1841); Bank of Watertown *v.* Watertown, 25 Wend.

under the Pennsylvania statutes is practically a corporation, and as such may sue in a federal court.[1] Partnership associations organized under the laws of Michigan are controlled by the

686 (1841); Willoughby *v.* Comstock, 3 Hill, 389 (1842); Leavitt *v.* Yates, 4 Edw. 134 (1843); Leavitt *v.* Tylee, 1 Sandf. Ch. 207 (1843); People *v.* Niagara County, 4 Hill, 20 (1842); Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23 (1844); *Re* Bank of Dansville, 6 Hill, 370 (1844); Gifford *v.* Livingston, 2 Denio, 380 (1845); Case *v.* Mechanics' Banking Assoc., 1 Sandf. 693 (1848); Leavitt *v.* Blatchford, 17 N. Y. 521 (1858); S. C., 5 Barb. 9; Cuyler *v.* Sanford, 8 Barb. 225 (1850); Gillet *v.* Moody, 3 N. Y. 479 (1850); Talmage *v.* Pell, 7 N. Y. 328 (1852); Tracy *v.* Talmage, 18 Barb. 456 (1854); Gillet *v.* Phillips, 13 N. Y. 114 (1855); Falconer *v.* Campbell, 2 McLean, 195 (1840); S. C., 8 Fed. Cas. 963; Duncan *v.* Jones, 32 Hun, 12 (1884). A joint-stock association existing in New York and suable by the laws of New York by service on its president may be sued as a corporation in Ohio, although not actually incorporated in New York. Adams Express Co. *v.* State, 55 Ohio St. 69 (1896). The United States Express Company, an unincorporated association under the laws of the state of New York, is treated as a corporation in other states. Edgeworth *v.* Wood, 58 N. J. L. 463 (1896). The taxation statutes of Pennsylvania imposing taxes upon corporations organized in another state do not apply to an unincorporated association, an express company organized in New York.

[1] Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. Rep. 585 (1898). A partnership association under the statutes of Pennsylvania is not a corporation to the extent that the estate of a stockholder is liable on a claim arising after the death of such stockholder. Bodey *v.* Cooper, 82 Md. 625 (1896). Nor is it a corporation within the meaning of the tax statutes. Gregg *v.* Sanford, 65 Fed. Rep. 151 (1895). An association formed under the Pennsylvania statutes is a partnership and not a corporation. Hence it cannot be sued in Massachusetts in the name under which it does business. Edwards *v.* Warren, etc. Works, 168 Mass. 564 (1897). In Carter *v.* Producers' Oil Co., 38 Atl. Rep. 571 (Pa., 1897), the court said in regard to Pennsylvania joint-stock associations organized under the statutes: "Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. . . . A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars."

laws relative to corporations.[1] Under the partnership association statute of Pennsylvania, a by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[2]

§ 506. *Joint-stock companies may arise by implication of law.* Joint-stock companies are generally formed by the mutual agreement and direct intent of the parties. They may, however, arise by implication of law. Thus, an ineffectual attempt at an incorporation may make the parties members, not of a corporation, but of a joint-stock company.[3] In like manner, after the charter of a corporation expires and the parties continue to do business, they do so as a joint-stock company.[4]

Sanford *v.* Gregg, 58 Fed. Rep. 620 (1893). The English joint-stock company is much the same. "The company has a name as an association, maintaining the identity of the body through all changes of its members; its property is divided into transferable shares; and it has conferred upon it the legal capacity to sue and be sued in the name of one of its officers, and such a suit . . . may be brought by or against a member as well as a third person." It is a corporation, though the English statute declares it is not. Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). So, also, with the New York joint-stock companies. Fargo *v.* Louisville, etc. R'y, 6 Fed. Rep. 787 (1881); Sanford *v.* Supervisors of New York, 15 How. Pr. 172 (1858); Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). As regards the liability of the members for the debts of the company, it is held to be a copartnership. Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). The refusal of the legislature to call them corporations is important as cutting off the exemption of the members from liability to creditors; an exemption which, at common law, belongs to all corporations. Joint-stock companies in England have always been largely statutory. See Van Sandau *v.* Moore, 1 Russ. 441 (1826). In New York the English decisions on these companies are doubtless good authority, since they exist under statutes which are much alike. A New York joint-stock association cannot sue as such in the federal courts. Chapman *v.* Barney, 129 U. S. 677 (1889). In New York the statutes relative to taxation of corporations do not apply to joint-stock companies. They are not corporations. People *v.* Coleman, 133 N. Y. 279 (1892); Hoey *v.* Coleman, 46 Fed. Rep. 221 (1891). An unincorporated joint-stock association is legal in New York. Under the statutes of that state such associations are corporations for many purposes. People *v.* Wemple, 117 N. Y. 136 (1889).

[1] Rouse, etc. Co. *v.* Detroit, etc. Co., 69 N. W. Rep. 511 (Mich., 1896).

[2] Carter *v.* Producers' Oil Co., 38 Atl. Rep. 571 (Pa., 1897).

[3] *Re* Mendenhall, 9 Nat. Bankr. Reg. 497 (1874); S. C., 17 Fed. Cas. 10; Whipple *v.* Parker, 29 Mich. 369, 380 (1874); and see ch. XIII, *supra*. *Cf.* Foster *v.* Moulton, 35 Minn. 458 (1886).

[4] Watertown Nat. Bank *v.* Landon, 45 N. Y. 410 (1871).

§ 507. *How a person becomes a member — Transfers.* — A person becomes a member of a joint-stock company by any act which indicates an intent to become a member on his part, and a consent or acquiescence therein by the company itself.[1] He may also become a member by a transfer made to him of another member's interest, unless the articles of association restrict the right of transfer.[2]

§ 508. *Liability of members to creditors and to the company.* A joint-stock company is, in regard to the liability of its members to creditors of the company, a partnership; its members are liable as partners;[3] and the ordinary rules of partnership

[1] The formalities need be no greater than in forming an ordinary partnership. Schuylerville Nat. Bank *v.* Van Derwerker, 74 N. Y. 234 (1878); Pettis *v.* Atkins, 60 Ill. 454 (1871); Machinists' Nat. Bank *v.* Dean, 124 Mass. 81 (1878). *Cf.* Volger *v.* Ray, 131 Mass. 439 (1881). It is not necessary that certificates of the stock be issued in order to constitute membership. Dennis *v.* Kennedy, 19 Barb. 517 (1854); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880). Evidence of subscription and payment of an assessment is sufficient. Frost *v.* Walker, 60 Me. 468 (1872). But not of subscription without any participation. Hedge's Appeal, 63 Pa. St. 273 (1869).

[2] A transfer of the certificate of stock has such effect although not registered in the stock-book. Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Transfer may be before the certificates are issued. Butterfield *v.* Spencer, 1 Bosw. 1 (1856). But if the articles of association prohibit transfer, the transferee takes only the right to profits, not as a partner, but as an assignee. Harper *v.* Raymond, 3 Bosw. 29 (1858). So, also, where transfer is allowed only on consent of certain officers who refuse. Kingman *v.* Spurr, 24 Mass. 235 (1828). A transfer does not carry dividends already declared. Harper *v.* Raymond, 3 Bosw. 29 (1858). If a transfer is improperly allowed, the company is liable to the party injured. Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Laurie, 164 Ill. 42 (1896). See also § 621*a*, *infra*. As to the liability of the transferee, see next section.

[3] Wadsworth *v.* Duncan, 164 Ill. 360 (1896); McFadden *v.* Leeka, 48 Ohio St. 513 (1891); Jenne *v.* Matlack, 41 S. W. Rep. 11 (Ky., 1897); Westcott *v.* Fargo, 61 N. Y. 542 (1875); Witherhead *v.* Allen, 3 Keyes, 562 (1867); Cross *v.* Jackson, 5 Hill, 478 (1843); Skinner *v.* Dayton, 19 Johns. 513 (1822); Wells *v.* Gates, 18 Barb. 554 (1854); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Taft *v.* Ward, 106 Mass. 518 (1871); S. C., 111 Mass. 518 (1873); Bodwell *v.* Eastman, 106 Mass. 525 (1871); Tappan *v.* Bailey, 45 Mass. 529 (1842); Cutler *v.* Thomas, 25 Vt. 73 (1852); Kramer *v.* Arthurs, 7 Pa. St. 165 (1847); Gott *v.* Dinsmore, 111 Mass. 45 (1872); Newell *v.* Borden, 128 Mass. 31 (1879). See also § 504, *supra*. *Contra*, Irvine *v.* Forbes, 11 Barb. 587

exist between the members themselves,[1] including the right to contribution as between themselves,[2] and also render a member liable to third persons.[3] The question whether a stockholder

(1852); Livingston v. Lynch, 4 Johns. Ch. 573 (1820), overruled as dicta by Townsend v. Goewey, 19 Wend. 424 (1838); Allen v. Long, 80 Tex. 261 (1891); Ridenour v. Mayo, 40 Ohio St. 9 (1883). In Frost v. Walker, 60 Me. 468 (1872), the court said: "An unincorporated joint-stock company is a mere partnership, and each member is personally liable for all its debts. It is important for the public to know that if persons connect themselves with a company of this description they are every one of them liable to pay the demands upon it." The officers who enter into a contract for the company are liable thereon personally. "It is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals for the simple reason that there is no other principal in existence." Lewis v. Tilton, 64 Iowa, 220 (1884); Fredendall v. Taylor, 26 Wis. 286 (1870). The individual members of a club are not liable for the salary of the manager, even though the club is unincorporated. Georgeson v. Caffrey, 71 Hun, 472 (1893). Those who actively take part in a purchase are liable whether the others are or not. Winona Lumber Co. v. Church, 6 S. D. 498 (1895). This liability as partners applies only to associations having a definite membership, and does not apply to

[1] Bullard v. Kinney, 10 Cal. 60 (1858). The remedy of one member against another is in equity. Huth v. Humboldt Stamm, 61 Conn. 227 (1892). One member cannot sue another at law for his part of the profits of the business, which is under control of the latter. Myrick v. Dame, 63 Mass. 248 (1852); Duff v. Maguire, 90 Mass. 300 (1864); Whitehouse v. Sprague, 7 Atl. Rep. 17 (Me., 1886). A person induced to put money into an enterprise on false representations that it is a joint-stock company may recover back his money. Lebby v. Ahrens, 26 S. C. 275 (1887). A director of an unincorporated association who contracts for it is not liable personally. Abbott v. Cobb, 17 Vt. 593 (1845); Alexander v. Worman, 6 H. & N. 100 (1860).

[2] Morrissey v. Weed, 12 Hun, 491 (1878); Skinner v. Dayton, 19 Johns. 513 (1822); Ray v. Powers, 134 Mass. 22 (1883); Whitman v. Porter, 107 Mass. 522 (1871); Tyrrell v. Washburn, 88 Mass. 466 (1863). But not if the expense was incurred contrary to the articles of association. Danforth v. Allen, 49 Mass. 331 (1844); Clark v. Reed, 28 Mass. 446 (1831). One stockholder cannot sue another at law for his part of the assets. Whitehouse v. Sprague, 7 Atl. Rep. 17 (Me., 1886). Where the constitution of an unincorporated association limits the debts, and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders. McFadden v. Leeka, 48 Ohio St. 513 (1891).

[3] A member's interest cannot be reached by execution. Kramer v. Arthurs, 7 Pa. St. 165 (1847). But see Lindley, Partn. (2d Am. ed.), p. 837. Acquiescence in the dealings of other members with third persons binds a member. Pennsylvania Ins. Co. v. Murphy, 5 Minn. 36 (1860); Wells v. Gates, 18 Barb. 554 (1854). For the liability as affected by the transfer of stock, see Smith v. Virgin, 33 Me. 148 (1851).

may limit his common-law or statutory liability by an express contract with the company's creditors to that effect is discussed

a public meeting held to promote the construction of a shoe shop, the subscriptions made at such meeting having been duly paid, even though it was further voted "to stand back of the committee." In any case the suit would be at law and not in equity. Cheney *v.* Goodwin, 88 Me. 563 (1896). A lease to an unincorporated association binds personally all members assenting to it. Reding *v.* Anderson, 72 Iowa, 498 (1887). Members of co-operative trading associations are liable as partners for the debts of the concern. Davison *v.* Holden, 55 Conn. 103 (1887). And sometimes are liable also for debts contracted after they have sold their stock. See Shamburg *v.* Abbott, 112 Pa. St. 6 (1886). The members of an unincorporated association to enforce the liquor laws are not liable to an attorney for services in prosecuting cases. McCabe *v.* Goodfellow, 133 N. Y. 89 (1892). The vice-president and the treasurer of an unincorporated fair association are liable for premiums offered. Murray *v.* Walker, 83 Iowa, 202 (1891). Members of a joint-stock company are personally liable for the debts of the company. Durham Fertilizer Co. *v.* Clute, 112 N. C. 440 (1893). The members of a joint-stock company are liable for its debts. People *v.* Coleman, 133 N. Y. 279 (1892). In the case of Seacord *v.* Pendleton, 55 Hun, 579 (1890), the court reviewed the authorities and decided that the stockholders in a bank which was not incorporated were not liable to depositors, there being no allegation that the stockholders had any articles of association or partnership, or had performed any act, or had knowledge of the business or consented thereto. A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscriber's part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription if he would pay that is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis *v.* Shafer, 50 Fed. Rep. 764 (1892). If proof is given by plaintiff that a co-partnership existed, and the defense is that it was a corporation, the defendant must prove that fact. Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark *v.* Jones, 87 Ala. 474 (1889). A notice to stockholders that they will be held liable under a statute is not served on the members of an unincorporated association by serving such notice on the chief officer of such association. Wells *v.* Robb, 43 Kan. 201 (1890). Where a creditor of a bank sues the stockholders as partners, the burden of proof is on him to prove that no corporation existed, it being shown that the bank always acted as a corporation and held itself out as such and was supposed so to be by the stockholders. Hallstead *v.* Coleman, 143 Pa. St. 352 (1891). The supposition or belief of the members that they are not liable beyond the par value of their stock does not protect them from liability. Farnum *v.* Patch, 60 N. H. 294 (1880); and see § 233, note, *supra*.

elsewhere.[1] The member's subscription may be enforced by a suit at law.[2]

In enforcing the liability of members of a joint-stock company by a suit in equity, if the parties are very numerous or unknown, they need not all be joined as defendants.[3] Suits by or against unincorporated associations must be brought in the name of or against all the members.[4] A member who transfers his interest is nevertheless liable for precedent debts of the association.[5] Members who sell their stock and withdraw are liable for subsequent debts where proper notice of their withdrawal

[1] See § 216, *supra*.

[2] If the subscription runs to the trustees personally they may sue thereon. Otherwise all must join as plaintiffs. Cross *v.* Jackson, 5 Hill, 478 (1843); Townsend *v.* Goewey, 19 Wend. 424 (1838). It seems that a subscription to a voluntary association is enforceable by a corporation which took the place of the proposed voluntary association, where the subscriber knew of the change of plan and did not object. Osborn *v.* Crosby, 63 N. H. 583 (1885). Subscriptions to its stock are collectible the same as subscriptions to stock of corporations. Bullock *v.* Falmouth, etc. Co., 85 Ky. 184 (1887).

[3] Mandeville *v.* Riggs, 2 Pet. 482 (1829), reversing Riggs *v.* Swann, 3 Cranch, C. C. 183 (1827); S. C., 20 Fed. Cas. 788. See also Phipps *v.* Jones, 20 Pa. St. 260 (1853); Dennis *v.* Kennedy, 19 Barb. 517 (1854); Wood *v.* Draper, 24 Barb. 187 (1857); Smith *v.* Lockwood, 1 Code Rep. (N. S.) 319 (1851); Birmingham *v.* Gallagher, 112 Mass. 190 (1873); Snow *v.* Wheeler, 113 Mass. 179 (1873); Pipe *v.* Bateman, 1 Iowa, 360 (1855); Marshall *v.* Lovelass, Cam. & N. (N. C.) 217 (1801); Lloyd *v.* Loaring, 6 Ves. Jr. 773 (1802); Deems *v.* Albany, etc. Line, 14 Blatchf. 474 (1878); S. C., 7 Fed. Cas. 348. As regards the practice in bringing actions against members of an unincorporated association, see Kneeland, Attachments, ch. XVI.

[4] Williams *v.* Bank of Michigan, 7 Wend. 539, 542 (1831); Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313 (1880); Mears *v.* Moulton, 30 Md. 142 (1868); McGreary *v.* Chandler, 58 Me. 537 (1870). One or more members of an unincorporated association may sue for the benefit of all. Liggett *v.* Ladd, 17 Oreg. 89 (1888). In Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. The court may direct a writ of mandamus to be served upon the resident general agent of the company. State *v.* Adams, etc. Co., 68 N. W. Rep. 1085 (Minn., 1896). By statute, in Ohio, one or more of the stockholders may sue for the benefit of the association. Platt *v.* Colvin, 50 Ohio St. 703 (1893). In a suit against an unincorporated association, the members of which are so scattered as to render service upon all impossible, service upon its officers is sufficient to give the court jurisdiction over the members. An unincorporated association acting as a corporation may be sued as a corporation in its corporate name by one of its members. Fitzpatrick *v.* Rutter, 160 Ill. 282 (1895).

[5] Morgan's Case, 1 De G. & Sm. 750 (1849); Tyrrell *v.* Washburn, 88 Mass. 466 (1863).

has not been given, the same as in a partnership.[1] The members are liable for past contracts, even though they dissolve the association.[2] A purchaser of stock in an unincorporated association is not liable to creditors for debts contracted before he became a member.[3] The rights and liabilities of a member depend upon the law of the place of the domicile of the company itself.[4] The rules applicable to stockholders in corporations are, by analogy, applied to members in these companies, especially as regards their defenses to subscriptions[5] and meetings of the company.[6] These associations cannot be taxed on a franchise, as corporations may be.[7]

§ 509. *Actions by members against officers and the company.*— The members may bring an action to remedy the fraud,[8] *ultra*

[1] New York, etc. Bank *v.* Crowell, 177 Pa. St. 313 (1896).

[2] Camden, etc. R. R. *v.* Guarantors of Pennsylvania, 35 Atl. Rep. 796 (N. J., 1896).

[3] Christy *v.* Sill, 131 Pa. St. 492 (1890). The transferee of a share in an unincorporated company is liable for all debts existing at the time of or after the transfer. Taylor *v.* Ifill, 1 N. R. 566 (1863). Although a stockholder purchased his stock from the association which was insolvent at the time, yet he cannot offset this as capital contributed by him. Barndollar *v.* Du Bois, 142 Pa. St. 565 (1891). A member is not liable for debts contracted before he became a member. Hornberger *v.* Orchard, 39 Neb. 639 (1894).

[4] Cutler *v.* Thomas, 25 Vt. 73 (1852).

[5] That the full capital stock must be subscribed before any subscription is collectible, see Bray *v.* Farwell, 81 N. Y. 600 (1880). *Contra*, Tappan *v.* Bailey, 45 Mass. 529 (1842); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Pitchford *v.* Davis, 5 M. & W. 2 (1839). Forfeiture of stock releases the member only as to subsequent debts. Skinner *v.* Dayton, 19 Johns. 513 (1822).

[6] Notice of the time and place must be given. Irvine *v.* Forbes, 11 Barb. 587 (1852). The members cannot act except in meeting assembled. The majority do not rule. Livingston *v.* Lynch, 4 Johns. Ch. 573 (1820); Irvine *v.* Forbes, 11 Barb. 587 (1852). But the articles may provide otherwise. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867).

[7] Hoadley *v.* Essex County, 105 Mass. 519 (1870); Gleason *v.* McKay, 134 Mass. 419 (1883), holding the statute to be unconstitutional. *Cf.* § 505, *supra.*

[8] The other members are not proper parties. Boody *v.* Drew, 46 How. Pr. 459 (1874). An officer may be enjoined, but not removed. The suit must not be in the interest of a rival company. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). Trustees receiving gifts are liable therefor to the company. *Re* Fry, 4 Phila. Rep. 129 (1860). Trustees cannot sell to the company. Robbins *v.* Butler, 24 Ill. 387 (1860). The treasurer may be compelled to pay over funds belonging to the company. Sharp *v.* Warren, 6 Price, 131 (1818). The trustees are liable in tort for their frauds on the company. Dennis *v.* Kennedy, 19 Barb. 517 (1854). A committee to build may be made to account where they secretly contract with themselves, though the contract

vires acts,[1] and negligence[2] of the trustees. In New York a member may, by statute, sue the company, in the same manner that a stockholder in a corporation may sue the corporation.[3] A bill in equity by a member of an unincorporated association to enjoin the directors from enforcing an alleged illegal by-law must join all the directors as defendants.[4]

§ 510. *Dissolution.*— Where the term of existence of a joint-stock company is fixed by its articles of association, it cannot be dissolved at the instance of a member before the expiration of that time.[5] It may, however, be dissolved where the enterprise becomes wholly impracticable or its attainment impossible, but not always because of the misconduct of its officers.[6] The death

is nominally with other persons. Whitman *v.* Bowden, 27 S. C. 53 (1887).

[1] A member cannot be compelled to accept the stock of another company for his interest, a consolidation of the two having been made. Frothingham *v.* Barney, 6 Hun, 366 (1876). But he may not be able to prevent the consolidation. McVicker *v.* Ross, 55 Barb. 247 (1869). An *ultra vires* act may be enjoined. Abels *v.* McKeen, 18 N. J. Eq. 462 (1867). The members need not make good the officers' debts paid by the latter, growing out of *ultra vires* acts. Crum's Appeal, 66 Pa. St. 474 (1870). But the officers themselves are liable to third persons. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). And possibly the members. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). If a member has not participated or acquiesced in the *ultra vires* act he is not liable thereon. Roberts's Appeal, 92 Pa. St. 407 (1880). *Cf.* Van Aernam *v.* Bleistein, 102 N. Y. 355 (1886), holding the members liable for a libel; aff'g Van Aernam *v.* McCune, 32 Hun, 316.

[2] *Re* Fry, 4 Phila. 129 (1860).

[3] Code Civ. Proc., § 1919; Westcott *v.* Fargo, 61 N. Y. 542 (1875); Saltsman *v.* Shults, 14 Hun, 256 (1878). At common law the name is not recognized and the suit would fail. Habicht *v.* Pemberton, 4 Sandf. 657 (1851); Pipe *v.* Bateman, 1 Iowa, 369 (1855); Ewing *v.* Medlock, 14 Ala. (O. S.) 82 (1837); Schmidt *v.* Gunther, 5 Daly, 452 (1874).

[4] Greer, etc. Co. *v.* Stoller, 77 Fed. Rep. 1 (1896).

[5] Von Schmidt *v.* Huntington, 1 Cal. 55 (1850). See also Smith *v.* Virgin, 33 Me. 148 (1851). *Cf.* Lindley, Partn. 234; Lafond *v.* Deems, 81 N. Y. 507 (1880). The minority cannot force a dissolution as in the case of partnership. Equity will not aid, unless there be good reason for dissolution. Hinkley *v.* Blethen, 78 Me. 221 (1886). Minority of an Odd Fellows' lodge cannot compel sale of property and distribution. Robbins *v.* Waldo Lodge, 78 Me. 565 (1887); and see Bagley *v.* Smith, 10 N. Y. 489 (1853). A court will wind up a partnership, even before its fixed time of existence has expired, if it is insolvent or unprofitable or incapable of proceeding. Jennings *v.* Baddeley, 3 K. & J. 78 (1856); Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Holladay *v.* Elliott, 8 Oreg. 84 (1879); Seighortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Brien *v.* Harriman, 1 Tenn. Ch. 467 (1873); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871).

[6] Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). *Contra*, Mills *v.* Hurd, 32 Fed. Rep. 127 (1887).

of a member does not dissolve it;[1] nor does a transfer of one's interest.[2] The dissolution of one of the subordinate unincorporated organizations by the general organization does not vest in the latter the property of the former.[3] The incorporation of the association by a part of the members does not dissolve the association.[4] The incorporation of an association is a material change in the association, which is not legal unless authorized by an amendment to its articles of association.[5] Upon dissolution the trustees of the company are bound to convert the property into cash and distribute it.[6] In proceedings for a dissolution all the members need not be made parties.[7]

[1] McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316 (1884). *Cf.* Walker *v.* Wait, 50 Vt. 668 (1878). The death of a stockholder does not dissolve the association, nor release his estate from subsequently incurred debts. Phillips *v.* Blatchford, 137 Mass. 510 (1884). The death of a member does not dissolve the company, but if it has not paid dividends for twenty-three years and is not likely to pay any, a court may decree dissolution. Willis *v.* Chapman, 68 Vt. 459 (1896).

[2] A transfer of his stock by a member does not dissolve a joint-stock association under the Pennsylvania law. *Re* Globe Refining Co., 151 Pa. St. 558 (1892).

[3] Wicks *v.* Monihan, 130 N. Y. 232 (1891). The withdrawal of a charter by a higher body from one of its branches does not affect the right of the latter to its property. Wells *v.* Monihan, 129 N. Y. 161 (1891).

[4] A part of the members of an unincorporated association cannot proceed to incorporate it against the objections of the others. Rudolph *v.* Southern Ben. League, 23 Abb. N. C. 199 (1889). Where an unincorporated association appoints a committee to incorporate, and they do so, and then proceed to run an opposition business, the association cannot enjoin them from so doing. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893). A committee appointed by a voluntary association to obtain a charter may incorporate in the name of the voluntary association, and the association cannot enjoin the use of such name. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893).

[5] National Grand Lodge *v.* Watkins, 175 Pa. St. 241 (1896).

[6] Frothingham *v.* Barney, 6 Hun, 366 (1876); Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Upon the expiration of the time for which the company was organized it becomes dissolved, and the assets must be distributed if any one of the members insists thereon. Mann *v.* Butler, 2 Barb. Ch. 362 (1847). As to the distribution of funds of an incorporated benevolent association, see Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to the land, see § 504, *supra*. As to the rules governing the distribution of the assets of a mutual benefit building corporation, see People *v.* Lowe, 117 N. Y. 175 (1889). Where a majority of a voluntary association secede from the higher organization to which the lower one belongs, they cannot take the property with them. Gorman *v.* O'Connor, 155 Pa. St. 239 (1893). In general, see 78 L. T. Rep. 639.

[7] Such as non-residents who cannot be reached. Angell *v.* Lawton, 76 N. Y. 540 (1879). The complainant may bring the proceeding in behalf of himself and others having a common interest with him. Mann *v.* Butler, 2 Barb. Ch. 362 (1847).

CHAPTER XXX.

STOCKHOLDERS' RIGHT TO INSPECT THE BOOKS OF THE CORPORATION.

§ 511. Common-law rights.
512. Common-law action for damages for refusal.
513. Mandamus is the preferable remedy.
514. Not granted as a matter of course unless the right is statutory.
515. When it will and will not be granted.
516. Allegations and form of writ.
517. Right to inspect minutes of meetings of directors.
518. Statutes giving right of inspection.
519. Orders to corporation to allow inspection — Subpœna *duces tecum* — Bill of discovery.

§ 511. *Common-law rights.*— The stockholders of a corporation had, at common law, a right to examine at any reasonable time, and for any reasonable purpose, any one or all of the books and records of the corporation.[1] This rule grew out of

[1] "At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation." Stone *v.* Kellogg, 46 N. E. Rep. 222 (Ill., 1896). Stockholders "have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." Per Redfield, J., in Lewis *v.* Brainerd, 53 Vt. 519 (1881). In Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884), the court said: "In the absence of agreement, every shareholder has the right to inspect the accounts — a right subject to the necessities of the company, yet existing. . . . The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." The right exists although "its exercise be inconvenient to the book-keepers and managers of the partnership business." In Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885), the court said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times . . . and they are entitled to such inspection though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection." Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108 (1874). "The minority stockholder should have the right to require a statement from the company." Sage *v.* Culver, 71 Hun, 42 (1893). A stockholder is not entitled as a matter of right to inspect the stock-book or other books of the bank. The court will not, although it has the power, grant a mandamus for the inspection of the stock-book or other books of a bank, unless some special grounds be disclosed to warrant it. *Re* Bank of Upper Canada

an analogous rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members.[1] Nevertheless it seems that a stockholder has no right, aside from statute, to examine the original papers and vouchers of the corporation, unless some property right is involved, or some controversy exists, or some specific and valuable interest is in question, to settle which an inspection of these documents is necessary.[2]

A director has an absolute right to examine all the books of the company,[3] even though he is hostile to the corporation.[4] But in Connecticut a contrary rule is laid down where he is seeking information in order to organize a rival company.[5]

v. Baldwin, 1 Draper (K. B. Can.), 55 (1829). A stockholder in a New York corporation has a common-law right to examine the books and papers of the corporation where a proposition has been made for the purchase of all the stock of the company and the dividends have been greatly reduced. *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898). Mr. Simon Stern, in the Cyclopedia of Political Science, Political Economy, and United States History, vol. III, p. 526, says: "Another problem presented by the existing condition of the railways in the United States is that which arises from secrecy of management. This evil must be dealt with radically. One of the prime motives for secrecy of management is the enormous advantage which at the present day it gives to the managers in the maintenance of their power. They alone know where the stockholders are to be found, and can therefore control votes by the knowledge of how to reach or buy them, thus perpetuating their control. Another motive is the advantage thus afforded for stock speculations. The board of managers, by keeping unto themselves the knowledge that their property is losing heavily in comparative traffic, can sell their own holdings and go short of the market under circumstances which will yield them an absolute certainty of profit on the transaction. This gives them an enormous advantage over the community by depleting the pockets of the unwary, who find themselves saddled with stocks at high prices, bought months in advance of the public announcement that the road is in difficulties. The knowledge of rapid gains in the development of business likewise gives, so long as it can be kept secret, a like advantage in purchase of stock. This advantage has been exploited to such a degree in the United States that the investing public has become inspired with a general distrust for railroad stock investment."

[1] Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884).

[2] Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895).

[3] People *v.* Throop, 12 Wend. 181 (1834); Charlick *v.* Flushing R. R., 10 Abb. Pr. 130 (1860); *Re* Ciancimino, N. Y. L. J., Dec. 23, 1890. *Cf.* State *v.* Einstein, 46 N. J. L. 479 (1884).

[4] People *v.* Throop, 12 Wend. 181 (1834).

[5] A director who is actively organizing a rival company has no right to examine the letter files of the for-

A creditor of the corporation or any person who is a stranger to it can obtain access to its records by a bill in equity for discovery.[1] Corporate books in the hands of a receiver should be open to all parties.[2]

§ 512. *Common-law action for damages for refusal.*— The legal right of a stockholder of a corporation to examine the corporate books is a right which gives him a cause of action at law for damages against the corporate officers if they refuse to allow the inspection.[3] The plaintiff is entitled to nominal damages, and to such further damages as he may prove. It has been held that he need not allege or prove any special reason or purpose of his desire and request to examine the books;[4] but the vast size of modern corporations, with tens of thousands of stockholders and hundreds of clerks, renders it impossible to open all the books to all the stockholders, and renders necessary the rule that some good reason be given by the stockholder applying to examine the books.

§ 513. *Mandamus is the preferable remedy.*— An action for damages is generally totally inadequate as a remedy.[5] The

mer in order to aid the latter. The secretary may forcibly take them from him. Heminway *v.* Heminway, 58 Conn. 443 (1890).

[1] A bill of discovery lies at instance of corporate creditors in the courts of one state to compel corporate officers to give the names of stockholders of the corporation in another state with a view to enforcing the statutory liability in the latter state. Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). As to the remedy by subpœna, etc., see § 519, *infra*. As to the general right of a stockholder to examine the books of a corporation and the recognition of such right in equity by discovery, see Gresley, Eq. Ev. 116, 117; Kynaston *v.* East India Co., 3 Swanst. 249 (1819); Bolton *v.* Liverpool, 3 Sim. 467 (1831); S. C., 1 Myl. & K. 88; Brace *v.* Ormond, 1 Meriv. 409 (1816).

[2] See § 872, *infra*; 78 L. T. Rep. 443.

[3] Lewis *v.* Brainerd, 53 Vt. 510 (1881). As to the right to inspection and to take copies of records in a county clerk's or register's office, see Randolph *v.* State, 82 Ala. 527 (1886); Hanson *v.* Eichstaedt, 69 Wis. 538 (1887); Brewer *v.* Watson, 71 Ala. 299 (1882); Phelan *v.* State, 76 Ala. 49 (1884); Webber *v.* Townley, 43 Mich. 534 (1880); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); People *v.* Cornell, 47 Barb. 329 (1866); People *v.* Reilly, 38 Hun, 429 (1886); People *v.* Richards, 99 N. Y. 620 (1885). A stockholder has the legal right to inspect the books of the corporation of which he is a member, but the company is not liable for a refusal of the secretary to allow a stockholder to examine the books. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893).

[4] Lewis *v.* Brainerd, 53 Vt. 510 (1881).

[5] In Cockburn *v.* Union Bank, 13 La. Ann. 269 (1858), the court said a suit for damages "might last for a long time and petitioner suffer great loss by being debarred from an examination" of the books. "He does not ask

stockholder wishes to inspect the corporate books and does not wish damages or a lawsuit. Accordingly, in certain cases, upon the application of a stockholder who has been denied the privilege of examining the corporate records, it has been the practice of the courts to issue a mandamus to the corporate officers commanding them to allow a specified stockholder to examine the books of the corporation.[1] Thus, at common law, a stockholder has a right to a mandamus to compel the corporate officers to allow him to examine certain books and papers of the corporation, where a proposition has been made for the purchase of all the stock of the corporation, and a large reduction has been made in the dividends, and the stockholder is unable to ascertain the real value of his stock.[2]

§ 514. *Not granted as a matter of course unless the right is statutory.*— The writ of mandamus, however, does not issue herein as a matter of course. It is an extraordinary remedy, to be invoked only upon special occasions. The courts do not grant the mandamus until it has taken into careful consideration all the facts and circumstances of the case. The condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted only in furtherance of essential justice.[3]

for damages, but for the exercise of a right. If he has the right he ought to have the exercise of it as soon as possible; for the deprivation of his right cannot, perhaps, be accurately estimated in damages. It may be many years before the amount of the damage can be known."

[1] "It would seem, from the weight of authority and in reason, that a shareholder is entitled to mandamus to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at reasonable times, for a specific and proper purpose, upon showing a refusal on the part of the *custos* to allow it, and not otherwise." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); S. C. *sub nom.* Phœnix Iron Co. *v.* Commonwealth, 113 Pa. St. 563 (1886), explaining the method of procedure, and holding that the applicant need not apply to a court of equity. The old rule that mandamus will issue only for a public purpose is no longer a rule of law so as to prevent its use herein. Commonwealth, etc., *supra*, questioning Rex *v.* Bank of England, 2 B. & Ald. 620 (1819); and Rex *v.* London Assur. Co., 5 B. & Ald. 899 (1822). See also Rex *v.* Clear, 4 Barn. & C. 899 (1825); Foster *v.* White, 86 Ala. 467 (1889).

[2] *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898).

[3] "The application is addressed to the sound discretion of the court."

Where a statute gives to stockholders the right to examine corporate books, mandamus seems to be granted as a matter of right.[1]

The reasons for granting the writ "should be clear and cogent. . . . To hold that every person who shows himself to be a holder of stock is at liberty to demand an examination of the transfer-books when and as often as he pleases, and, if refused, to apply for a writ of mandamus to enforce an absolute right, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders. . . . The power of the court should be exercised in such cases with great discrimination and care." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); affirmed, *sub nom. Re* Sage, 70 N. Y. 220 (1877). See also People *v.* Northern Pac. R. R., 50 N. Y. Super. Ct. 456 (1884). "Discretion in these matters should be exercised in a reasonable manner and subject to precedent." Regina *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). A reference may be ordered by the court to determine the truth of the allegations in the affidavits used to obtain a mandamus. People *v.* St. Louis, etc. R'y, 44 Hun, 552 (1887). Mandamus is the preferable remedy. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893).

[1] Where a statute gives the right to inspect, this right may be enforced by mandamus. Coquard *v.* National, etc. Co., 49 N. E. Rep. 563 (Ill., 1898). A statute giving the right to examine the books and records gives the right to examine contracts, and this right may be enforced by mandamus. Stone *v.* Kellogg, 46 N. E. Rep. 222 (Ill., 1896). Mandamus lies at the instance of a stockholder to compel his corporation to allow him to inspect the books of the company relative to the stock in accordance with the constitution of Louisiana, the object of the stockholder being to ascertain the value of his stock and to guide his future action in regard thereto. State *v.* New Orleans, etc. Co., 22 S. Rep. 815 (La., 1897). Under the Wisconsin statute authorizing a stockholder to examine the stock-books and accounts, a mandamus may be issued to the officer having the books in charge. State *v.* Bergenthal, 72 Wis. 314 (1888). Under a constitutional right to see the list of stockholders, a stockholder has no absolute right to take a list of them. Commonwealth *v.* Empire Pass. R'y, 134 Pa. St. 237 (1890). Mandamus lies to enforce the statutory right of inspection. People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). Mandamus lies to compel the resident agent of a foreign corporation to open its transfer books to a stockholder as required by statute. People *v.* Paton, 20 Abb. N. Cas. 195 (1887). Mandamus will lie in behalf of the wife of a deceased stockholder, who holds the certificates made out in his name, to compel the corporation to allow her to examine the transfer books in order that she may vote intelligently at a coming election. People *v.* Eadie, 63 Hun, 320 (1892). Mandamus lies to open for the inspection of a stockholder and for taking memoranda therefrom such corporate books as the statute prescribes shall be open to him. *Re* Martin, 62 Hun, 557 (1891). Mandamus lies to allow inspection as required by the statute, and the fact that the applicant holds a certificate of stock is sufficient. Martin *v.* Johnston Co., 25 Abb. N. Cas. 350 (1890). Where there is a state statute allowing stockholders to examine the corporate books, a national bank in the state is subject thereto and mandamus will issue.

§ 515. *When it will and will not be granted.*— It will not be granted to satisfy curiosity, nor to aid the stock-market speculations of the stockholders.[1] Either some property rights of the stockholder must be involved, or some controversy exist, or some specific and valuable interest be in question, to settle which an inspection of the corporate records becomes necessary.[2]

Winter *v.* Baldwin, 89 Ala. 483 (1889). Under a statute to the effect that "the stockholders of all private corporations have the right of access to, inspection, and examination of the books, records, and papers of the corporation, at reasonable and proper times," a stockholder has the "right to examine the books at any and all reasonable times," and "when this right is claimed and refused, he is entitled to a mandamus on the averment that he is a stockholder of the corporation; that he has demanded the right of inspection; that the time was reasonable and proper; and that the right was denied him." He may make the examination through an agent. Foster *v.* White, 86 Ala. 467 (1889). Concerning the New York act requiring resident transfer agents of foreign corporations to exhibit to stockholders the transfer book and a list of stockholders, and concerning an alternative writ of mandamus therein, see People *v.* Crawford, 68 Hun, 547 (1893). Mandamus lies to compel corporate officers to exhibit to a stockholder the books specified in the statute giving this right. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). See also, concerning such statutes, § 518, *infra*.

[1] The writ will not be "granted to enable a corporator to gratify idle curiosity." Foster *v.* White, 86 Ala. 467 (1889); People *v.* Walker, 9 Mich. 328 (1861). "The interests of all the corporators require that the writ shall not go at the caprice of the curious or suspicious." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). "Courts should guard against all attempts by combinations hostile to the corporation or its existing officers to use its writ of mandamus to accomplish their personal or speculative ends." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877). Nor will the court grant "a mere wrecking petition to ruin a going concern." *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). Mere suspicion is not enough to justify an order of inspection, even though the applicant stockholder intends to bring suit against the directors. Central, etc. R. R. *v.* Twenty-third Street R'y, 53 How. Pr. 45 (1877).

[2] Thus, where there had been no dividends for nine years, and the officers were partners in a competing concern, and refused to allow inspection, it was granted in order to enable the applicant to ascertain whether the real facts justified an action for fraud on the part of the officers. Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). Granted also to allow applicant to ascertain whether a by-law existed entitling him to an office by promotion. Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). Mismanagement and intent to bring suit need not be alleged. "Oftentimes frauds are discoverable only by examination of the books by an expert accountant." Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885). It is granted also to a stockholder who has a suit or controversy with a party other than the corporation itself. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800). It has been granted to enable a stockholder to see

Mandamus will be granted in order to enable the applicant to ascertain who are stockholders, with a view to canvassing their

the discount book, although there is no suit between him and the corporation, and no intent to bring one. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858). At an early day, however, it was held that "the members have no right, on speculative grounds, to call for an examination of the books and muniments in order to see if, by possibility, the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged, . . . or there should be some particular matter in dispute between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose, in respect of which the examination becomes necessary." King *v.* Merchant Tailors' Co., 2 B. & Ad. 115 (1831). The applicant must allege the extent of his interest, also wherein his object of inspection is just and useful. Hatch *v.* City Bank, 1 Rob. (La.) 470 (1842). The case of State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876), states that the two preceding cases "failed through want of precision and definiteness in stating some well-defined purpose, some reasonable cause, and showing that they had some interest in the matter." A charter provision that the corporate powers "shall be exercised by a board of directors" is immaterial herein. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). Where a reduction of capital stock is contemplated, a large stockholder has a right to inspection to ascertain whether the business is being "prudently and profitably" carried on. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). The writ will not be granted to allow applicant, a director, to inspect and make entries. Rosenfeld *v.* Einstein, 46 N. J. L. 479 (1884). The general purpose of ascertaining "the condition of the company" was held insufficient in People *v.* Walker, 9 Mich. 328 (1861). The stockholder may take memoranda or a list of the stockholders. Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); Cotheal *v.* Brouwer, 5 N. Y. 562 (1851), affirming Brouwer *v.* Cotheal, 10 Barb. 216 (1850); Hide *v.* Holmes, 2 Molloy, 372 (1825). In Stettauer *v.* New York, etc. Co., 42 N. J. Eq. 46 (1886), where a stockholder filed a bill in equity to compel corporate officers to allow himself and his accountant to examine the corporate books, its business having been closed and distribution of assets made, but a statement of its affairs refused, the court held that the bill would not lie, since no fraud or insufficient distribution of assets was alleged. Mandamus is the proper remedy. Swift *v.* State, 7 Houst. (Del.) 338 (1886), holds that mandamus will issue to the officers of a foreign corporation to exhibit its books then in the state, and allow copies of records to be taken by a stockholder who intends to commence suit against a pledgee of his stock; the controversy turning on the question of the earnings and expenses of the corporation. Mandamus to open the stock-ledger was denied in a case where the owner of four shares of stock alleged that little or no dividends were paid, and the stock was depreciating, no mismanagement being charged. A by-law authorizing inspection of books of account does not authorize inspection of stock-ledger. Lyon *v.* American Screw Co., 16 R. I. 472 (1889). Where a Michigan stockholder in a Connecticut corporation is suing in Michigan other stockholders, on contracts relative to stock, he may ob-

votes for an election.[1] Mandamus will not be granted to allow a stockholder to make a list of the stockholders where the object is to combine them in attacking a lease made by the corporation.[2]

§ 516. *Allegation and form of writ.*— The writ should run to the person or officer who has control of the records.[3] The stockholder may make the inspection through an agent, and may have the aid of an interpreter, attorney, or expert.[4] The request to inspect the books, for refusal of which the mandamus is asked, must be alleged to have been made at a proper time and place, and of the proper person, and to have been re-

tain in Delaware a mandamus compelling the president, who resides there and has corporate books and papers there, to allow him to examine the same and take copies. Richardson *v.* Swift, 7 Houst. (Del.) 137 (1885), a carefully considered case. Mandamus may lie to compel the resident officers of a foreign corporation to permit inspection. State *v.* Farmer, 7 Ohio C. C. 429 (1892). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a mandamus to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. Investment Co. *v.* Eldridge, 2 Pa. Dist. 394 (1893).

[1] Mandamus was granted in People *v.* Eadie, N. Y. L. J., Dec. 30, 1891, to open the stock-books to a stockholder who wished to ascertain who were stockholders in order to confer with them for the purpose of changing the board at an approaching election. Mandamus was granted to a stockholder who wished to persuade other stockholders not to appeal a suit in which he was interested adversely to the corporation, the defeated party. Reg. *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). See also People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220 (1877). A stockholder in Pennsylvania may have a mandamus to compel the company to allow him to inspect and take a copy of the list of stockholders, his purpose being to consult them and obtain proxies from other stockholders. It is immaterial that a receiver is in charge of the property under a foreclosure. Such a receiver has nothing to do with the stock-book. Commonwealth *v.* Philadelphia, etc. R. R., 3 Pa. Dist. 115 (1893).

[2] Commonwealth *v.* Empire Pass. R'y, 134 Pa. St. 237 (1890), and note. See criticism on this case in N. Y. L. J., Oct. 13, 1890.

[3] "The writ shall be directed to him who is to do the thing required to be done." A director may demand inspection though hostile to the corporation. People *v.* Throop, 12 Wend. 183 (1834).

[4] In examining the books a stockholder may have with him his attorney and stenographer. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). A stockholder who is entitled to examine corporate books may have with him an attorney or other person familiar with that line of business. People *v.* Nassau Ferry Co., 86 Hun, 128 (1895). May inspect through his duly authorized agent. State *v.* Bienville Oil Works Co., 28 La. Ann. 204 (1876). See also § 519, *infra*.

fused.[1] The application should also state what information the applicant needs, and what books of the corporation he wishes to inspect.[2] "The order should be so drawn as not to inconvenience the transaction of business."[3] Technical objections to the writ are not favored by the courts. Nevertheless the substantial allegations must be made.

§ 517. *Right to inspect minutes of meetings of directors.*— It would take a strong case to induce a court to issue a mandamus commanding the corporate officers to allow a stockholder to inspect the minutes of the meetings of the directors.[4] The success of the corporate enterprise depends frequently upon the secrecy of the plans of the directors. In connection with litigations the rule, of course, is different; but, aside from this, it

[1] The stockholder must first apply to the proper corporate officer having authority to grant inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835). And must state to him the reason why he desires inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835); also Rex *v.* Clear, 4 Barn. & C. 899 (1825); People *v.* Walker, 9 Mich. 328 (1861).

[2] Morgan's Case, L. R. 28 Ch. D. 620 (1884). This case also states that in England it is customary for many banking companies to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. Irrelevant parts of the books may be sealed up. Jones *v.* Andrews, 58 L. T. Rep. 601 (1888); Earp *v.* Lloyd, 3 K. & J. 549 (1857); Napier *v.* Staples, 2 Molloy, 270 (1828); Hill *v.* Great Western R'y, 10 C. B. (N. S.) 148 (1861); Clifford *v.* Taylor, 1 Taunt. 167 (1808); Gerard *v.* Penswick, 1 Swanst. 533 (1818); Dias *v.* Merle, 2 Paige, 494 (1831); Titus *v.* Cortelyou, 1 Barb. 444 (1847); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Pynchon *v.* Day, 118 Ill. 9 (1886). But if such irrelevant matter cannot be separated, the party must produce the whole. Carew *v.* White, 5 Beav. 172 (1842).

[3] Duffy *v.* Mutual Brewing Co., N. Y. L. J., Oct. 3, 1892, p. 18, approving of text.

[4] "It is highly proper that an inspection of the books containing the proceedings of the directors should be obtained on special occasions and for special purposes; . . . but the proposed daily and hourly inspection and publication of all their proceedings would be tantamount to admitting the presence of strangers at all their meetings, and would probably ere long be found very prejudicial to the shareholders." Regina *v.* Mariquita, etc. Min. Co., 1 El. & El. 289 (1858). "A private stockholder of an incorporated company has no right to have access to the minutes of the proceedings of the directors unless that right is expressly given by the charter; and consequently, and of necessity, he must remain ignorant of their action until they choose to make that action known" (dictum). Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508, 514 (1861). See also Lindley, Companies, under "Inspection" in Index. In Streit *v.* Citizens' F. Ins. Co., 29 N. J. Eq. 21, 31 (1878), the court said: "The officers ought not to have denied to any stockholder an opportunity, properly applied for, to examine the minutes of the meetings of the directors."

seems that a stockholder is not entitled as a matter of right to a mandamus to allow him to inspect the minutes of the directors' meetings. The same rule would seem to apply to miscellaneous questions asked of the directors at stockholders' meetings.

§ 518. *Statutes giving right of inspection.*— The right to inspect corporate records is frequently given to stockholders by statutory provisions. Sometimes this statutory right extends only to the corporate transfer book.[1] Sometimes it includes all corporate records.[2] Mandamus lies to enforce this right.[3] Fre-

[1] See Part VII, *infra*. The New York statute was construed in Cotheal *v.* Brouwer, 5 N. Y. 562 (1851); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* Mott, 1 How. Pr. 247 (1845); Kelsey *v.* Pfaudler, etc. Co., 3 N. Y. Supp. 723 (1889); People *v.* Throop, 12 Wend. 183 (1834). The New York statute in relation to transfer agents in this state of foreign corporations was construed in People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220; People *v.* Northern Pacific R. R., 50 N. Y. Super. Ct. 456 (1884); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* U. S. etc. Co., 20 Abb. N. Cas. 192 (1888); People *v.* Paton, 20 Abb. N. Cas. 195 (1887); *Re* Commerford *v.* William J. Johnston Co., N. Y. L. J., Oct. 7, 1890; Ervin *v.* Oregon R'y, etc. Co., 22 Hun, 566 (1880). For New Jersey, see Revision of 1877, p. 183, § 36; Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885); S. C., 7 Atl. Rep. 521 (1887). Under the statutes of New Jersey the court will order the books of the company to be brought within the state on the petition of the president and a director. A person having a right to examine the books of the company may do so through an attorney. It is immaterial what the motive of the applicant may be. Mitchell *v.* Rubber Reclaiming Co., 24 Atl. Rep. 407 (N. J., 1892). As to the law in Connecticut, see Pratt *v.* Meriden Cutlery Co., 35 Conn. 36 (1868). See, in general, Cain *v.* Pullen, 34 La. Ann. 511 (1882). A delay of one day in allowing the inspection, owing to the absence of the person having charge of the books, does not cause the penalty to attach. Kelsey *v.* Pfaudler, etc. Co., 41 Hun, 20 (1886). The statutory right of stockholders in a New York corporation to examine certain books does not take away the common-law right of the stockholders to examine the books and papers for a proper purpose and to have a mandamus to that effect. *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898).

[2] Ohio Rev. Stat. (1886), § 3312; Cal. Civ. Code, §§ 377, 378; Penal Code, 565; R. I. Pub. St., ch. 153, § 21, and ch. 158, § 24 (1882); Mich. Gen. Stat. § 3173, for banks. See also Colo. Gen. Stat. (1882), § 249; Mo. Rev. Stat. (1879), §§ 720, 721; Vermont R. Laws (1880), §§ 3294, 3295; Mass. 1860, ch. 68, § 10; Ill. Rev. Stat. (1874), ch. 32, § 13. The pleading in a cause of action arising under a statute herein must clearly bring the case within the statute. Lewis *v.* Brainerd, 53 Vt. 510 (1881). The purpose of the inspection need not be stated to the officer. That the officer had notice

[3] See § 514, *supra*.

quently the charter itself states that the stockholder shall have certain rights of inspection. In England the Companies Act regulates specifically the stockholders' right of inspection, and provides for a committee of investigation in behalf of the stockholders whenever an investigation is desired by them.[1]

§ 519. *Orders to corporation to allow inspection — Subpœna duces tecum — Bill of discovery.*— An inspection of corporate records is often desired in connection with an action which is pending in the courts, and it has been the practice of the courts to grant applications for this purpose.[2] The order to allow an

of plaintiff's stockholdership must be alleged. Williams *v.* College Corner, etc. Co., 45 Ind. 170 (1873). *Cf.* Queen *v.* Grand Canal, 1 Ir. L. R. 337 (1839). The common-law right of inspection remains, although a special statutory right is also given. People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877).

[1] 25 & 26 Vict., c. 89, Table A. In England, under a statute allowing a stockholder to inspect the register of stockholders, etc., an injunction lies to restrain corporate officers from refusing this right. Holland *v.* Dickson, L. R. 37 Ch. D. 669 (1888). A company which by statute is bound to allow an inspection of the register must allow a party to take copies of the same, and an injunction lies in case of refusal. Nelson *v.* Anglo-American, etc. Co., [1897] 1 Ch. 130. A stockholder has the right to make a copy of corporate records which he is examining. Boord *v.* African, etc. Co., 77 L. T. Rep. 553 (1897). Under the English statute a stockholder may inspect the transfer book and take copies, even though he is acting in the interest of a rival company. Mutter *v.* Eastern, etc. R'y, L. R. 38 Ch. D. 92 (1888). A stockholder suing to set aside a fraudulent contract may have inspection even of privileged matters between the company and its attorney. Gourand *v.* Edison, etc. Co., 59 L. T. Rep. 813 (1888).

[2] The evidence sought must be directly material to the cause. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Rex *v.* Babb, 3 T. R. 579 (1790); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), holding that a stranger has no more right to have an inspection here than in a case where he sues a copartnership. See Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297 (1874), holding that in New York the inspection is proper if the evidence is material and cannot otherwise be obtained; Clinch *v.* Financial Corp., L. R. 2 Eq. 271 (1866), where a director was compelled to produce. In the federal courts an inspection will not be granted in order to frame a complaint. Paine *v.* Warren, 33 Fed. Rep. 357 (1888).

In a bill alleging fraud on the part of the directors, whereby complainant, a stockholder, has been injured, the latter may obtain such inspection. Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833). See Bassford *v.* Blakesley, 6 Beav. 131 (1842). On a verified petition by a single shareholder stating that a mine owned by the company is being worked at a loss, an inspection of the company's books will be granted. *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). In a suit to hold the directors of a life insurance company personally responsible for large losses alleged to have been caused by moneys improperly paid on policies, an inspection has been allowed, although plaintiff was said to have but a tri-

inspection may be made at any stage of the action. A stockholder has this right to aid him in suits with strangers, and of course his right herein is more extensive than the rights of the other party to the action. In fact, a person who is not a stock-

fling interest in the company and was desirous of injuring it, and had published prejudicial statements in regard to the matter. Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1857). Where a company was being wound up, an application on behalf of twenty-four out of eight hundred and fifty-six shareholders, who had associated themselves together for an investigation into the company's affairs, was allowed, with permission to employ an accountant to carry on the examination of the books. Joint-stock Discount Co.'s Case, 36 L. J. Eq. 150 (1867). See Emma Silver Min. Co.'s Case, L. R. 10 Ch. App. 194 (1875); People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); 70 N. Y. 220; *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866). An inspection will not be granted for the purpose of fishing out a defense to a suit. Birmingham, etc. R'y *v.* White, 1 Q. B. 282 (1841); Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830). See Hoyt *v.* American Exch. Bank, 1 Duer, 652 (1853); Shoe & Leather Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385 (1883). Nor to furnish materials to the other side for a new trial. Pratt *v.* Goswell, 9 C. B. (N. S.) 706 (1861). Nor to ascertain whether petitioner might better accept, with the other shareholders, what was offered her for her holding in an old company, which was being wound up, instead of proceeding with an arbitration. *Re* Glamorganshire Banking Co., L. R. 28 Ch. D. 620 (1884). Nor to establish a justification in an action against the petitioner for libel, imputing insolvency to the company. Metropolitan, etc. Co. *v.* Hawkins, 4 H. & N. 146 (1859). See Finlay *v.* Lindsay, 7 Ir. L. R. (N. S.) 1 (1857); Collins *v.* Yates, 27 L. J. (Exch.) 150 (1858); Opdyke *v.* Marble, 44 Barb. 64 (1864). Nor to examine all the books of the company for fifty years back, because petitioner alleges that he is dissatisfied with the management of the company and with the accounts, besides other grounds. Regina *v.* Grand Canal, 1 Ir. L. R. 337 (1839). Nor where the petition does not specify the particular books asked for, nor the object of the petitioner in making the application to the officers and to the court. Regina *v.* London, etc. Docks Co., 44 L. J. (Q. B.) 4 (1874). See Hunt *v.* Hewitt, 7 Exch. 236 (1852); Pepper *v.* Chambers, 7 Exch. 226 (1852); New England Iron Co. *v.* New York Loan, etc. Co., 55 How. Pr. 351 (1878); Central, etc. R. R. *v.* Twenty-third St. R'y, 53 How. Pr. 45 (1877); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881); Walker *v.* Granite Bank, 44 Barb. 39 (1865). The court may direct the *manner* of the examination. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857).

An appeal may be taken from an order granting a party leave to inspect and examine the books of a corporation, the appellant. Thompson *v.* Erie R'y, 9 Abb. Pr. (N. S.) 213 (1870); Lancashire, etc. Co. *v.* Greatorex, 14 L. T. Rep. 290 (1866); People *v.* Kent County Judge, 38 Mich. 351 (1878); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881). See Saxby *v.* Easterbrook, L. R. 7 Exch. 207 (1872); Bustros *v.* White, L. R. 1 Q. B. D. 423 (1876); Clyde *v.* Rogers, 24 Hun, 145 (1881); McCargo *v.* Crutcher, 27 Ala. 171 (1855); Sage's Case, 70 N. Y. 221 (1877). As to the costs of an inspection, see Hill *v.* Philp, 7 Exch. 233 (1852); Davey *v.* Pemberton, 11 C. B.

holder has no more right to an inspection of the corporate books than he has to inspect the books of a copartnership. This is the rule even though he is suing or being sued by a stockholder.[1] But in a suit against stockholders for malicious prosecution, they may be required by mandamus to produce certain books of the corporation for the inspection of the plaintiff.[2] If a stockholder, and sometimes a third person, is suing or being sued by a corporation, he is entitled to the usual right of a notice to produce documents,[3] or to a discovery by an order,[4] especially

(N. S.) 628 (1862); Gardner *v.* Dangerfield, 5 Beav. 385 (1842). Stockholders obtaining inspection may be ordered not to disclose the information received. *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866); Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). May examine through an attorney. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). A professional accountant may be employed. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); 1 Greenl. Ev., § 474. An inspection of the stock-ledger was allowed in People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). So also of the discount-book. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858); People *v.* Throop, 12 Wend. 183 (1834). So also of the by-laws. Harrison *v.* Williams, 3 B. & C. 162 (1824); Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). See also Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833), where the order was to a third person having charge of the books. "The courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other." 1 Greenl. Ev., § 559. An article of the company taking away the right of inspection does not prevent a rule issuing requiring its allowance in pending litigation. Hall *v.* Connell, 3 Y. & C. (Exch.) 707 (1840). The rule stated in the text above applies to joint-stock companies. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681 (1863). In the federal courts the right is statutory. U. S. Rev. Stat., § 724. The opinions of counsel in the case of a fraudulent transaction are not privileged. Williams *v.* Quebrada R'y, etc. Co., [1895] 2 Ch. 751.

[1] Strangers have no more right to demand inspection of the books of a corporation during litigation in which the corporation is not interested than they have to demand a similar right of any other person. Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), overruling earlier cases. See also Opdyke *v.* Marble, 44 Barb. 64 (1864); Morgan *v.* Morgan, 16 Abb. Pr. (N. S.) 291 (1874). A corporation will not be compelled to open its records for the purposes of a litigation in which it is not a party. Henry *v.* Travelers' Ins. Co., 35 Fed. Rep. 15 (1888).

[2] Eddy *v.* Bay Circuit Judge, 72 N. W. Rep. 890 (Mich., 1897).

[3] See Wait, Insolv. Corp., § 519. See also § 714, *infra*.

[4] Rex *v.* Travannion, 2 Chitty, 366 (1818); Swansea Vale R'y *v.* Budd, L. R. 2 Eq. 274 (1866); Macintosh *v.* Flint, etc. R. R., 1 R'y & Corp. L. J. 384 (Mich., 1887), a stockholder's case. An order to allow examination of the corporate records was granted in Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. Rep. 46 (1894), where the defendant company said that it had not violated a contract, but that its successor was liable. Where a stockholder files a bill to obtain an accounting, and charges misappropriation, and

in England and New York state, or by compelling the corporate officers to swear to the pleading of the corporation, where

makes a motion that he be allowed to examine the books, the court will wait until the corporation pleads or answers before granting the motion. Ranger *v.* Champion, etc. Co., 51 Fed. Rep. 61 (1892). A corporation may appeal from an order for the examination of one of its officers. Sherman *v.* Beacon, etc. Co., 58 Hun, 143 (1890). Under the statutory practice in Rhode Island the court may order the production of the record book of the corporation in court or for an inspection. Arnold *v.* Pawtuxet, etc. Co., 18 R. I. 189 (1893). By examination before trial plaintiff may ascertain whether defendants are proper defendants or whether they are a corporation. Sweeney *v.* Sturgis, 24 Hun, 162 (1881). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain what the company is and of whom it consists. Clark *v.* Wilcklow, 75 Hun, 290 (1894). The affidavit to obtain the order must show that the information sought is essential. Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830); Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 428 (1851). The officers may be orally examined by the court with reference to where the books are. Lacharme *v.* Quartz Rock, etc. Min. Co., 1 H. & C. 134 (1862). They may be required to make affidavits. Ranger *v.* Great Western R'y, 4 De G. & J. 74 (1859); *Re* Burton, 31 L. J. (Q. B.) 62 (1861). Such inspections may be through agents. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); Draper *v.* Manchester, etc. R'y, 7 Jur. (N. S.) pt. 1, 86 (1861). But see *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884); Bank of Utica *v.* Hillard, 6 Cow. 62 (1826). In an action against a corporation the plaintiff is entitled to inspect all the minutes and entries in the company's books having reference to the subject in litigation. Hill *v.* Great Western R'y, 10 C. B. (N. S.) 148 (1861); Harrison *v.* Williams, 3 B. & C. 162 (1824); *Re* Burton, 31 L. J. (Q. B.) 62 (1861); Sinclair *v.* Gray, 9 Fla. 71 (1860). See Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Rex *v.* Buckingham, 8 B. & C. 375 (1828); Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830). It includes the agent, solicitor, counsel, or expert of the party asking the inspection. Hide *v.* Holmes, 2 Molloy, 372 (1825); Blair *v.* Massey, I. R. 5 Eq. 623 (1871); Joint-stock Discount Co.'s Case, 36 L. J. (Eq.) 150 (1867); Bonnardet *v.* Taylor, 1 Johns. & H. 383 (1861); Attorney-General *v.* Whitwood Local Board, 40 L. J. (Ch.) 592 (1871); Lindsay *v.* Gladstone, L. R. 9 Eq. 132 (1869); Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1857); State *v.* Bienville, etc. Co., 28 La. Ann. 204 (1876); Ballin *v.* Ferst, 55 Ga. 546 (1875). But see Bartley *v.* Bartley, 1 Drew. 233 (1852); Summerfield *v.* Pritchard, 17 Beav. 9 (1853); Draper *v.* Manchester, etc. R. R., 3 De G., F. & J. 23 (1861); *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). And a shareholder who is also the solicitor of opposing litigants is nevertheless so entitled. Reg. *v.* Wilts, etc. Canal Nav. Co., 29 L. T. Rep. 922 (1874); Kingsford *v.* Great Western R'y, 16 C. B. (N. S.) 761 (1864). But see Hutt's Case, 7 Dowl. Pr. 690 (1839); Herschfeld *v.* Clarke, 11 Exch. 712 (1856). See also notes *supra*. The manner of inspection must be gentlemanly. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). The plaintiff may have inspection of corporate minutes in a suit by a superintendent against the corporation. Hill *v.* Great Western R'y, 10 C. B. (N. S.) 148 (1861). Or in a suit by a claimant of office. *Re*

the facts sought for are brought out by that pleading[1] or by a bill of discovery.[2]

Burton, 31 L. J. (Q. B.) 62 (1861. See also § 714, *infra*. An order will not be granted for the purpose of fishing out a defense. Birmingham, etc. R'y v. White, 1 Q. B. 282 (1841). See also Credit Co. v. Webster, 53 L. T. Rep. 419 (1885). In New York the right of inspection by order is regulated by statute. Code Civ. Proc., §§ 803–809. See Boorman v. Atlantic, etc. R. R., 78 N. Y. 399 (1879); Ervin v. Oregon R'y, etc. Co., 22 Hun, 566 (1880), holding that where the books are in use only sworn copies can be required; Johnson v. Consolidated, etc. Min. Co., 2 Abb. Pr. (N. S.) 413 (1867); Walker v. Granite Bank, 19 Abb. Pr. 111 (1865); Thompson v. Erie R'y, 9 Abb. Pr. (N. S.) 230 (1870); Fenlon v. Dempsey, 10 N. Y. St. Rep. 733 (1887); People v. U. S. Mercantile Rep. Co., 20 Abb. N. Cas. 192 (1888); Shipherd v. Cohen, N. Y. D. Reg., Jan. 26, 1888. So also is the right to subpœna a corporation. Code Civ. Proc., §§ 868, 869, 872, 873. See New York, etc. R. R. v. Carhart, 36 Hun, 288 (1885); Reichman v. Manhattan Co., 26 Hun, 433 (1882); ch. 536, L. 1880; Fenlon v. Dempsey, 50 Hun, 131 (1888); Russell v. Manhattan R'y, N. Y. D. Reg., Dec. 8, 1887; People v. Mutual, etc. Co., 74 N. Y. 434 (1878); Wainwright v. Tiffiny, 13 N. Y. Civ. Pro. 222 (1887). The transfer-book may be thus examined. See Fenlon v. Dempsey, 50 Hun, 131 (1888).

[1] Formerly in equity suits it was the practice to make as co-defendants with the corporation such officers as could answer under oath such matters as the complainant desired to know. See § 738, *infra*; Glasscott v. Copper-Miners, 11 Sim. 305 (1840); *Re* Barned's Bkg. Co., L. R. 2 Ch. App. 350 (1867); French v. First Nat. Bank, 7 Ben. 488 (1874); S. C., 9 Fed. Cas. 786. This rule prevails because the corporation itself cannot be convicted of perjury. McKim v. Odom, 3 Bland Ch. (Md.) 407, 420 (1828); Wych v. Meal, 3 P. Wms. 311 (1734); Bevans v. Dingman's Choice Turnp., 10 Pa. St. 174 (1849). The corporation itself may be compelled to answer fully. See Gamewell, etc. Co. v. New York, 31 Fed. Rep. 312 (1887), citing cases. A corporate officer may be joined with the corporation as a defendant to obtain from him a discovery. Lord Eldon said as to this rule: "It originated with Lord Talbot, who reasoned thus upon it: that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information." Continental Nat. Bank v. Heilman, 66 Fed. Rep. 184 (1895).

[2] A bill lies in equity to compel a corporation to discover, in aid of a suit at law, for damages for infringement of patent. Colgate v. Compagnie Française, 23 Fed. Rep. 82 (1885). See also as to a bill of discovery, McComb v. Chicago, etc. R. R., 19 Blatchf. 69 (1881); Costa Rica v. Erlanger, L. R. 1 Ch. D. 171 (1875); Glasscott v. Copper-Miners, 11 Sim. 305 (1840); Moodalay v. Morton, 1 Bro. C. C. 469 (1785); Colgate v. Compagnie Française, 23 Fed. Rep. 82 (1885); Stettauer v. New York, etc. Co., 42 N. J. Eq. 46 (1886); French v. First Nat. Bank, 7 Ben. 488 (1874); S. C., 9 Fed. Cas. 786. But a bill of discovery will not lie against one who is merely a witness. Fenton v. Hughes, 7 Ves. Jr. 287 (1802); Dummer v. Chippenham, 14 Ves. Jr. 245 (1807). As to the difference between a bill of discovery and other bills, see

A bill of discovery may be brought to discover the names of stockholders in order to enforce their statutory liability.[1] Sometimes a *subpœna duces tecum* may be issued in behalf of a stockholder or of a third person.[2]

Most of the states have statutes regulating this subject, and these statutes frequently displace the common-law procedure.

McIntyre *v.* Union College, 6 Paige, 239 (1837); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841). Where discovery is sought from an officer he should be made a party defendant. Virginia, etc. Co. *v.* Hale, 93 Ala. 542 (1890). A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a mandamus was inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892).

[1] Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887).

[2] New York Code of C. P., § 868. The right of a stockholder to compel a corporation to produce in court the corporate records has been the subject of some controversy. In New York, under the old Code, it was held that a *subpœna duces tecum* will not always lie herein, but that an order to the corporation to allow an inspection is the proper remedy. La Farge *v.* La Farge F. Ins. Co., 14 How. Pr. 26 (1857); Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297 (1874). In Iowa a corporate servant who is required by a subpœna to produce the corporate books, which show that the corporation has violated the liquor laws, need not do so if the books are not in his possession. But otherwise he is guilty of contempt. U. S. Express Co. *v.* Henderson, 69 Iowa, 40 (1886). See also preceding notes. The president may be compelled by *subpœna duces tecum* to produce drawings owned by the company in a suit in which it is a party. Johnson, etc. Co. *v.* North Branch Steel Co., 48 Fed. Rep. 195 (1891). Stock-exchange books, as evidence, must be proved by the secretary. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891).

CHAPTER XXXI.

LIENS OF THE CORPORATION ON STOCK FOR THE STOCKHOLDER'S DEBTS TO THE CORPORATION.

§§ 520, 521. No lien at common law.
522–524. A lien may be created by statute, by charter, or possibly by by-law or contract — Notice of the lien.
525. What phrases in charters or statutes will or will not authorize the corporation to create or enforce a lien on stock.
526. The lien, when established, covers all the stockholders's shares and dividends.
§ 527. The lien protects the corporation as to all the debts due to it from the shareholders.
528. Right of lien as against miscellaneous parties.
529. The lien can be enforced for the benefit of the corporation only.
530. Methods of enforcing the lien.
531. The corporation may waive its lien.
532. The lien as affected by transfers and notice.
533. The lien on national-bank stock.

§§ 520, 521. *No lien at common law.*— Corporations, both in this country and in England, frequently possess and exercise a lien on a shareholder's stock for debts due from that shareholder to the corporation. In this chapter it is proposed to consider the origin of the lien; the extent to which it may be exercised and enforced; the waiver of it by the corporation; and its effect generally upon the transfer of shares.

It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company.[1] The policy of the common law has always been to

[1] Gemmell *v.* Davis, 75 Md. 546 (1892); Massachusetts Iron Co. *v.* Hooper, 61 Mass. 183 (1851); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Fitzhugh *v.* Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126 (1825); Williams *v.* Lowe, 4 Neb. 382, 398 (1876); Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304 (1829); Hart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878); People *v.* Crockett, 9 Cal. 112 (1858); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Neale *v.* Janney, 2 Cranch C. C. 188 (1819); S. C., 17 Fed. Cas. 1366; McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852); Cliso Inv. Co. *v.* Washington Sav. Bank, 50 Pac. Rep. 575 (Wash., 1897). *Cf.* Weston's Case, L. R. 4 Ch. 20 (1868). See also Gibson *v.* Hudson's Bay Co., MS. Rep. Mich. T. 12 Geo. I. (1726); 7 Vin. Abr. (2d Lond. ed.) 125; Pinkett *v.* Wright, 2 Hare, 120 (1842); Byrne *v.* Union Bank, 9 Rob. (La.) 433 (1845);

discountenance secret liens, inasmuch as they hinder trade and restrict the safe and speedy transfer of property.[1] It is upon this ground that the courts refuse to enforce a lien upon stock when such lien is not created by charter or by by-law. A stockholder has a right to sell his stock and have it transferred on the corporate books, although there are unpaid calls due on the stock at the time of transfer, and for refusal to transfer he may sue for conversion.[2] A trustee issuing certificates to represent an interest in a reorganized property has no lien on a certificate for costs in a litigation over it.[3]

§ 522. *A lien may be created by statute, by charter, or possibly by by-law or contract — Notice of the lien.*— Such a lien as this in favor of the corporation may be created by statute,[4] by charter,[5] and the weight of authority holds that it may be created by by-law.

With respect to the right of a corporation to enact a by-law creating such a lien, it is held in many jurisdictions that such a by-law is valid and binding upon all persons who buy or transfer the shares.[6] There is nevertheless strong authority for the

Hussey *v.* Manufacturers', etc. Bank, 27 Mass. 414 (1830); Bryon *v.* Carter, 22 La. Ann. 98 (1870). In New York the rule that there is no lien at common law is applied to banking corporations. Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859). And to corporations formed under the General Manufacturing Companies Act. Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874).

[1] Quoted and approved in Boyd *v.* Redd, 27 S. E. Rep. 35 (N. C., 1897).

[2] Craig *v.* Hesperia, etc. Co., 113 Cal. 7 (1896).

[3] Cassagne *v.* Marvin, 143 N. Y. 292 (1894).

[4] Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

[5] Union Bank *v.* Laird, 2 Wheat. 390 (1817); Stebbins *v.* Phœnix F. Ins. Co., 3 Paige 350 (1832); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); Bohmer *v.* City Bank, 77 Va. 445 (1883); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); Cross *v.* Phenix Bank, 1 R. I. 39 (1840); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870).

[6] Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); S. C., 14 Fed. Cas. 772; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310; People *v.* Crockett, 9 Cal. 112 (1858);

rule that such a by-law cannot create a lien on the stock so as to bind a *bona fide* purchaser, or other person into whose hands the shares may come, to whom actual knowledge of the by-law cannot be imputed.

Such is the rule in New York,[1] Louisiana,[2] Massachusetts,[3] Alabama,[4] Pennsylvania,[5] California,[6] Missouri,[7] Mississippi,[8] and, it seems, in some other states.[9]

Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); S. C., 19 Fed. Cas. 135; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Geyer *v.* Western Ins. Co., 3 Pittsb. 41 (1867); *Re* Dunkerson, 4 Biss. 227 (1868); S. C., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); Child *v.* Hudson's Bay Co., 2 P. Wms. 207 (1723); Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 301 (1893). *Cf.* Heart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336, 340 (1878). In Tuttle *v.* Walton, 1 Ga. 43 (1846), it was said that as between the corporators themselves such a by-law will be held valid. A by-law creating a lien in behalf of the corporation on stock is valid as against a stockholder and any one who purchases his stock with notice that such by-law exists. John, etc. Co. *v.* Woodside, 39 Atl. Rep. 413 (Md., 1898).

[1] Driscoll *v.* West Bradley, etc. Co.,

[2] Bryon *v.* Carter, 22 La. Ann. 98 (1870); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881). *Cf.* New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

[3] In Nesmith *v.* Washington Bank, 23 Mass. 324 (1828), the court doubted whether a by-law could under any circumstances create a lien on the shares as against the creditors of the share-owner, but did not decide the point. In Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829), there is a somewhat decided ground taken against the validity of any by-law which tends to limit the free transfer of shares. In Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830), Chief Justice Shaw seems to doubt the validity of a by-law giving the bank a lien on its own stock.

[4] Planters', etc. Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

[5] Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

[6] Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883).

[7] A by-law giving the corporation a lien on stock is not good as against a *bona fide* purchaser of the certificate who had no notice of the by-law. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). So, also, as to a pledgee. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

[8] Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

[9] Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); S. C., 8 Fed. Cas. 891; Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). *Cf.* Neale *v.* Janney, 2 Cranch C. C. 188 (1819); S. C., 17 Fed. Cas. 1266. A lien of the corporation on stock is prevented by a statutory provision that the company should not loan money on the security of its own stock. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85 (1887). As to national banks, see § 533, *infra*.

Upon the whole it may be said that the question whether a corporation may, by by-law, create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation, is not settled. The weight of authority in this country is against the validity of the by-law, and such would seem to be a result most in accord with public policy.

§ 523. In Pennsylvania it is the statutory law that the transfer of shares of stock in a railway corporation can be made only upon payment of any indebtedness that may exist on the part of the shareholders who seek to transfer, unless the lien is waived by the corporation.[1] In New Hampshire liens upon shares are forbidden by statute.[2]

When a lien is expressly given to the corporation by its charter or by statute, all persons dealing with the corporation are affected by it and must take notice of it.[3] A statutory lien need not be set out in the certificate in order to give notice to the transferee.[4] And where the lien is not authorized by the char-

59 N. Y. 96 (1874); Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868); Conklin *v.* Second Nat. Bank, 53 Barb. 512, note (1868); S. C. aff'd, 45 N. Y. 655 (1871). In the case last cited it was held that not even where the certificate of stock contained a provision that the stock was not transferable until all the liabilities of the stockholder to the bank were paid did the bank acquire a lien upon the shares for the subsequent indebtedness of the share-owner. And all the New York decisions proceed upon the broad ground that the policy of the law is to protect a *bona fide* vendee of shares of stock against secret or equitable claims thereto. *Cf.* Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); McCready *v.* Rumsey, 6 Duer, 574 (1857); Arnold *v.* Suffolk Bank, 52 Barb. 424 (1857); 26 App. Div. 213.

[1] Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824). *Cf.* Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857).

[2] Hill *v.* Pine River Bank, 45 N. H. 300, 309 (1864).

[3] Bishop *v.* Globe Co., 135 Mass. 132 (1883); Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 69 N. W. Rep. 663 (Mich., 1896); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893); Union Bank *v.* Laird, 2 Wheat. 390 (1817); Bohmer *v.* City Bank, 77 Va. 445 (1883); Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826); St. Louis, etc. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewell *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Stebbins *v.* Phenix F. Ins. Co., 3 Paige, 350 (1832).

[4] National Bank *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896); McCready *v.* Rumsey, 6 Duer, 574 (1857); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). A lien on stock created by statute gives the corporation a prior right in the stock as against a subsequent

ter or by statute, the mere declaration of its existence in the certificate will not avail against a *bona fide* purchaser.[1]

§ 524. It is a salutary rule that a lien created by by-law can bind only those who take the stock with notice of the by-law. This is because by-laws do not of themselves impart or convey notice.[2] A transferee of a certificate of stock is not bound to take notice of a by-law giving a corporation a lien on the stock for debts due from the registered owner to the corporation, even though the certificate of stock stated on its face that it was subject to the by-laws.[3] So, too, a by-law enacted subsequently to a transfer, although the transfer has not been recorded on the corporate books, cannot affect the rights of the parties as to that transfer.[4] By-laws creating liens on stock have been, however, held valid and enforceable as against the assignees in bankruptcy or in insolvency.[5]

A clause in a charter declaring that debts due from the stockholders must be paid before a transfer will be allowed is sufficient to create a lien on the stock without other action on the

pledgee and purchaser at the pledgee's sale, even though the certificate of stock gives no intimation of a lien. Hammond *v.* Hastings, 134 U. S. 401 (1890). But where the by-law under which the lien is claimed directs that notice of the lien should be given in the certificate of stock, this provision must be regarded as meaning that the lien should not be asserted against a person not having notice by the certificate. And the issuance of certificates not containing this notice is a waiver of the lien contemplated by such by-law. Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

[1] Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871). But in Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857), it is held that a statement on the face of the certificate of stock that it is issued subject to all debts due from the owners to the corporation will bind a transferee as a qualification or restriction of the transferrer's title, and that, too, although no charter provision or by-law authorizes such a lien on the stock. So, also, Jennings *v.* Bank of California, 79 Cal. 323 (1889).

[2] Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96, 109 (1874); Bank of Holly Springs *v.* Pinson, 58 Miss. 421, 435 (1880); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883). See also People *v.* Miller, 39 Hun, 557 (1886), concerning the validity and effect of by-laws regulating the sale and transfer of seats or membership in the commercial exchanges, and the enforcement of the liens created thereupon by such by-laws in favor of other members of the corporation.

[3] Des Moines, etc. Bank *v.* Warren etc. Bank, 66 N. W. Rep. 154 (Iowa, 1896).

[4] People *v.* Crockett, 9 Cal. 112 (1858).

[5] Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); S. C., 11 Am. Dec. 575; Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); *Re* Bigelow, 1 Nat. Bankr. Reg. 632, 667 (1868); S. C., 3 Fed. Cas. 341, 343.

part of the corporation.[1] And so, also, a power conferred by the charter upon the directors to refuse a transfer so long as the shareholder who wishes to transfer is indebted to the corporation, when exercised by the corporate management, supports the lien.[2]

A lien may be created by special agreement among the shareholders.[3] And even a mere usage of a corporation not to transfer shares while the owner is indebted to the corporation is sufficient to create a lien on stock, valid between the corporation and its shareholders, and one which will bind a shareholder who borrows money with knowledge of it.[4]

§ 525. *What phrases in charters or statutes will or will not authorize the corporation to create or enforce a lien on stock.*— The question sometimes arises whether or not the corporation, by the charter or the statute under which it acts, has authority to enact a by-law creating a lien upon its stock in favor of the

[1] Farmers' Bank Case, 2 Bland, Ch. (Md.) 394 (1830); Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

[2] Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857).

[3] Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857). By inserting in the certificate of stock a statement that the corporation has a lien on it for debts due to the corporation, a purchaser takes subject thereto. It is a contract lien. Jennings *v.* Bank of California, 79 Cal. 323 (1889). The stockholders may assent to a lien in behalf of the corporation on stock for debts due to the corporation from the stockholder, and the method of foreclosing it may also be so prescribed. The statute of limitations does not run against it. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1890). The corporation cannot create a lien on stock by a by-law; but where the surety of the debt secured by the stock as collateral pays the debt, his equities are not superior to the corporation, and he cannot claim the certificate free from the lien, he having aided in passing the by-law. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

[4] Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 88 (1822); S. C., 11 Am. Dec. 575. *Cf.* Vansands *v.* Middlesex Bank, 26 Conn. 144 (1857). Where the certificates of stock contain on their face a statement that a corporation has a lien on the stock for debts due from the registered owner, and for many years all the stockholders acquiesced therein, such a lien may be upheld, although there is no charter provision or by-law authorizing the lien. So held where a stockholder brought an action for himself and other stockholders complaining of various misfeasances and malfeasances, including the charge that such an illegal claim of lien existed. Reynolds *v.* Bank of Mt. Vernon, 6 App. Div. (N. Y.) 62 (1896). So in Bryon *v.* Carter, 22 La. Ann. 98 (1870), it is held that a by-law creating a lien, while it may be valid as between the parties if it be brought to their knowledge, is not binding on the judgment creditors of the shareholders.

corporation for debts due it by the shareholders. It has been held that, where the directors are authorized to make "regulations" as to transfers, they may make a by-law creating a lien.[1] So various other phrases have been held sufficient to confer this power.[2] Where, in addition to the articles of incorporation, the statute provides for articles of association, the corporation may in the latter provide for a lien on the stock.[3]

§ 526. *The lien, when established, covers all the stockholder's shares and dividends.*— A valid lien in favor of the corporation, when regularly established, attaches to all the shares and dividends of the indebted stockholder. Thus, it attaches to all the shares the stockholder owns, although the debt be for calls due and unpaid upon only a part of them.[4] The lien attaches

[1] Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); S. C., 19 Fed. Cas. 135. *Cf.* Tuttle *v.* Walton, 1 Ga. 43 (1846).

[2] Bryon *v.* Carter, 22 La. Ann. 98 (1870); Brent *v.* Bank of Washington, 10 Pet. 596, 613 (1836); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); S. C., 19 Fed. Cas. 135. Except when such power is expressly given to the directors it can only be exercised by vote of the stockholders. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). A charter power given to the directors of a corporation "to make all by-laws not inconsistent with any existing law of the state for the management of its property, the regulation of its affairs, and the transfer of its stock," has been held in Missouri to include the power in question. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870). But in New York the same language used in the general statute was held not to include it. Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874). See also St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Bank of Attica *v.* Manufacturers' Bank, 20 N. Y. 501 (1859). For a discussion of this question as applied to national banks, see § 533, *infra*.

[3] Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun, 90 (1894). Where the statute allows the incorporators to include special provisions in their articles of incorporation, and a lien right is inserted, and the certificate of stock on its face refers to the articles of association, a purchaser of a certificate buys subject to such lien. Gibbs *v.* Long Island Bank, 83 Hun, 92 (1894).

[4] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832). *Cf.* Brent *v.* Bank of Washington, 2 Cranch C. C. 517 (1824); S. C., 4 Fed. Cas. 61. In Virginia, however, it seems that there can be no lien on wholly paid-up shares to secure the payment of an unpaid subscription to other shares. Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882). *Cf.* Va. Code, 1887, §§ 1127, 1128, 1130; Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). And in England a lien on stock for unpaid calls is a lien only on those particular shares upon which the call is made and not on other shares. Hubbersty *v.* Manchester, etc. R'y, L. R. 2 Q. B. 471 (1867).

not only to the stock itself, but to dividends declared on the stock.[1] It is accordingly held that a corporation may lawfully retain dividends, and apply them to the payment of a debt due to it from the shareholder, since in an action by the shareholder to enforce payment of his dividends the corporation may plead the debt by way of set-off.[2] But dividends declared after the death of the stockholder are not subject to a lien for his debts.[3] The lien attaches to the shares even after a liquidation or dissolution of the company.[4] It attaches not only to valid stock, but to spurious stock obtained by forgery.[5] So also the lien attaches to trust stock for debts due from a trustee who holds stock in trust, but in his own name, and without any indication of the trust.[6] Where a *cestui que trust* owes the corporation a debt, the lien attaches to his stock though held for him in the name of a trustee.[7] And stock standing on the corporate books in the name of a fictitious person is subject to a lien for the indebtedness of the real owner.[8]

§ 527. *The lien protects the corporation as to all the debts due to it from the shareholder.*— It is a general rule that a lien upon stock is a lien for all debts of the shareholder due to the

[1] Thus, it attaches to the dividends, even though only "shares and stock" be specifically named in the statute or charter as subject to the lien (Hague *v.* Dandeson, 2 Exch. 741 — 1848), and though, in the absence of express provision, it is held that no such lien impliedly exists. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). So, in Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874), it was held that the terms of the act of 1864 which are inconsistent with the existence of a stock lien do not preclude a lien on dividends.

[2] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). *Cf.* Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch C. C. 517 (1824); S. C., 4 Fed. Cas. 61. See also § 544, *infra*.

[3] Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); S. C., 4 Fed. Cas. 61; Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

[4] *Re* General Exchange Bank, L. R. 6 Ch. App. 818 (1871).

[5] Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882).

[6] New London, etc. Bank *v.* Brocklebank, L. R. 21 Ch. D. 302 (1882); Young *v.* Vough, 23 N. J. Eq. 325 (1873); Burns *v.* Lawrie, 2 Sc. Ct. of Sess. Cas. (2d ser.) 1348 (1840), otherwise cited, 2 Dunlop, 1348.

[7] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832).

[8] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832), where the president of a corporation with fraudulent intent procured shares to be recorded in a fictitious name, and, having himself become indebted to the corporation, procured an assignment of the shares to another creditor, who sought to have the transfer recorded.

corporation;[1] and it is not necessary that the debt be due and payable at the time when the lien is sought to be enforced. It covers debts which are not due as well as those that are due, and all indebtedness to the corporation, whether payable presently or at a future time.[2] The lien will continue for the benefit of the corporation, although the debt be barred by the statute of limitations.[3] The lien attaches whether the stockholder's debt to the corporation accrued before or after he became a stockholder.[4] A lien created by statute applies to debts due from the stockholder to the corporation prior to the passage of the statute.[5] It also secures debts for which the shareholder is liable only as indorser or surety,[6] and debts due from a part-

Held, that the lien still attached for the debts of the original holder.

[1] Union Bank *v.* Laird, 2 Wheat. 390 (1817); Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); *Ex parte* Stringer, L. R. 9 Q. B. D. 436 (1882); *Re* Peebles, 2 Hughes, 394 (1875); S. C., 19 Fed. Cas. 94; Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879). *Quære*, whether the lien attaches for funds embezzled by the stockholder. Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

[2] Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310; Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); McCready *v.* Rumsey, 6 Duer, 574 (1857); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862). *Cf.* *Re* Stockton, etc. Co., L. R. 2 Ch. D. 101 (1875). In Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826), it was held that a bank organized under the Pennsylvania law of March 21, 1814, might lawfully refuse to permit the transfer of the stock of a shareholder who was the drawer of a bill discounted by the bank, but not payable at the time the transfer was demanded — both the shareholder and his indorser having, since the discount of the paper, become insolvent. So, also, Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833). But where the lien is expressly made a security for debts "actually due and payable," it will be held to cover only debts due and payable. Reese *v.* Bank of Commerce, 14 Md. 271 (1859). *Cf.* Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833).

[3] Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Brent *v.* Bank of Washington, 10 Pet. 596, 617 (1836).

[4] Schmidt *v.* Hennepin, etc. Co., 35 Minn. 511 (1886).

[5] Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893).

[6] McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); S. C., 16 Fed. Cas. 264; Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Union Bank *v.* Laird, 2 Wheat. 390 (1817); McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank *v.* Bonnie, 43 S. W.

nership in which the stockholder is a partner.[1] So, also, it secures the corporation for unpaid calls upon the original subscription.[2] But the lien does not attach until a call is made.[3] The fact that the corporation has other security does not prevent it from enforcing its charter lien on the stock.[4] The lien also attaches to the stock of a depositor who has overdrawn his account.[5]

§ 528. *Right of lien as against miscellaneous parties.*— The lien of a corporation on shares of stock as security for the payment of debts due to the corporation from the owner is a lien

Rep. 407 (Ky., 1897); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845). *Cf.* Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). A corporation, on discounting a bill or note, may take security from one of the parties, and also hold the shares of another party as security for the same loan. Union Bank *v.* Laird, 2 Wheat. 390 (1817). *Cf.* Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Helm *v.* Swiggett, 12 Ind. 194 (1859); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

[1] Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 69 N. W. Rep. 663 (Mich., 1896); *Re* Bigelow, 2 Ben. 469 (1868); S. C., 3 Fed. Cas. 341; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

[2] Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); McCready *v.* Rumsey, 6 Duer, 574 (1857); Regina *v.* Wing, 33 Eng. L. & Eq. 80 (1855); *Re* Hoylake R'y, L. R. 9 Ch. 257 (1874); Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16, § 16); Shaw *v.* Rowley, 5 Eng. R'y & Can. Cas. 47 (1847); *Ex parte* Tooke, 6 Eng. R'y & Can. Cas. 1 (1849). *Cf.* Newry, etc. R'y *v.* Edmunds, 2 Exch. 118 (1848); Ambergate, etc. R'y *v.* Mitchell, 4 Exch. 540 (1849); Great North, etc. R'y *v.* Biddulph, 7 M. & W. 243 (1840); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). *Cf.* Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484, 499 (1847), holding that instalments not called in constituted no such indebtedness as was contemplated in the statutory provision for the lien. Such a construction "would be to render its stock wholly untransferable until the par amount of it had been paid up, although the requisite instalments for that purpose had never been called in." The lien secures general debts as well as unpaid calls. National Bank, etc. *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896).

[3] Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847). *Cf. Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310; Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857). A director transferring his shares before the call avoids the lien, although he knew the call was to be made. The call is made when the date of payment is fixed, and not by a mere general resolution. *Re* Cawley, etc. Co., L. R. 42 Ch. D. 209 (1889).

[4] German Nat. Bank *v.* Kentucky T. Co., 40 S. W. Rep. 458 (Ky., 1897); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

[5] Reese *v.* Bank of Commerce, 14 Md. 271 (1859).

only as to the indebtedness of duly recorded shareholders.[1] There is no lien on the stock as to debts of an intervening unrecorded owner of the stock.[2] Where, however, the corporation is notified of the sale and transfer of the certificates of stock, without a return of the certificates to the corporation and the taking out new certificates in the name of the purchaser, and the corporation notes the fact in its certificate book, the corporation has a lien on the stock for a debt due from the purchaser, and not even a *bona fide* purchaser from him can avoid such lien.[3] A lien of a corporation on stock for debts due it from its stockholders does not attach to stock purchased by another corporation, the latter having no power to purchase.[4]

§ 529. *The lien can be enforced for the benefit of the corporation only.*— The right of a corporation to a lien on the stock of its shareholders as security for the payment of their debts to the corporation is a right to be enforced only by the corporation and exclusively for its own benefit. Accordingly, it is held that the corporation cannot become the assignee of the claim of some third person against one of its shareholders in order to enforce payment of that claim for the benefit of the third person by a recourse to the corporate lien on the shareholder's stock.[5] Neither can the corporation be compelled, for the benefit of sureties as to a part of the shareholder's indebtedness, to apply the proceeds of the sale of the stock to the liquidation of that part of their claim which is secured.[6] The lien does not extend

[1] *Cf.* § 526, *supra*, and § 532, *infra*. Where the legal title to shares can only be acquired by a transfer made in a prescribed mode, yet a complete equitable title may be otherwise acquired, and the lien may attach thereto.

[2] Helm *v.* Swiggett, 12 Ind. 194 (1859).

[3] Bank of Commerce *v.* Bank of Newport, 63 Fed. Rep. 898 (1894).

[4] Lanier Lumber Co. *v.* Rees, 103 Ala. 622 (1894).

[5] A bank having a lien by statute for any debt held by it against a stockholder cannot purchase notes of the stockholder for the express purpose of acquiring such lien, the bank at the time of the purchase knowing that the stock had been pledged by the stockholder to another creditor. Bank *v.* Bonnie, 43 S. W. Rep. 407 (Ky., 1897); White's Bank *v.* Toledo, etc. Ins. Co., 12 Ohio St. 601 (1861). To the point that this lien is one exclusively for the benefit of the corporation, see Bank of Utica *v.* Smalley, 2 Cow. 770 (1824).

[6] Cross *v.* Phenix Bank, 1 R. I. 39 (1840). But see Kuhns *v.* Westmoreland Bank, 2 Watts (Pa.), 136 (1833), where it is said that "the principle that a surety is entitled to the benefit of all the creditor's securities is of such universal application that it would require strong evidence of

to claims against the stockholder on paper made by the stockholder and purchased by the corporation.[1] The lien is for the benefit of the corporation, and it may apply the proceeds of the sale of the stock in such a way as best to subserve its own interest.[2]

§ 530. *Methods of enforcing the lien.*— When a corporation has a lien upon the stock of those of its shareholders who are indebted to it, it may refuse to allow a transfer of the stock until the debt is paid or secured to its satisfaction. This is the usual method of enforcing a lien.[3] And the corporation may insist upon its lien and hold the stock even against a *bona fide* purchaser, inasmuch as purchasers of stock are bound to take notice of legal liens.[4] It may, moreover, hold the whole amount of the shareholder's stock, although the amount of the debt be less than the value of the shares. It cannot be compelled to transfer so much of the stock as is in excess of the amount of

legislative intention to make the present case an exception to it." *Cf.* also Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327, 340 (1881).

[1] Boyd *v.* Redd, 27 S. E. Rep. 35 (N. C., 1897).

[2] Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883); Bishop *v.* Globe Co., 135 Mass. 132 (1883).

[3] Reese *v.* Bank of Commerce, 14 Md. 271 (1859); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); McCready *v.* Rumsey, 6 Duer, 574 (1857); Tuttle *v.* Walton, 1 Ga. 43 (1846); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826). *Cf.* Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). In Bishop *v.* Globe Co., 135 Mass. 132 (1883), the rule is declared that if by the law of the state under which a corporation is organized the corporation has a lien on the stock of any shareholder for a debt due from him to the corporation, the lien is a good defense to an action in another state against the corporation by a person to whom the shareholder has transferred his stock, but in whose name, by reason of the lien, the corporation has refused to register the transfer.

[4] Newberry *v.* Detroit, etc. R. R., 17 Mich. 141 (1868); Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Tuttle *v.* Walton, 1 Ga. 43 (1846); Dorr *v.* Life Ins. etc. Co., 73 N. W. Rep. 635 (Minn., 1898).

the debt.[1] But the corporation can enforce its lien against the transferee only by a refusal to allow the transfer or by a suit to foreclose. It cannot make the transferee personally liable for the debt.

The corporation may, however, proceed by an attachment of the stock.[2] So also, upon non-payment of the debt, the corporation may file a bill in a court of chancery and have the shares sold in the usual way, as in other cases of property held under a lien.[3] In a suit to foreclose a lien the transferrer is not a necessary party.[4] A decree authorizing the sale of stock for the payment of the debt need not give the shareholder the right of redemption. An absolute and valid title may pass to the purchaser immediately upon the sale.[5] A valid lien in favor of a bank upon shares of stock in the bank belonging to the estate of a deceased person will not yield to a prior claim against the estate in favor of the government.[6] But an unwarranted claim of lien by a corporation, and a consequent refusal to register a transfer until the debt as to which the lien is asserted is paid, is a conversion of the shares, and the transferrer may have his action against the corporation therefor.[7] In order, however, to put the corporation in the wrong for a refusal to transfer where

[1] Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); S. C., 19 Fed. Cas. 671.

[2] Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849).

[3] *Re* Morrison, 10 Nat. Bankr. Reg. 105 (1873); S. C., 17 Fed. Cas. 831. In Farmers' Bank's Case, 2 Bland, Ch. (Md.), 394 (1830), and Brent *v.* Bank of Washington, 10 Pet. 596 (1836), bills were filed by the owners of the stock to compel a transfer, and the corporation defended on the ground of its lien. Under the California code a corporation may by suit foreclose a lien which it has on its stock. Mechanics', etc. Assoc. *v.* King, 83 Cal. 440 (1890). To enforce a lien upon stock under the Alabama statute no action on the part of the board of directors is necessary. Elliott *v.* Sibley, 101 Ala. 344 (1893).

[4] Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 69 N. W. Rep. 663 (Mich., 1896).

[5] Reese *v.* Bank of Commerce, 14 Md. 271, 284 (1859). In one case the lien was held to be equivalent to a pledge; and it was held that, after giving due notice to the delinquent shareholder, the corporation might sell at public auction without filing a bill to foreclose. Farmers' Bank's Case, 2 Bland, Ch. (Md.) 394 (1830). In this case it is also held that, where the corporation neglects or refuses to sell the stock of a deceased shareholder who is in arrears, the administrator may file a bill and obtain an order of sale directed to the corporation.

[6] Brent *v.* Bank of Washington, 10 Pet. 596 (1836).

[7] Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873). *Cf.* Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Case *v.* Bank, 100 U. S. 446

it claims more than is due, the shareholder must tender what he admits to be due.[1] The fact that a stockholder claims that the corporation owes him more money than he owes it is not sufficient to sustain a bill in equity to enjoin the corporation from selling the stock in order to pay the amount due the corporation. Some other ground of equitable jurisdiction must be set forth.[2] Where a corporation has other security also, a court of equity may compel it to resort to that first.[3] A corporation is liable in damages for selling the stock of a stockholder for non-payment of dues, where such sale was irregular and illegal.[4]

§ 531. *The corporation may waive its lien.*— A corporation which has a lien upon its stockholders' stock for debts due to it from them need not necessarily depend upon or insist upon its lien for the collection of the debt. It has two remedies — one to enforce the lien, the other to collect the debt as though there was no lien.[5] Hence it is that the lien of a corporation on

(1879); Skinner *v.* City of London M. Ins. Corp., L. R. 14 Q. B. D. 882 (1885), holding also that only nominal damages could be recovered where the terms of the transfer were secret.

[1] Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); S. C., 19 Fed. Cas. 671. In German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874), it was held that, where the stock sold under the lien realized a sum insufficient to satisfy the corporate debt, the unpaid balance of the claim of the corporation could not be paid until there had been a proportionate payment of the claims of other creditors of the shareholder out of his general assets. *Cf. Re* Peebles, 2 Hughes, 394 (1875); S. C., 19 Fed. Cas. 94.

[2] Elliott *v.* Sibley, 101 Ala. 344 (1893). This case holds, also, that in a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant, and that the complainant must aver a readiness to pay whatever may be found due.

[3] Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). Where the company has a lien on stock, and the stockholder sells a part, the purchaser may require the company to first have recourse to the unsold part to collect its debt. A subsequent execution levied on the unsold part does not deprive the purchaser of the other part of his rights stated above. Gray *v.* Stone, 69 L. T. Rep. 282 (1893).

[4] The sale here was contrary to the requirements of the by-laws. The corporation bought the stock itself at such sale. The fact that a surplus realized at the sale was sent to the stockholder by check, and was received by him, did not bar his remedy, he being in ignorance of the illegality. Allen *v.* American Building, etc. Association, 49 Minn. 544 (1892).

[5] A subscriber for stock cannot avoid liability to the corporation by setting up that the corporation has a lien on the stock therefor and may enforce it. Lankershim, etc. Co. *v.* Herberger, 82 Cal. 600 (1890).

stock may be asserted and enforced, or, in the discretion of the corporation, it may be waived.[1]

Where the corporation has other security it is not obliged to resort to the lien.[2] Cases may arise where the intervening rights of other creditors of the shareholder render it inequitable for the corporation to waive its lien on the stock,[3] but in general the right of the corporation to waive the lien at its option is absolute.

Accordingly, where a note discounted for a shareholder was protested for non-payment, it was held that the bank might waive its lien on the stockholder's shares in the bank and proceed directly against the indorser.[4] And the corporation, by waiving the lien, does not discharge a surety, unless the surety has given the corporation express notice not to waive the lien.[5] The corporation will not be held to have waived its lien upon the stock of its debtor merely because it has taken other or additional security for the debts;[6] nor because it assents to a general assignment by the shareholder for the benefit of creditors.[7] But of course if a corporation, having a statutory lien on stock, agrees to take other security in place thereof, it thereby waives its lien.[8] The corporation may allow the transfer of a portion of a shareholder's stock without waiving its lien on the rest.[9] But a waiver of the lien for a limited time is fatal, provided the stock is transferred during that time.[10]

[1] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847); *Re* Hoylake R'y, L. R. 9 Ch. 257, 259 (1874). But see Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); *Re* Bigelow, 1 Nat. Bankr. Reg. 667 (1868); S. C., 3 Fed. Cas. 341. A waiver is the intentional relinquishment of a known right. It is not to be inferred and imputed to a corporation in the absence of proof of it, and a mere failure to assert the lien is not equivalent to a relinquishment or waiver of it. First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22, 44 (1877).

[2] Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

[3] *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); S. C., 2 Fed. Cas. 310.

[4] Cross *v.* Phenix Bank, 1 R. I. 39 (1840).

[5] Perrine *v.* Fireman's Ins. Co., 22 Ala. 575 (1853).

[6] Union Bank *v.* Laird, 2 Wheat. 390 (1817).

[7] Dobbins *v.* Walton, 37 Ga. 614 (1868).

[8] St. Paul Nat. Bank *v.* Life Ins. etc. Co., 73 N. W. Rep. 713 (Minn., 1898).

[9] First Nat. Bank of Hartford *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). But *cf.* Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847).

[10] Thus, if within such time the stock is pledged for a debt, the right of the corporation, after the expira-

A waiver which will bind the corporation may, in the absence of something to qualify the power, be made by the cashier of a bank, acting by virtue of an express or implied authority, for the board of directors;[1] or the secretary of an insurance company;[2] or the general manager or properly-qualified general agent of the corporation, especially if that is a general custom of the company.[3] Accordingly, where one buys shares on the faith of a representation of the corporate officers that the stock is unincumbered, he is entitled to the shares free from any corporate lien.[4]

And where the corporate officers allow a transfer to be registered, and a new certificate to be issued, there is a waiver of the corporate lien as to the debts of the transferrer.[5] Where the corporation sells a claim it has against a stockholder it thereby loses its lien.[6] The lien is not waived by a by-law that stockholders must offer their stock to the bank before selling elsewhere, and that after ten days they may sell elsewhere.[7] Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes

tion of the time to acquire its charter lien, is subordinate to the right of the pledgee until the debt is paid or the pledge is released. Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873).

[1] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). So, also, the refusal of the cashier to permit a transfer is the act of the bank, for which it may be charged. Case *v.* Bank, 100 U. S. 446 (1879). Where the cashier of a bank takes part in the pledging of stock by one of the stockholders, the bank cannot subsequently claim a lien on the stock for debts incurred by the stockholder after such pledge. Birmingham Trust, etc. Co. *v.* Louisiana Nat. Bank, 99 Ala. 379 (1893).

[2] Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849). *Cf.* Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

[3] See Bishop *v.* Globe Co., 135 Mass. 132 (1883); Young *v.* Vough, 23 N. J. Eq. 325 (1873).

[4] Moore *v.* Bank of Commerce, 52 Mo. 377 (1873).

[5] Hill *v.* Pine River Bank, 45 N. H. 300 (1864); Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870). So, also, a by-law requiring the consent of the board of directors to a transfer by one indebted to the corporation is held to be repealed where a custom of disregarding it has been shown, it appearing also that the secretary had been allowed to exercise his own discretion about such transfers without consulting the directors. In such a case the consent of the secretary to the transfer is a waiver of the lien. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849).

[6] Ralston *v.* Bank of California, 112 Cal. 208 (1896).

[7] Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 69 N. W. Rep. 663 (Mich., 1896).

the stock in pledge, and causes an indorsement thereof to be made on the stub of the stock-book of the corporation, the corporation cannot thereafter claim a lien as against him; and moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books.[1]

§ 532. *The lien as affected by transfers and notice.*— A purchaser of stock is bound to take notice of the statute giving a lien upon the stock.[2] Nevertheless, upon a transfer of stock, the title thereto passes absolutely as between transferrer and transferee, even though the corporation, in the assertion of a lien upon the stock for the indebtedness of the transferee, refuses to register the transfer until a certain debt is paid or secured.[3] But of course the assignee or transferee, or whoever succeeds to the rights of the shareholder in the stock, takes it subject to the lien of the corporation.[4] And when the stock is sold by the corporation to pay the debts of the transferrer, the transferee is entitled to the surplus, if any there be, which remains after the claim of the corporation is satisfied.[5]

[1] Des Moines, etc. Co. *v.* Des Moines, etc. Bank, 66 N. W. Rep. 914 (Iowa, 1896). Where the cashier of a bank tells a purchaser of stock that the bank has no lien upon the stock, a statutory lien of the bank on the stock is waived as to him. Oakland C. S. Bank *v.* State Bank, 71 N. W. Rep. 453 (Mich., 1897).

[2] Dorr *v.* Life Ins. etc. Co., 73 N. W. Rep. 635 (Minn., 1898). See also § 530, *supra*.

[3] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Johnston *v.* Laflin, 103 U. S. 800 (1880); Fitzhugh *v.* Bank of Shepherdsville, 3 Mon. (Ky.) 126 (1825); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); S. C. *sub nom.* Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); People *v.* Miller, 39 Hun, 557, 563 (1886). *Cf.* Dunn *v.* Commercial Bank, 11 Barb. 580 (1852); Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Sargent *v.* Essex Marine R'y, 26 Mass. 202; (1829); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). Corporations having a statutory lien on stock for debts nevertheless must allow transfer to one who takes subject to the corporate lien for part of the unpaid subscription. Herdegen *v.* Cotzhausen, 70 Wis. 589 (1888). The lien attaches when a call is made, and not when it becomes due. Queen *v.* Londonderry, etc. R'y, 13 Q. B. 998 (1849).

[4] Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

[5] Tuttle *v.* Walton, 1 Ga. 43 (1846);

The corporation cannot, after it has been regularly notified of the transfer, assert a lien upon the stock to secure an indebtedness of the transferrer contracted subsequently to the notice.[1] A mere notice to the bank is, in such a case, sufficient to protect the transferee. It is immaterial that the transfer was not registered.[2] Where the directors of a corporation know that a stockholder of record has transferred his stock, the corporation cannot claim a lien for debts incurred subsequently.[3] And in a case where the transfer was registered, but no certificate had been issued, it was held that a pledgee was protected.[4] But where there is neither a register of the transfer nor notice of it served upon the corporation, the stock may properly be subjected to a corporate lien for the indebtedness of the transferrer incurred subsequently to the transfer.[5] A pledgee who is duly registered on the corporate books as a shareholder, but to whom no certificate has been issued, is nevertheless protected against liens upon his shares for the indebtedness of the pledgor.[6]

Foster *v.* Potter, 37 Mo. 525 (1866); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855).

[1] Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Nesmith *v.* Washington Bank, 23 Mass. 324 (1828). The same rule applies where the stock is pledged. Bradford Banking Co. *v.* Briggs, L. R. 12 App. Cas. 29 (1886). But where the shareholder transfers his stock, and subsequently, without notifying the corporation of the transfer, borrows money from the corporation in regular course of business, the corporation may refuse to register the transfer and may insist upon the lien. Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874).

[2] Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873).

[3] Prince, etc. Co. *v.* St. Paul, etc. Co., 70 N. W. Rep. 1079 (Minn., 1897).

[4] Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). Where it is the custom to have the corporation, upon request, certify that it has no lien, such a request operates as notice to the corporation. Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). This case holds also that notice to the corporation by a loaner of money to the stockholder does not enure to the benefit of a purchaser who knew nothing thereof.

[5] Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874). Where the statute gives a lien for debts due, the lien applies as against a transfer of the certificate made before the debt became due, but presented to the corporation for transfer after the debt became due. Michigan, etc. Co. *v.* State Bank, 69 N. W. Rep. 645 (Mich., 1896). As to the rule in England, see Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882); Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884); New London, etc. Bank *v.* Brocklebank, L. R. 21 Ch. D. 302 (1882). In England, however, unrecorded transferees of stock have few, if any, rights as against the corporation.

[6] Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

But a pledgee who neglects to notify the corporation that he holds the stock in pledge, or to take the proper steps to secure title to the stock in his own name, will not be protected against the lien of the corporation upon the stock to secure the payment of an indebtedness contracted to the bank by the pledgor in the meantime and subsequently to the pledge of the shares.[1] A corporate lien will not attach to stock for the debts of a legatee unless the legatee accept the shares.[2]

Where one pays a debt as surety for a shareholder, he is entitled to be subrogated to the rights of the corporation by way of lien on the shareholder's stock.[3] And where the transferee pays the transferrer's debt to the corporation in order to obtain a registry of the transfer, he of course may have his action to recover back from his transferrer the amount so paid.[4]

Where the company has a lien upon the stock of a shareholder, the latter may compel the company to assign their lien to a third person who will advance the money, and to whom the shares are at the same time transferred.[5]

§ 533. *Liens on national-bank stock.*— National banks were formerly held to have power to enact by-laws creating a lien on stock in the bank for debts owed by its owner to the bank.[6] But the supreme court of the United States, when the question came before it, refused to enforce such a by-law, and decided that its enactment was not within the spirit of those provisions of the National Banking Act of 1864 which confer power upon the management of a national bank to regulate the business of the bank and to conduct its affairs.[7] In the present state of the

[1] Platt *v.* Birmingham Axle Co., 41 Conn. 255, 264 (1874); Jennings *v.* Bank of California, 79 Cal. 323 (1889); Gemmell *v.* Davis, 75 Md. 546 (1892).

[2] Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847).

[3] Young *v.* Vough, 23 N. J. Eq. 325 (1873); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306, 310 (1835); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863). *Cf.* Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870); National Exch. Bank *v.* Silliman, 65 N. Y. 475 (1875).

[4] Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). See also § 262, *supra*.

[5] Everitt *v.* Automatic, etc. Co., [1892] 3 Ch. 506.

[6] The leading case was Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); S. C., 14 Fed. Cas. 772, upholding the lien. To the same effect, see Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); *Re* Dunkerson, 4 Biss. 227 (1868); S. C., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873).

[7] Bullard *v.* Bank, 18 Wall. 589 (1873). See also Bank *v.* Lanier, 11 Wall. 369 (1870); Case *v.* Bank, 100 U. S. 446 (1879). One reason for deny-

law, therefore, no national bank can, by any by-law, create any lien upon shares of stock in the bank to secure the payment of any indebtedness which the owner of the shares may contract to the bank.[1] This conclusion is in accord with the well-settled policy of the federal courts to protect purchasers of certificates of stock against all secret dangers.

ing this power to national banks is that they are prohibited from loaning money to stockholders on the security of their stock.

[1] Delaware, etc. R. R. *v.* Oxford Iron Co., 38 N. J. Eq. 340 (1884); Meyers *v.* Valley Nat. Bank, 18 Nat. Bankr. Reg. 34 (1879); S. C., 17 Fed. Cas. 250; Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); New Orleans Nat. Bank *v.* Wiltz, 10 Fed. Rep. 330 (1881); Goodbar *v.* City Nat. Bank, 78 Tex. 461 (1890); Second Nat. Bank *v.* National State Bank, 10 Bush (Ky.), 367 (1874); Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 306 (1872); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); S. C., 8 Fed. Cas. 891. In the case last cited, which upon appeal was affirmed by the supreme court of the United States, it was held that such a by-law was in its operation the same thing as though a loan were made by the bank upon the security of the stock — a transaction forbidden by the thirty-fifth section of the National Banking Act. Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871). *Cf.* Xenia Nat. Bank *v.* Stewart, 107 U. S. 676 (1882); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868). A bank, however, may attach the stock of one of its stockholders for debts due from him to it. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874).

CHAPTER XXXII.

DIVIDENDS.

§ 534. Definition of a dividend and the four kinds of dividends.
535. Scrip dividends, property dividends, and bond dividends.
536. Stock dividends.
537. Interest-bearing stock.
538. To whom the corporation is to pay the dividend.
539. To whom the dividend belongs.
540. Dividends must be equal and without preferences.
541. A dividend when declared is a debt due absolutely to the shareholder.
542, 543. It is a debt which may be collected by legal proceedings.
544. Right of the corporation to apply dividends to the payment of debts due to it by the shareholder.
§ 545. The courts very rarely compel the directors to declare a dividend.
546. Dividends can usually be made only from profits — What are profits which may be used for dividends.
547. A stockholder may enjoin an illegal dividend.
548. Dividends which impair the capital stock may be illegal and may be recovered back from the stockholders — Dividends on dissolution.
549. Proceedings to recover back such a dividend.
550. The liability herein of the corporate officers.
551. Guarantee of dividends by contract.

§ 534. *Definition of a dividend and the four kinds of dividends.*— A dividend is a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders on demand or at a fixed time.[1] Until the dividend is declared these corporate profits belong to the corporation, not to the shareholders, and are liable for corporate indebtedness.[2] But the board of directors of a bank have no power to pledge its future profits unless the stockholders assent thereto.[3]

A corporation may, in general, make four different kinds of

[1] Lockhardt *v.* Van Alstyne, 31 Mich. 76 (1875); Chaffee *v.* Rutland R. R., 55 Vt. 110, 129 (1882); Hyatt *v.* Allen, 56 N. Y. 553 (1874). "The term 'dividend,' in its technical as well as in its ordinary acceptation, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894).

[2] Goodwin *v.* Hardy, 57 Me. 143, 145 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Minot *v.* Paine, 99 Mass. 101 (1868); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Mickles *v.* Rochester, etc. Bank, 11 Paige, 118 (1844), holding that stockholders are neither tenants in common nor copartners of corporate property.

[3] Brown *v.* Bradford, 72 N. W. Rep. 648 (Iowa, 1897).

dividends: namely, a dividend payable in cash, in stock, in bonds or scrip, or in property.

Dividends are declared by the directors and not by the stockholders.[1] A division of profits without the formality of declaring a dividend is equivalent to a dividend.[2] A division of the profits is a dividend even though not called such and not considered such by the directors and stockholders.[3] A stockholder cannot prove by parol that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.[4]

Numerous cases on the definition of the word "dividend" have arisen in connection with the taxation of corporations.[5]

[1] See § 545, *infra*.

[2] Rorke *v.* Thomas, 56 N. Y. 559 (1874); Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1891); McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). See also § 572*a*, *infra*. Where a fixed per cent is paid annually to stockholders instead of dividends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainderman. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1891).

[3] Commonwealth *v.* Pittsburg, etc. R'y, 74 Pa. St. 83, 90 (1873), holding that a stock dividend was not such a dividend as entered into the rate of taxation. Lehigh Crane Iron Co. *v.* Commonwealth, 55 Pa. St. 448 (1867), where the capital stock was $100,000, but dividends were declared on an assumed capital of $1,000,000, the property being worth the latter figure by reason of profits invested in it. The same device was resorted to in Citizens', etc. R. R. *v.* Philadelphia, 49 Pa. St. 251 (1865). "Dividends declared," as used in an employee's contract of payment for services, the rate of payment being according to such "dividends," were construed to mean profits, even though not distributed by dividends, the intent being clear. Acceptance of part payment is no bar to an action to collect. Sease *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349 (1893). Where large salaries are paid, instead of declaring dividends, the object being "concealment and delusion," the court will not hold that such "salaries" are a part of the manufacturing expense of a defendant guilty of infringing a patent. Rubber Co. *v.* Goodyear, 9 Wall. 788 (1869); Seabury *v.* Am Ende, 152 U. S. 561 (1894). A stockholder cannot maintain a suit for a dividend which the stockholders informally agreed should be declared, but which never was declared. American Wire Nail Co. *v.* Gedge, 96 Ky. 513 (1895).

[4] Dennis *v.* Joslin, etc. Co., 36 Atl. Rep. 129 (R. I., 1896).

[5] A tax upon the receipts of a railroad is not a tax upon dividends. Comm'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholders in cash, this is a reduction of capital stock, and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Cen-

Corporations have inherent power to declare and pay dividends, even though they have no capital stock.[1]

§ 535. *Scrip dividends, property dividends, and bond dividends.*— A scrip dividend is a dividend of certificates giving the holder certain rights which are specified in the certificate itself. These dividends are usually declared when the company has profits which are not in the shape of money, but are in other forms of property, and the company wishes to anticipate the time when the property may be sold for cash, and the cash distributed by a money dividend. The certificate sometimes entitles the holder to a sum of money payable with interest at a certain time after date, or at the option of the company, or when the company shall have accumulated sufficient surplus to pay the certificates in full. Sometimes the certificates are certificates of indebtedness, and are made convertible, at the option of the holder, into bonds or stocks;[2] and sometimes the certifi-

tral Transp. Co., 145 Pa. St. 89 (1891). Where a tax is levied on dividends the officers cannot defend on the ground that the dividend was illegal. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). In Commonwealth *v.* Pittsburg, etc. R'y, 74 Pa. St. 83 (1873), a lessor company having twelve per cent dividends guaranteed on its stock declared a stock dividend so that the guarantee should be seven per cent on the stock thus increased. The court held that such a dividend did not subject the company to a tax based on dividends. In Louisiana taxes are assessed on franchises, the value of which is ascertained from the earning capacity of the corporation. Crescent City R. Co. *v.* New Orleans, 44 La. Ann. 1057 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1053 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1055 (1892).

[1] In McKean *v.* Biddle, 37 Atl. Rep. 528 (Pa., 1897), where a mutual insurance company for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over four million dollars, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

[2] Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882); State *v.* Baltimore, etc. Co., 6 Gill (Md.), 363 (1848). In Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892), land had been sold to the company for a certain amount of preferred stock, and also a certain amount of "land scrip," such scrip entitling the holder to exchange them for land so conveyed at a price to be thereafter determined. The company had the right to pay off the scrip and retire it. The company sold part of the land, and then proceeded to make a scrip dividend of the scrip so taken up by it. A dissenting scripholder brought suit to undo the transaction on the ground that the scrip taken up by the company should be canceled. The court sustained his action, and held that from the original contract it was clear that the land was received as a trust fund to ultimately pay off the scrip. Reversing Rogers *v.* Phelps, 9 N. Y. Supp. 886 (1890). In

cate entitles the holder to exchange the certificate for lands of the corporation to an amount equivalent in value to the face value of the certificate; or to receive from the corporation any other benefit or advantage which the corporation may lawfully confer. Sometimes the certificate so far partakes of the character of a certificate of stock as to entitle the holder to dividends.[1] Where the corporation, having a large surplus, issues

Brown *v.* Lehigh, etc. Co., 49 Pa. St. 270 (1865), a dividend of scrip had been declared, the scrip being as follows:

"No. ——. SCRIP. Shares.

"This is to certify that —— ——, —— heirs or assigns, will be entitled, upon the surrender of this certificate, to —— shares in the capital stock of the Lehigh Coal and Navigation Company as soon as the present funded debt of the company has been paid off, or adequate provision made for its discharge when due and payment demanded; and will also be entitled to a *pro rata* share of any future distribution of scrip; but not to any cash dividend until this certificate has been converted into stock, as above provided.

"Or, this certificate may, at any time, at the option of the holder thereof, be converted into stock upon payment by said holder, either in cash or in the six per cent loans of the company, of the par value of said stock, and the surrender of this certificate.

"This certificate is transferable only at the office of the company.

"Witness," etc.

Several years after the issue, the mortgage being paid off, the scrip-holders claimed that they were entitled to back dividends equal to past dividends paid on the stock. The court held, however, that the terms of the contract did not give any such right, and that dividends commenced only from the time the scrip was converted into stock.

The holder of a certificate of indebtedness convertible into stock cannot claim an interest in a stock dividend until he has converted the scrip into stock. Miller *v.* Illinois Central R. R., 24 Barb. 312 (1857); Brundage *v.* Brundage, 63 Barb. 397 (1873); aff'd, 60 N. Y. 544 (1875), holding that assignable "interest certificates" representing earnings spent for improvements, and payable out of future earnings with dividends, or convertible into stock at the company's option, did not pass with a bequest of a life interest in certain shares of the stock. See also Butler *v.* Glen Cove, etc. Co., 18 Hun, 47 (1879). See § 283, *supra*. *Cf.* Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876). The court in this case, speaking of a dividend of interest-bearing securities, said: "That the company had no lawful authority for issuing the certificates cannot be doubted." In Merz *v.* Interior Conduit, etc. Co., 87 Hun, 430 (1895), the issue of bonds to pay certificates of indebtedness which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view.

[1] Bailey *v.* Railroad Co., 22 Wall. 604 (1874). *Cf.* Brundage *v.* Brundage, 60 N. Y. 544 (1875).

The character of the scrip in this case is shown by the resolution authorizing it, as follows:

"Whereas, this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties with a view to an increase of its traffic, moneys equal in amount to eighty per cent of the capital stock of the company; and whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period:

"Now, therefore, resolved, that a certificate signed by the president and treasurer of this company be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent of the capital stock held by him, payable ratably with the

such certificates, they are held not to transfer the title to that surplus from the corporation to the holders of the certificates.[1] In general the issue of scrip dividends may be entirely lawful, and they are upheld by the courts; but when they are declared in fraud of the rights of third parties they may be set aside.[2]

Scrip is practically the same thing as shares of stock, except

other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon at the same rates and times as dividends shall be paid on the shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion."

This was the famous scrip dividend made by the New York Central R. R. Co. under the management of Commodore Vanderbilt.

The form of the certificate was as follows:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"No. ——. Interest Certificate.

"Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that A. B., being the holder of —— shares of the capital stock of said company, is entitled to —— dollars, payable ratably with the other certificates issued under said resolution, *at the pleasure of the company, out of its future earnings*, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

"—— ——, President.

"—— ——, "Treasurer."

At the foot of each certificate there was a form of transfer in blank:

"For a valuable consideration, I, A. B., do hereby sell, assign, and transfer all interest in the above certificate to C. D., and do hereby irrevocably appoint E. F. attorney, to execute a transfer thereof on the books of the railroad company therein mentioned."

See Bailey *v.* Railroad Co., 22 Wall. 603 (1874). This dividend was declared although the company by its charter was limited to ten per cent dividends.

A dividend of scrip — *i. e.*, a paper entitling the holder to dividends equal to dividends thereafter declared on the capital stock — is practically a stock dividend, except that the scrip cannot vote, and provision is generally made for taking it up in some manner. Such a dividend was involved in Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884).

[1] People *v.* Board of Assessors, 76 N. Y. 202 (1879), affirming S. C., 16 Hun, 196. In this case it was held that the issue of these certificates could not operate to relieve the corporation from their obligations to pay their tax upon the surplus, because the surplus remained in the hands of the company, and as such was liable to assessment and taxation. See also Bailey *v.* Railroad Co., 22 Wall. 604 (1874). See 87 Fed. Rep. 51.

[2] While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them without the knowledge of the other passed a resolution declaring a scrip dividend of ten per cent on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876).

that it has no voting power. It is issued sometimes because the company cannot issue any more capital stock, the whole capital stock being already out; sometimes to avoid taxes, and sometimes to increase the transferable shares without giving to the new shares a voting power. If the interest or dividends are payable only from the profits, the issue of the scrip is legal whenever a stock dividend would be legal, that is, whenever the property of the company is equal in value to the capital stock plus the scrip dividend.

A property dividend is where property is divided instead of that property being sold for cash and the cash then used to pay a dividend.[1] A property dividend occurs where a corporation sells all its property to another corporation and takes in payment thereof the stock and the bonds of the purchasing corporation and then makes a distribution of the same among its stockholders. It has been held that any one of its stockholders may object and insist on payment of his shares in cash.[2] This, however, is practically a dissolution of the company and a distribution of its assets, a subject which is considered elsewhere.[3]

A dividend or distribution of the company's bonds among its stockholders is legal, if the capital stock is not thereby impaired and if corporate creditors existing at that time do not object.[4] Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock, subject to the common-law liability for so doing.[5]

In the absence of a special provision to the contrary, dividends will be presumed to be payable in cash, and in lawful or current money.[6] But where the dividend is paid in depreciated currency, a stockholder cannot insist that he shall be paid any more than what the depreciated currency is worth in regular currency.[7]

[1] An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). Where corporate land is deeded by way of dividend or distribution among stockholders, there is no warranty of title. Olsen *v.* Homestead, etc. Co., 87 Tex. 368 (1894).

[2] See § 671, *infra*.

[3] See § 548, *infra*.

[4] See § 766, *infra*.

[5] People *v.* Barker, 141 N. Y. 251 (1894). See also §§ 546, 548, 671, *infra*.

[6] Ehle *v.* Chittenango Bank, 24 N. Y. 548 (1862).

[7] Back dividends may be recovered on stock which has been illegally confiscated; but where the dividends to other stockholders were paid in

§ 536. *Stock dividends.*—A stock dividend, as the name imports, is a dividend of the stock of the corporation. Such a dividend is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been accumulated and is permanently added to the capital stock of the corporation. Corporations frequently make a dividend of this character when improvements of the corporate property or extensions of the business have been made out of the profits earned. It is also made when the corporate plant has increased in value, and it seems better to issue new stock to represent the excess of value than to sell the increase and declare a cash dividend. In this country these dividends are frequently made, and are constantly sustained by the courts.[1] The shareholders, having voted to declare such

Confederate currency, the back dividends paid after the war to a northern stockholder are a sum equal in value to the Confederate currency when the dividends were declared. Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); Scott *v.* Central R'y, etc. Co., 52 Barb. 45 (1868). In this case two of the three judges held that though the dividends were declared without specifying how they should be paid, yet where they were paid as a matter of fact in depreciated Confederate currency, a northern stockholder could not, after the war, claim the same dividends payable in United States currency.

[1] Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188 *et seq.* (1883); Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895); Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896), a dictum; City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Howell *v.* Chicago, etc. R. R., 51 Barb. 378 (1868); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Gordon *v.* Richmond, etc. R. R., 78 Va. 501, 521 (1884); Minot *v.* Paine, 99 Mass. 101 (1868); Boston, etc. R. R. *v.* Commonwealth, 100 Mass. 399 (1868); Deland *v.* Williams, 101 Mass. 571 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Gibbons *v.* Mahon, 4 Mackey, 130 (1885); Jones *v.* Morrison, 31 Minn. 140 (1883); Earp's Appeal, 28 Pa. St. 368 (1857); Wiltbank's Appeal, 64 Pa. St. 256 (1870); Commonwealth *v.* Pittsburgh, etc. R. R., 74 Pa. St. 83 (1873); Brown *v.* Lehigh Coal, etc. Co., 49 Pa. St. 270 (1865); Commonwealth *v.* Cleveland, etc. R. R., 29 Pa. St. 370 (1857); Parker *v.* Mason, 8 R. I. 427 (1867); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847). See Harris *v.* San Francisco, Sugar, etc. Co., 41 Cal. 393 (1871), holding that one who is entitled to and receives a stock dividend cannot claim also a part of the cash profits which are used for improvements, even though a contract calls for cash. See also § 51, *supra*, and ch. XXXIII, *infra*. As to the taxation of stock dividends, see § 572*a*, *infra*. In England a stock dividend has been declared to be *ultra vires* so far as dissenting stockholders are concerned. It cannot be forced upon a stockholder. Hoole *v.* Great Western R'y, L. R. 3 Ch. 262 (1867). In *Re* Eastern, etc. Co., 68 L. T. Rep. 321 (1893), a stock dividend was involved, but its legality was not passed upon. It is discretionary with the directors as to whether they will declare a stock or a cash

a dividend, may, at any time before the certificates are issued, reconsider the matter and revoke the dividend.[1] Preferred stockholders are entitled to share in the distribution of stock by a stock dividend according to the terms of their preferred stock.[2] In some of the states a stock dividend is prohibited by statute or constitutional provision.[3]

§ 537. *Interest-bearing stock.*— It has already been shown that a corporation may issue stock and make a contract with the subscriber that the company will pay interest upon the sums paid in by the subscriber.[4] Such a contract is legal, however, only when the interest is to be paid from the net profits of the enterprise, and not from the capital stock. Unless net profits have been earned the stipulated interest cannot legally be paid. Consequently there is little difference between interest-bearing stock and preferred stock.

§ 538. *To whom the corporation is to pay the dividend.*— The question as to whom a dividend shall be paid after it has been regularly declared is one which sometimes involves the corporation in considerable difficulty. It is not always easy to decide which one of two or more claimants is entitled to the dividend.

The general rule is that the corporation may pay the dividend to the person in whose name the stock stands registered upon the corporate stock book at the time the dividend is declared.[5] It may do so without inquiring whether he has transferred the

dividend. Howell *v.* Chicago, etc. R'y, 51 Barb. 378 (1868). Where a consolidation of three corporations is made by increasing the capital stock of one and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheny *v.* Federal, etc. R'y, 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R'y, 179 Pa. St. 414 (1897).

[1] Terry *v.* Eagle Lock Co., 47 Conn. 141 (1879). After cancellation there is no statutory liability on such stock. Hollingshead *v.* Woodward, 35 Hun, 410 (1885). A stock dividend after declaration cannot be revoked, except possibly for some extraordinary cause. Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895). *Cf.* § 541, *infra.*

[2] Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). See also Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), and ch. XVI, *supra.*

[3] See §§ 51, 287, *supra;* 50 N. E. R. 648.

[4] See ch. XVI, *supra.*

[5] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), affirming 25 Hun, 438 (1881); Donnally *v.* Hearndon,

stock, and without requiring the production of the certificate.[1] Moreover, it is a well-settled rule that the corporation is protected in paying dividends to a recorded shareholder, although he may have transferred his shares, no notice of the transfer having been given to the company.[2] But after notice of a transfer the corporation must pay the dividend to the transferee, although no registry has been made.[3] And between two claimants of the dividend, one being the *cestui que trust* and the other a *bona fide* transferee, the corporation may interplead.[4]

The right to dividends does not, however, depend upon the issue of the certificate, and the owner of shares may claim his dividends though no certificate has ever been issued by the

41 W. Va. 519 (1895); Jones *v.* Terre Haute, etc. R. R., 29 Barb. 353 (1859); affirmed, 57 N. Y. 196; Northrup *v.* Newton, etc. Turnp. Co., 3 Conn. 544 (1821). *Cf.* Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881), in regard to the assignment of dividends. The guaranty accumulations of an insurance company conducted both on the mutual and stock principle belong to the stockholders and not to the policy-holders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). As to dividends on a tontine insurance policy, see Pierce *v.* Equitable Life Ass. Co., 145 Mass. 56 (1887). As to a dividend by way of redeeming stock in a building association, see Mechanics', etc. Assoc.'s Appeal, 7 Atl. Rep. 728 (Pa., 1887).

[1] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), aff'g 25 Hun, 438; Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880).

[2] Bank of Commerce's Appeal, 73 Pa. St. 59 (1873), where a distribution of assets was made; Bell *v.* Lafferty, 1 Pa. Sup. Ct. 454 (1881), where the assignee of a dividend without a certificate obtained payment, and the court held the company not liable to an unrecorded pledgee; Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Smith *v.* American Coal Co., 7 Lans. 317 (1873); Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880), the corporation not having been notified.

[3] See same cases as in preceding note. The corporation is liable to a transferee for dividends declared after a registry has been requested and improperly refused. Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Where the transferee and holder of the certificate notifies the corporation thereof after a dividend has been declared, but before it is paid, he is entitled to the dividend, and may sue the corporation for it. Timberlake *v.* Shippers' Compress Co., 72 Miss. 323 (1895).

[4] Salisbury Mill *v.* Townsend, 109 Mass. 115 (1871); Cross *v.* Eureka, etc. Co., 73 Cal. 302 (1887), a case between pledgor and pledgee. See also § 387, *supra*. *Cf.* Stone *v.* Reed, 152 Mass. 179 (1890), where a corporate creditor sued the treasurer for distributing property among the stockholders. A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. Hinckley *v.* Pfister, 83 Wis. 64 (1892).

corporation.[1] The corporation is protected if it pay dividends to the administrator without notice of a transfer by him.[2]

With respect to the dividends on the stock of a married woman, the corporation must pay them to the husband or not, according to the law of the domicile of the corporation, and not according to the law of the domicile of the married woman.[3] The husband, by collecting dividends on his wife's shares, does not thereby reduce the stock to possession.[4]

Even though the corporation closes its transfer-book several days before a dividend is declared, nevertheless those are entitled to the dividend who apply for registry on or before the day of the declaration of the dividend.[5]

If the holder of a certificate of stock has applied for transfer and been refused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock.[6]

§ 539. *To whom the dividend belongs.*—As between the vendor and vendee of shares of stock, it is a settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. Even though the transfer has not been recorded, the transferee has a right to the dividends as against the transferrer. The law, moreover, refuses to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared. This rule is just, inasmuch as the ac-

[1] Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824).

[2] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883). The heirs of a stockholder must, in order to entitle themselves to dividends, procure a transfer of their ancestor's shares into their own names on the corporate books, where the certificates have been pledged and the company notified. State *v.* New Orleans, etc. R. R., 30 La. Ann. 308 (1878).

[3] Graham *v.* First Nat. Bank of Norfolk, 84 N. Y. 393 (1881), affirming S. C., 20 Hun, 325. As to the rule in California, see Dow *v.* Gould, etc. Co., 31 Cal. 629 (1867).

[4] Burr *v.* Sherwood, 3 Bradf. (N. Y. Surr.) 85 (1854). *Cf.* Harcum *v.* Hudnall, 14 Gratt. (Va.) 369, 382 (1858); Searing *v.* Searing, 9 Paige, 283 (1841). A receipt of dividends by the husband only reduces the dividends into possession and not the stock. See § 319. *supra.*

[5] Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196, 205 (1874); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Frequently, however, the charter or statutes provide otherwise.

[6] Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo., 1893); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). But not if the transferee has treated the refusal to transfer as a conversion. Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878).

crued profits and expected dividends enter into the value and price at which the stock is sold.[1]

A transfer of stock passes, of course, all dividends declared subsequently to the transfer, although the dividend was earned before the transfer was made.[2]

[1] Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); March *v.* Railroad Co., 43 N. H. 515, 520 (1862); Ryan *v.* Leavenworth, etc. R. R., 21 Kan. 365, 403 (1879); Foot *v.* Worthington, 39 Mass. 299 (1839); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871); Brundage *v.* Brundage, 65 Barb. 397, 408 (1873); affirmed, 60 N. Y. 544; Goodwin *v.* Hardy, 57 Me. 143 (1869); Hill *v.* Newichawanick Co., 8 Hun, 459 (1876); aff'd, 71 N. Y. 593 (1877); Bates *v.* McKinley, 31 L. J. (Ch.) 389 (1862); King *v.* Follet, 3 Vt. 385 (1831); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850). See also ch. XXXIII, *infra*. *Cf.* Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823). A person who guarantees to another a dividend and is obliged to pay it himself cannot claim a subsequent dividend by way of reimbursement. Parks *v.* Automatic, etc. Co., 14 Daly, 424 (1888). A dividend declared after the certificates have been sold belongs to the transferee as against the transferrer. Gemmell *v.* Davis, 75 Md. 546 (1892), approving the text herein. Where a stockholder assigns by contract the stock and all dividends to another, he must pay to the latter any subsequent dividends which he receives. Cook *v.* Monroe, 45 Neb. 349 (1895). Where stock is sold at auction on August 1 and a deposit paid, the balance to be paid August 29, a dividend declared on August 24 belongs to the purchaser. Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Where a company purchases shares of its own stock and subsequently uses it to declare a stock dividend, a stockholder who sold part of his stock in the interim is entitled to the dividend on only such stock as he owned when the dividend was declared. Coleman *v.* Columbia Oil Co., 51 Pa. St. 74 (1865). Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). Although the purchaser of stock is entitled to a dividend declared after the contract of sale is made, even though the contract has not yet been carried out, yet the purchasers cannot insist on the vendor's giving an order on the corporation for such dividends. The vendee should collect without such order. He rescinds the sale by insisting on such order. Phinizy *v.* Murray, 83 Ga. 747 (1889). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. Shepard *v.* Stockham, 45 Kan. 244 (1891). Where an agent to sell was to have all that he sold for above a certain price, a sum in excess thereof belongs to him, although it was for dividends not yet declared. Blakeslee *v.* Ervin, 40 Neb. 130 (1894).

[2] Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823), by Chancellor Kent; Goodwin *v.* Hardy, 57 Me. 143 (1869); March *v.* Eastern R. R., 43 N. H. 515 (1862); Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857); Brundage *v.* Brundage, 1 Thomp. & C. 82; aff'd, 60 N. Y. 544 (1875); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871). And a purchaser of stock at a tax sale, if the proceedings are legal and regular, is entitled to a certificate and to dividends subsequently declared. Smith

A pledgee is entitled to dividends on the stock held in pledge, but must account for them when the pledge is redeemed.[1]

When a dividend is made payable on a day subsequent to the day on which it is formally declared, it belongs to the stockholder who owns the shares on the day the dividend is declared, and not to the owner at the time it is payable.[2]

Where stock is bought deliverable at the seller's option, the dividends declared between the day of the purchase and the delivery belong to the purchaser.[3] But a contract to sell on demand entitles the vendor to dividends declared before the demand is made.[4] But of course any agreement between vendor and vendee, modifying or changing the above rules, will be upheld. Dividends are a proper subject for a contract, and a valid contract may be made in reference to them.[5] The vendor may

v. Northampton Bank, 58 Mass. 1 (1849).

[1] See § 468, *supra.*

[2] Wheeler *v.* Northwestern Sleigh Co., 39 Fed. Rep. 347 (1889); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming S. C., 8 Hun, 459; 48 How. Pr. 427 (1874); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Bright *v.* Lord, 51 Ind. 272 (1875), where an option had been given. *Cf.* Hopper *v.* Sage, 112 N. Y. 530 (1889); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 178 (1881); *Re* Kernochan, 104 N. Y. 618 (1887); Clive *v.* Clive, Kay, 600 (1854). *Contra*, Burroughs *v.* North Carolina R. R., 67 N. C. 376 (1872). The transfer of stock does not transfer past stock dividends which have been declared, even though the stock dividend has not been actually delivered. City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856). See also ch. XVI, *supra.* Where a pledge of stock is renewed and a new note given, dividends accruing before the renewal go to the pledgor. Fairbank *v.* Merchants', etc. Bank, 132 Ill. 120 (1889).

[3] Currie *v.* White, 45 N. Y. 822 (1871); Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Under a contract of a person to buy certain stock within a certain time if the other party desired to sell (a "put"), the first person reserving all dividends "declared during the time," a dividend declared before but payable during the time of the option belongs to the seller. Hopper *v.* Sage, 112 N. Y. 530 (1889). *Contra*, Harris *v.* Stevens, 7 N. H. 454 (1835).

[4] Bright *v.* Lord, 51 Ind. 272 (1875).

[5] Brewster *v.* Lathrop, 15 Cal. 21 (1860); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Union Screw Co. *v.* American Screw Co., 11 R. I. 569 (1877); affirmed, 13 R. I. 673 (1880), in which it was held that where a contract between two corporations for the purchase of the stock of one of them on a certain day was by agreement postponed to a later day, a dividend declared in the interval belonged to the purchaser. Where the vendor of stock reserves "one-half of whatever price the same should be sold for, when sold, over and above that sum," he is not entitled to an account of dividends, or other income received by the vendee from or on account of the stock.

provide by contract that he should have the dividends in lieu of interest on the purchase price until such purchase price is paid.[1]

A legatee of shares takes the stock as it was at the time of the testator's death. All dividends declared previous to that event go to the administrator.[2]

The question of whether a dividend is apportionable is considered elsewhere.[3]

A person who claims to be the owner of stock cannot establish his rights in a court by suing the party in possession of the stock for the dividends declared and paid.[4]

It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time and give to the lessee the right to vote the stock during that time.[5]

§ 540. *Dividends must be equal and without preferences.*— Dividends among stockholders of the same class must be always *pro rata*, equal, and without preference. If the company has issued preferred stock, the holders thereof constitute a class by themselves, and shareholders of that class will be entitled, as a class, to dividends in preference to holders of the common

Jones *v.* Kent, 80 N. Y. 585 (1880). A person who sells stock reserving a dividend that may be declared at a certain date cannot claim a stock dividend which is declared at the specified date. He can only claim the cash dividend. Kaufman *v.* Charlottesville Woolen Mills, 93 Va. 673 (1896). A contract by which the "surplus fund" on stock in a corporation up to a certain time shall belong to a certain party was construed in Thompson *v.* Hudgins, 22 S. Rep. 632 (Ala., 1897). Where an employee is paid according to the percentage of dividends, it is for the jury to say whether dividends on an increased capital stock are the proper gage of such salary. Bradburn *v.* Solvay Process Co., 18 N. Y. App. Div. 542 (1897).

[1] Hancock *v.* Clark, 68 Vt. 302 (1896).

[2] Brundage *v.* Brundage, 60 N. Y. 544 (1875); *Re* Kernochan, 104 N. Y. 618 (1887), where it was payable after the testator's death. *Cf.* Johnson *v.* Bridgewater Iron Mfg. Co., 80 Mass. 274 (1859); § 301, *supra*. The profits and surplus funds of a corporation, whenever they may have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself, and will pass under that name in a transfer or bequest. Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857). *Cf.* Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). In regard to the rights of a life tenant of stock as against a remainderman, see ch. XXXIII, *infra*.

[3] See § 558, *infra*.

[4] Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880). Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

[5] Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

stock. But as between shareholders of the same class there can be no discrimination, and profits set aside for dividends must be evenly divided among the stockholders according to the amount of stock each one owns.[1] Accordingly there can be no lawful discrimination in the division of dividends, although the subscription price of part of the stock is due and unpaid;[2] or because the contract work has not been done;[3] nor can there be a discrimination between the large and small stockholders

[1] Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. 510 (1865), where part were paid in gold; Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874), aff'g 29 Barb. 353 (1859); Morgan *v.* Great Eastern R'y, 1 Hem. & M. 560 (1863); Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), a case of preferred stock; State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847), where some were paid in cash and others were offered part cash and part stock; Atlantic, etc. Tel. Co. *v.* Commonwealth, 3 Brewst. (Pa.) 366 (1870), where a tax was levied on the assumption of an equal dividend to all; Hale *v.* Republican River Bridge Co., 8 Kan. 466 (1871), where by mistake a stockholder got more land scrip than was his share; Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865). *Cf.* Chase *v.* Vanderbilt, 62 N. Y. 307 (1875). Holder of receipt under reorganization, entitling him to preferred stock in the new company, is entitled to dividends declared before he obtains the certificates. Elsworth *v.* New York, etc. R. R., 19 Week. Dig. 211; aff'd, 98 N. Y. 648 (1885). See also Coey *v.* Belfast, etc. R'y, Ir. Rep. 2 C. L. 112 (1866); Harrison *v.* Mexican R'y, L. R. 19 Eq. 358 (1875), preferred stock cases. As to preferred stock, see ch. XVI, *supra*. Although dividends are guaranteed to a certain date, and are paid, the stock is entitled to participate in all subsequent dividends. Parks *v.* Automatic, etc. Co., 14 N. Y. St. Rep. 710 (1888). If a stockholder by accepting the benefits assents to a change in the privileges which pertain to his stock, he cannot afterwards object thereto. Compton *v.* The Chelsea, 59 Hun, 624 (1891); aff'd, 128 N. Y. 537.

[2] Oakbank Oil Co. *v.* Crum, L. R. 8 App. Cas. 65 (1882). Where a subscription for stock is paid up, the stockholder is entitled to his stock and past dividends, even though for thirty years he has slept upon his rights. Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County *v.* Nashville, etc. R. R., 14 Lea (Tenn.), 525 (1884). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid-in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. R'y *v.* Hambleton, 77 Md. 341 (1893).

[3] Although stock is issued to contractors before they are entitled to it, yet they are entitled to the dividends on such stock unless there was some agreement to the contrary. Central R. R. etc. Co. *v.* Papot, 59 Ga. 342 (1877); S. C. *sub nom.* Southwestern R. R. *v.* Papot, 67 Ga. 675, 690 (1881).

of a company as to the manner of payment of dividends.[1] After paying a dividend to a part of the shareholders the corporation cannot refuse to pay the rest upon the ground that by so doing the capital stock will be impaired,[2] or that all the surplus earnings have been either paid out as dividends or invested in permanent improvements.[3]

A bill in equity may be maintained by a stockholder to prevent an unequal or unfair distribution of the profits of the company,[4] and for an injunction to restrain a dividend when stock has been fraudulently overissued, until a true list of the holders of genuine stock can be obtained.[5]

§ 541. *A dividend when declared is a debt due absolutely to the shareholder.*— When a dividend out of the earnings of the company has been regularly declared and is due, it becomes immediately the individual property of the shareholder. There is, *eo instanti*, a severance, for the use and benefit of the members of the corporation, of so much of the accumulated earnings as are declared; and the dividend thereafter exists as a separate fund, distinct from the capital stock or surplus profits. It then becomes the absolute property of the stockholders.[6]

[1] Accordingly, where a dividend was declared, viz., to all stockholders owning less than fifty shares, cash, but to all of fifty shares and over, part cash and part in interest-bearing bonds of the corporation, the discrimination was held invalid and unlawful. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874). So also where a part of the authorized capital stock remained untaken, and a resolution of the directors was carried into effect, by which the untaken portion of the stock was issued to those shareholders not in arrears upon shares previously taken, to the exclusion, as to the new shares, of those in arrears upon the original issue, it was held an invalid discrimination and an unlawful imposition of a penalty upon those in arrears. Reese *v.* Montgomery County Bank, 31 Pa. St. 78 (1855).

[2] Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868). The validity of a dividend cannot be called into question by a bank in a suit to collect taxes on such dividend. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890).

[3] Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

[4] Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. 510 (1865). The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). Or the stockholder may sue at law for an equal dividend. See § 542, *infra*.

[5] Underwood *v.* New York, etc. R. R., 17 How. Pr. 537 (1859), a case growing out of the Schuyler frauds in New York.

[6] Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); Keppel *v.* Petersburg R. R., Chase's Dec. 167

Accordingly, whenever a dividend is regularly declared and credited to a depositor it becomes his property, to which he is entitled in preference to the creditors of the corporation.[1] If the funds to pay a dividend are placed by the corporation on deposit at a bank or elsewhere, the deposit is made and remains at the risk of the corporation and not of the shareholders, until a reasonable time after actual notice is given to the latter.[2] But it cannot be withdrawn and reclaimed either by the corporation or a receiver of the corporation, since the shareholders acquire, by virtue of the declaration of the dividend, a lien in equity upon the deposit.[3] And the shareholders' right to a dividend regularly declared, and to the fund set apart by the corporation to pay the dividend, is not affected by the subsequent insolvency of the corporation.[4] But where no specific fund has been set aside, a shareholder not having claimed or received his dividend has, upon the insolvency of the corporation, merely a claim of debt against the corporation, and must come in and fare as the other creditors do.[5] A dividend is something distinct and separable from the fund upon which it is declared, and it may be the subject of assignment by a shareholder be-

(1868); King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming S. C., 8 Hun, 459 (1876); Brundage *v.* Brundage, 60 N. Y. 544 (1875), affirming S. C., 65 Barb. 397 (1873); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875); Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860); *Re* Le Blanc, 14 Hun, 8 (1878). Upon the latter point compare People *v.* Merchants', etc. Bank, 78 N. Y. 269 (1879). Dividends on life-insurance policies, when once declared, cannot be varied by the company subsequently. Heusser *v.* Continental, etc. Ins. Co., 20 Fed. Rep. 222 (1884). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1880).

[1] Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880). A dividend declared and ordered deposited to the order of the stockholders and so held until the further order of the court is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891).

[2] King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860).

[3] *Re* Le Blanc, 14 Hun, 8 (1878); aff'd, 75 N. Y. 598; Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

[4] Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

[5] Lowne *v.* American Fire Ins. Co., 6 Paige, 482 (1837); Curry *v.* Woodward, 44 Ala. 305 (1870).

fore it is received from or declared by the corporation.[1] So it is held that a dividend must be made payable within a reasonable time after it is declared, and when once declared cannot be revoked.[2] But where the fact that a dividend has been voted by directors is not made public, or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.[3] Not only must the time of payment be reasonable, but a reasonable place of payment must be designated, and the entire transaction must be in good faith.[4]

§ 542. *It is a debt which may be collected by legal proceedings.*— The debt which the corporation owes its shareholders, when a dividend is declared and the day of payment arrives, is one which may be collected by the usual action at law. A suit to enforce the declaration of a dividend must be in equity; but when the dividend is not paid after it has been regularly declared, the shareholder's action is at law, and he may sue in assumpsit for the amount due him by the resolution declaring the dividend,[5] or he may file a bill in equity for an

[1] Marten *v.* Gibbon, 33 L. T Rep. 561 (1875). *Cf.* Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883). Bargains in prospective dividends are transactions which, by rule 61 of the stock exchange, the committee will not recognize or enforce. The contract is, however, one which is not contrary to law, and it is good between the parties. Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875). *Cf.* § 536, *supra.*

[2] Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

[3] Ford *v.* Easthampton, etc. Co., 158 Mass. 84 (1893). A stockholder who accepts a dividend which has been declared in lieu of one already declared, and thereby revoked, cannot claim both dividends. Albany, etc. Co. *v.* Arnold, 29 S. E. Rep. 695 (Ga., 1897).

[4] King *v.* Paterson, etc. R. R., 29 N. J. L. 82 (1860).

[5] Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865); West Chester, etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875); Coey *v.* Belfast, etc. R'y, Ir. Rep. 2 C. L. 112 (1866); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868); Hall *v.* Rose Hill, etc. Co., 70 Ill. 673 (1873); City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Marine Bank *v.* Biays, 4 Har. & J. (Md.) 338 (1818); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847); Kane *v.* Bloodgood, 7 Johns. Ch. 90, 132 (1823); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Fawcett *v.* Laurie, 1 Dr. & Sm. 192, 202 (1860); Dalton *v.* Midland Counties R'y, 13 C. B. 474 (1853); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). See Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875), sustaining a remedy in equity. But if a shareholder is not entitled to share in the dividend according to the terms of the resolution declaring it, he cannot have his action of assumpsit. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). In suing for a dividend the plaintiff must allege that the dividend has been declared. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo., 1893). Where a

accounting.[1] But mandamus is not a proper remedy in such a case.[2]

§ 543. A contract of directors to pay a dividend as a debt at fixed intervals, being in reality a preferred dividend, cannot be enforced either at law or in equity, except out of net profits, like other dividends.[3] A demand is necessary before the action at law by the shareholder can be maintained.[4]

It has been held, however, that the commencement of the suit constitutes in itself a sufficient demand.[5] Under ordinary circumstances interest is not recoverable upon dividends which have been declared, but which the shareholder has not claimed. The right to interest arises only upon a demand and a refusal to pay.[6] A stockholder is not entitled to interest on dividends, even where he has demanded the same after they have been declared, where an attachment is pending against his stock.[7] The statute of limitations begin to run only after demand.[8]

dividend has been paid to all stockholders except one, he may collect his by a suit. Southwestern, etc. R'y *v.* Martin, 57 Ark. 355 (1893).

[1] Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); S. C., 14 Fed. Cas. 357. This is the usual remedy where preferred stockholders sue to have a dividend declared. See ch. XVI, *supra*.

[2] Van Norman *v.* Central Car, etc. Co., 41 Mich. 166 (1879). But see *dicta* in King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1861), and Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

[3] Painesville, etc. R. R. *v.* King, 17 Ohio St. 534 (1867). See also ch. XVI, *supra*.

[4] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860). A mere letter of inquiry has been held under this rule an insufficient demand. Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). A demand while the shares are under and subject to an attachment by the corporation is not such a demand as this rule contemplates. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874).

[5] Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884); Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868). This accords with the settled theory of the law as to demand in similar cases. See East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875); Delamater *v.* Miller, 1 Cow. 75 (1823); Everett *v.* Coffin, 6 Wend. 603 (1831); Walradt *v.* Maynard, 3 Barb. 584 (1848); Carroll *v.* Cone, 40 Barb. 220 (1862); Ayer *v.* Ayer, 33 Mass. 327 (1835).

[6] Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 187 (1881); State *v.* Baltimore, etc. R. R., 6 Gill (Md.). 363, 387 (1847); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886). As to interest on preferred dividends, see ch. XVI, *supra*.

[7] Mustard *v.* Union Nat. Bank, 86 Me. 177 (1893).

[8] The statute of limitations begins to run against a stockholder's suit to collect dividends only after a demand

In England, however, it has been held that where dividends are credited up to the personal accounts of the stockholders, and for nearly twenty years certain stockholders do not claim dividends so credited to them, the statute of limitations is a bar, and, the company having been sold out by authority of a statute, the proceeds are to be divided among the stockholders without regard to such past-due and unpaid dividends. The statute of limitations began to run from the time the dividends became payable, and the company is not to be considered as a trustee in that respect.[1]

The action at law for the payment of a dividend which has been declared should be against the corporation, and not against the corporate officers.[2] But where the treasurer of an incorporated company withheld a dividend belonging to one of the stockholders on the ground that he himself owned the stock, an action of assumpsit against him individually was sustained.[3] And in a case where a stockholder had been unjustly deprived of his stock, it was held that he could not sue an individual shareholder to recover a dividend which should have been paid to him, but that his action was properly against the corporation.[4] In actions on the part of shareholders to enforce the payment of dividends, the validity or legality of the dividend cannot be questioned by the corporation.[5] But when a corpo-

and refusal, or notice to a shareholder that his right to dividends is denied. Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886). Compare Winchester, etc. Co. *v.* Wickliffe, 38 S. W. Rep. 866 (Ky., 1897). The statute of limitations does not begin to run against the collection of a dividend until it is demanded. A provision of a new charter into which the old company is merged, applying a three-year statute of limitations to dividends, does not affect dividends on old stock which has not come into the reorganization. Armant *v.* New Orleans, etc. R. R., 41 La. Ann. 1020 (1889); Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County *v.* Nashville, etc. R. R., 14 Lea (Tenn.), 525 (1884). In Bills *v.* Silver King Mining Co., 106 Cal. 9 (1895), it is held that the statute of limitations begins to run against the right of a stockholder to sue for his dividends from the time when his administrator inquires at the corporate office as to whether all dividends had been paid to decedent, even though a false answer in the affirmative was made by the corporation.

[1] *Re* Severn, etc. R'y, [1896] 1 Ch. 559.

[2] French *v.* Fuller, 40 Mass. 108 (1839); Smith *v.* Poor, 40 Me. 415 (1855); S. C., 3 Ware, 148 (1858); S. C., 22 Fed. Cas. 627.

[3] Williams *v.* Fullerton, 20 Vt. 346 (1848).

[4] Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880).

[5] Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868).

ration is sued for a dividend by two claimants therefor, it may support a bill of interpleader between them.[1]

§ 544. *Right of the corporation to apply dividends to the payment of debts due to it by the shareholder.*— It is well settled that if, at the time a dividend becomes payable, the stockholder owes the corporation any debt, the dividend due that shareholder may be applied in liquidation of the indebtedness; and if the corporation is sued for the dividend it may set up the debt by way of set-off or counter-claim.[2] This, however, amounts to a corporate lien on the stock so far as dividends are concerned; and it is not upheld where the registered stockholder has sold and transferred his certificate of stock before the dividend is payable.[3] The company cannot retain the dividend to secure

[1] Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871). See also § 387, *supra*. In England the rule was formerly otherwise. Dalton *v.* Midland R'y, 12 C. B. 458 (1852). Where a corporation is sued by a stockholder for a dividend declared by the directors, and all the other stockholders have received their dividends and retained them, the company cannot be allowed to set up its defense to the suit that the dividend has not been earned, and that its payment would withdraw a part of the capital of the company. Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868).

[2] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Donnally *v.* Hearndon, 41 W. Va. 519 (1895). See also § 526, *supra*. But a contrary rule prevails as to a deceased stockholder, upon a winding up of the company and a distribution of its assets. See Merchants' Bank, etc. *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); S. C., 4 Fed. Cas. 61. See also, *contra*, in general, *Ex parte* Winsor, 3 Story, C. C. 411 (1844); S. C., 30 Fed. Cas. 312. By agreement a dividend may be applied to an unpaid call. Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). For a contract of a corporation to sell to its superintendent shares of its stock at his option, and to allow him to pay for the stock by the dividends, see Goodwin, etc. Co.'s Appeal, 117 Pa. St. 514 (1888). The only right that a corporation has to retain a dividend from a stockholder who owes it money is based on set-off. Gemmell *v.* Davis, 75 Md. 546 (1892).

[3] Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer with a written request of the pledgor to the same effect, together with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt or for a debt of a firm in which he is interested. American, etc. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn., 1896). This set-off is not good on a debt against the transferrer where the certificates were sold, although

a debt for which the stockholder is only surety, the debt not yet being due.[1]

§ 545. *The courts very rarely compel the directors to declare a dividend.*— The board of directors declare the dividends, and it is for the directors, and not the shareholders, to determine whether or not a dividend shall be declared.[2]

When, therefore, the directors have exercised this discretion and refused to declare a dividend, there will be no interference by the courts with their decision, unless they are guilty of a wilful abuse of their discretionary powers, or of bad faith or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has no jurisdiction, unless fraud or a breach of trust is involved. There have been many attempts to sustain such a suit, yet, although the court did not disclaim jurisdiction, it has quite uniformly refused to interfere.[3]

not transferred on the books, before the dividend was declared. Gemmell *v.* Davis, 75 Md. 546 (1892). A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892).

[1] Solomon *v.* First Nat. Bank, 72 Miss. 854 (1895). Dividends due may be held by the corporation as an offset to debts due from the corporation, but not for a debt guaranteed by the stockholder, where such guaranty has not become due. First Nat. Bank *v.* De Morse, 26 S. W. Rep. 417 (Tex., 1894).

[2] "The directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation and to determine its amount." Hunter *v.* Roberts, 83 Mich. 63 (1890). The board of directors and not the stockholders declare dividends. Grant *v.* Ross, 37 S. W. Rep. 263 (Ky., 1896). See also the various cases in this and succeeding sections.

[3] New York, etc. R. R. *v.* Nickalls, 119 U. S. 296 (1886), rev'g 15 Fed. Rep. 575; Ely *v.* Sprague, Clarke, Ch. 351 (1840); Williams *v.* Western Union Tel. Co., 93 N. Y. 162 (1883); Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885); Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863); Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882); Smith *v.* Prattville Mfg. Co., 29 Ala. 503 (1857); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Rex *v.* Bank of England, 2 B. & Ald. 620 (1819), where the court refused to grant a mandamus for an examination of the accounts with a view to compelling a dividend. The directors are bound to distribute as profits only such part of the net income as they think proper; and their judgment of what is proper is conclusive upon the stockholders. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). *Cf.* Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880). In Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885), the court said: "In cases where the power of the directors of a corporation is without limitation and free from restraint, they are at liberty to exercise

Accordingly the directors may, in the fair exercise of their discretion, invest profits to extend and develop the business, and a reasonable use of the profits to provide additional facili-

a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of an honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective." In the above case, however, a contract that all the net profits should be divided annually varied these rules. The court refused to order a dividend.

In State *v.* Bank of Louisiana, 6 La. 745 (1834), the court refused to order a bank to declare a dividend although it had profits on hand of about one-tenth of its capital. The court said: "If the board honestly err in these matters, we are not ready to say the courts possess the power to rectify its mistakes." The remedy is in the elections. Courts will not order a dividend to be declared unless the directors "refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud or breach of that good faith which they are bound to exercise towards the stockholders." A dividend will not be ordered when the profits are invested in the plant and in long-time notes. Hunter *v.* Roberts, 83 Mich. 63 (1890). In Smith *v.* Prattville, etc. Co., 29 Ala. 503 (1857), the court refused to order a dividend, inasmuch as the charter expressly vested discretion as to that matter in the board of directors.

Where large dividends are made by a manufacturing company, it is entirely within the fair and honest discretion of the directors whether the remaining profits shall be passed to surplus or used for dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891). The fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891). Although the road was leased and the floating debt was only $1,000, and the bonded debt, $70,000, was due in seventeen years, and the other expenses only $6,000, while the company had $36,000 on hand and the regular rental for its road coming in, yet the court refused to order a dividend, in Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867), the court holding also that a demand must first be made, and that the directors, instead of the company, are the proper parties defendant. See ch. XVI, *supra.* In Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863), there was a contract to pay dividends, and it was upon this contract that the court based its right to pass upon the ability of the company to declare a dividend. The court refused to order a dividend. In Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), the court decreed the payment of what was substantially a dividend to the stockholders, but stated that an accounting must first be had to ascertain whether there was available for that purpose "a fund adequate, not only for the payment of the claims of the plaintiffs

ties for the business cannot be objected to or enjoined by a minority of the stockholders.[1]

Profits may also be set aside for the payment of indebtedness, though it is not yet due.[2] Where stock is pledged and the pledgee is in control of the company, and instead of declaring dividends he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given in pledge.[3] The free exercise of the directors' discretion cannot be interfered with by the contracts of promoters or original incorporators as to the disposition of

in the cause, but for the payment of all stockholders having like claims; and there must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad." In Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880), the court compelled the company to pay a dividend on the preferred stock, where there were profits available, but the common stockholders proposed to use all the profits for long-neglected repairs, the real reason being that there were profits sufficient for a dividend on the preferred, but not on both the common and preferred. The court said that profits meant the "surplus in receipts, after paying expenses and restoring the capital to the position it was in on the first of January in that year." Where a bill in equity, filed for the purpose of obtaining an accounting and the declaration of a dividend, does not clearly make out the existence of a surplus which the directors ought to distribute, the suit will fail. A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a mandamus was inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892).

[1] Where a corporation having a large surplus proposed, with the concurrence of a majority of the shareholders, to employ the surplus in extending the business, although such extension was opposed by a minority of the shareholders, it appearing that the proposed enlargement of the corporate enterprise was clearly *intra vires*, it was held, on a bill brought by the dissenting minority for an injunction against the proposed use of the surplus, and praying a distribution of it among the shareholders, that the facts were not such as to require the interposition of the court on behalf of the minority. Pratt *v.* Pratt, 33 Conn. 446 (1866), the court saying: "On a question of this sort much must necessarily be left to the discretion of the managing directors; and so long as they keep within the objects contemplated by the articles of association, and the expenditure is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them."

[2] Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867).

[3] Zellerbach *v.* Allenberg, 99 Cal. 57 (1893).

corporate profits.[1] A court will not compel a foreign corporation to declare a dividend.[2]

Nevertheless the discretion of the directors in the matter of declaring or refusing to declare a dividend is not absolute; and where there is a clear abuse of power in refusing to declare the dividend, a court of equity will, at the instance of any shareholder, compel the proper authorities to declare and pay the dividend.[3] Laches on the part of the shareholders in failing to commence their suit to compel the payment of a dividend until

[1] The agreement of the promoters and preliminary subscribers to the stock of the proposed company as to the division and disposition of the net profits does not bind the company unless it has expressly acquiesced in such agreement. Coyote, etc. Co. *v.* Ruble, 8 Oreg. 284 (1880). But if expressly ratified by the company it is binding. Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), where an agreement to pay annual interest to the stockholders out of the net profits was considered.

[2] Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1888). See also § 757, *infra.*

[3] Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougeray *v.* Cord, 50 N. J. Eq. 185. Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). In this case the directors had voted to themselves large salaries and had restored the same upon the order of the court. The court ordered a distribution of the money by way of dividends. Brown *v.* Buffalo, etc. R. R., 27 Hun, 342 (1882). See also Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885). In this case there was a contract that the net profits should be divided annually Scott *v.* Eagle Fire Ins. Co., 7 Paige, 198 (1838); Pratt *v.* Pratt, 33 Conn. 446 (1866); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875). Upon a sale of all the property of the corporation the directors may be compelled to declare a dividend. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). A stockholder cannot sue for profits until a dividend is declared. Beveridge *v.* New York, etc. R. R., 112 N. Y. 1 (1889).

the corporation becomes insolvent is fatal.[1] And the court will also consider that the aggrieved shareholders may, if a majority, refuse to re-elect the directors at the next election, or may sell their shares.[2]

§ 546. *Dividends can usually be made only from profits — What are profits which may be used for dividends.*— As against the dissent of stockholders or creditors, a dividend can lawfully be made only out of profits. The payment of it must leave the capital stock of the company intact and unimpaired, or the dividend itself will be held illegal.[3] A company may, however, legally pay interest on such part of the subscription as is paid in before required by calls. Such interest may be paid although there are no profits.[4]

In view of the rule that dividends can be made only from profits, it becomes important to ascertain what part of the income of a corporation constitutes "profits" which may be used for a dividend. This question has caused the courts considerable difficulty. There have been various definitions, explanations, and different states of facts involved in the cases which have come before the courts. The supreme court of the United States say that "the term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans."[5] An English court says that profits are the "excess of the current gains over the working expenses as shown by revenue accounts as distinguished from capital accounts."[6] A clear idea of what constitutes profits available for dividends can be obtained only by a study of the cases themselves.[7]

[1] Scott *v.* Eagle Fire Ins. Co., 7 Paige, 198 (1838).

[2] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844).

[3] Lockhardt *v.* Van Alstyne, 31 Mich. 76 (1875); Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207, 210 (1878). See also ch. XVI. *supra*, and cases in notes to this section. As to what constitutes a payment of dividends out of capital, see 3 R'y & Corp. L. J. 409, reviewing recent English decisions.

[4] Lock *v.* Queensland, etc. Co., [1896] A. C. 461.

[5] Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894), a dictum.

[6] *Re* London & Gen. Bank, 72 L. T. Rep. 227, 229 (1894).

[7] "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains; that is, out of net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of net earnings, the remainder is the profit

There are some general principles connected with this subject which have been established by the adjudications. It is

of the shareholders, to go towards dividends, which in that way are paid out of the net earnings." St. John *v.* Erie R'y, 10 Blatchf. 271, 279 (1872); S. C., 21 Fed. Cas. 167; S. C. aff'd, 22 Wall. 136 (1874); Warren *v.* King, 108 U. S. 389 (1882); Van Dyck *v.* McQuade, 86 N. Y. 38, 47 (1881). "Popularly speaking, the net receipts of a business are its profits." Eyster *v.* Centennial Board, 94 U. S. 500 (1876). "Surplus earnings" are said to be the moneys available for dividends. Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 191 (1883). "Net earnings" is a term synonymous with "net income," and also "net income" as used in the statute under consideration. Phillips *v.* Eastern R. R., 138 Mass. 122 (1884). In Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), it is said that the term "net earnings" does not imply that the company is wholly out of debt. The profits mean "the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution." Bills receivable are counted as part of the assets or net profits, but are not to be considered as the basis of a dividend, unless they can be sold without material loss. Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885). In the following cases the term "net profits," or an equivalent phrase, is defined: Coltness Iron Co. *v.* Black, L. R. 6 App. Cas. 315 (1881); New York, etc. R. R. *v.* Nickals, 119 U. S. 296 (1886). In Richardson *v.* Buhl, 77 Mich. 632 (1889), the court approved of the following statement: "That the first thing to be done by any manufacturer, who would ascertain his net earnings during the preceding year, is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year; and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the other hand, and this new inventory, with the deductions properly made, and all that he has received of every kind, on the other hand; and if his books are properly kept and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit-and-loss account." In Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 187 (1843), it is held that capital paid in on stock which is afterwards forfeited does not thereby become profits and liable to be distributed as a dividend. Money paid in as capital must remain and be treated and expended as capital, whether the stock that represents it is forfeited or not. To distribute such money as profits is to squander and dissipate the capital stock. "Gross earnings" include earnings of the railroad through a transfer company operated by it. Dardanelle, etc. R'y *v.* Shinn, 52 Ark. 93 (1889). "The assets, resources, and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can lawfully be declared; in other words, a profit exists." Hubbard *v.* Weare, 79 Iowa, 678 (1890); Miller *v.* Bradish, 69 Iowa, 278 (1886). See also McDougall *v.* Jersey, etc. Co., 2 Hem. & M. 528 (1864); Phillips *v.* Eastern R. R., 138 Mass. 122 (1884).

not necessary for a railroad or other corporation to use its profits to pay its funded or bonded debt instead of using those profits for a dividend. Such bonded debt is practically, though not theoretically, a part of the capital of the company.[1] But it is necessary to pay the interest on such bonded debt before any dividend is declared.[2]

The floating debt should be paid or funded before a dividend is declared.[3] A corporation often owes large debts and

[1] A company has power to and does raise its capital both by stock and by borrowing. "They expend that money in executing the works, and, the works having been executed, the capital of the company remains in the shape of the station houses, the permanent way, the warehouses, and everything else which requires expenditure of capital. The shareholders . . . are not to be told that all those things are to be paid for before they are to have any dividend out of the income." Mills *v.* Northern R'y, L. R. 5 Ch. 621, 631 (1870). For a learned and very satisfactory discussion of when net earnings are to be retained for the purpose of accumulating a fund to pay a corporate debt not yet due, see Hazeltine *v.* Belfast, etc. R. R., 79 Me. 411 (1887). All interest must be paid out of profits, and should not be charged to construction account. The court said also that a sinking fund should also be provided and an annual contribution made to it out of the profits. Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 188 (1843).

[2] Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486, 498 (1894); Gratz *v.* Redd, 4 B. Mon. (Ky.) 188 (1843). A dividend cannot properly be based on a statement which includes accrued interest with no allowance for interest on liabilities; outstanding accounts with no allowance for bad debts; and expense for perfecting a machine, it not being a success. Hubbard *v.* Weare, 79 Iowa, 678 (1890). Whether the interest on debentures can be legally charged upon the capital account of the company, the revenue available for dividend being thereby increased, was not decided in Bloxam *v.* Metropolitan R'y, L. R. 3 Ch. 337, 344, 350 (1868), but a preliminary injunction against the dividend was granted.

[3] The funded debt need not be paid before dividends are declared, but "any debts which have been incurred and which are due from the directors or the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, those are so many deductions from the profits, which, in my opinion, are not ascertained until the whole of them are paid." Corry *v.* Londonderry, etc. R'y, 29 Beav. 263, 273 (1860). However, in Stevens *v.* South Devon R'y, 9 Hare, 313, 326 (1851), a stockholder failed in his suit to enjoin dividends until the floating debt was paid. The court said: "I am of opinion that the court ought not, upon this ground, to interfere by injunction. . . . I think, also, that the question upon this third point is one of internal management, with which the court cannot interfere." Net earnings are the gross receipts less the expenses of operating the road to earn such receipts; also less the interest on the bonded, funded, permanent, or standing debt; also

still has its capital stock intact. So also outstanding and disputed claims need not be first paid.[1]

A proper sum must first be expended or set aside for repairs and reconstruction to replace depreciation due to wear and tear.[2] In other words, the fund available for dividends is as-

floating debts "which it is not wise and prudent to place in the form of a funded debt or to postpone for later payment;" also an annual contribution to a sinking fund to pay the funded debt when the condition of the company renders it expedient, as where the company will at some future time earn only its operating expenses. As to whether the floating debt should be paid and a contribution be made to a sinking fund "depends upon the financial resources and abilities of the corporation and the prospects of its road." The cost of construction may be charged to the capital-stock account. Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885).

[1] The court will not enjoin a dividend where the company shows that it has the necessary profits, even though there are outstanding claims on illegally issued stock. Carpenter *v.* New York & N. H. R. R., 5 Abb. Pr. 277 (1857). Where the company denies that the complainant is a stockholder, a preliminary injunction falls. Blatchford *v.* New York & N. H. R. R., 5 Abb. Pr. 276 (1857). Directors are not liable to replace dividends declared (by reason of a statute making them so liable if the dividends are not "from the surplus profits"), although dividends were declared while the company, being engaged in mining, assumed a mortgage debt in buying additional property, a sinking fund being begun to meet that liability gradually, and although the money to pay the dividend was borrowed, money to that amount having been put into improvements, and although losses due to an injunction against using a stream of water were not at once charged up to operating expense. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891).

[2] In Davison *v.* Gillies, L. R. 16 Ch. D. 347, note (1879), the court, at the instance of a stockholder, enjoined the declaration of a dividend on the ground that the street-railway tracks of the company had become worn out, and needed very expensive repairs, for which no provision had been made by the company, and that this capital so used up must be restored before a dividend was declared. The by-laws prohibited dividends except from the capital stock. The court said: "A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years. . . . I should think no commercial man would doubt that this is the right course — that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. . . . That being so, it appears to me that you can have no net

certained by taking into account the cost of repairs and a reasonable allowance for depreciation, for wear and tear, or constant use, giving credit for all actual permanent improvements.[1] But in the case of a mining company whose product when once used can never be replaced, it is not necessary to set aside funds for the purpose of purchasing a new mine.[2]

profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: as the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost." See also, as to construction account, Mackintosh *v.* Flint, etc. R. R., 34 Fed. Rep. 583 (1888).

[1] Depreciation at the rate of two per cent a year was charged in this case. The directors were held liable under the New Jersey statute for illegally declaring dividends. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894).

[2] A company owning a mine, lease, or patent may declare dividends out of its net proceeds, although the necessary result is that that much is permanently taken away from the substance of the estate. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891). Judge Lindley, in Verner *v.* General, etc. Trust, [1894] 2 Ch. 239, 266, said: "But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavoring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into, and form part of, such excess, in which case, to divide such excess without deducting the capital which forms part of it, will be contrary to law." In Lambert *v.* Neuchatel Asphalte Co., 51 L. J. (Ch.) 882 (1882), a stockholder sought to enjoin a dividend on the ground that the beds of asphalt belonging to the company were being consumed by the company, and that funds sufficient to replace this consumption should be set aside before any dividend was declared. Otherwise the capital would gradually be entirely used up. The court refused the injunction, inasmuch as the by-laws of the company gave absolute discretion to the stockholders to determine the net profits. No creditor's rights were involved in the case.

A very full and careful discussion of the right to declare dividends out of a mining property is to be found in Lee *v.* Neuchatel Asphalte Co., L. R. 41 Ch. D. 1, 20, 22, 24 (1889). In that case, however, the mines were at the time of the litigation more valuable than at the time when the company was formed, and it is to be noticed that the rules laid down expressly assumed that enough property existed to pay all creditors after declaring the dividend. The court said, per Lindley, J.:

"It is obvious with respect to such

In estimating the profits for a year for the purpose of declaring a dividend, it is not necessary to take into account the decrease in the value of the assets and the impairment of the capital stock of the company prior to that year. The fact that in a year prior to the declaration of the dividend some portion of the capital of an incorporated company has been lost and has not since been made good affords no ground for restraining the payment of a dividend out of profits subsequently

property, as with respect to various other properties of a like kind, mines and quarries, and so on, every ton of stuff which you get out of that which you have bought with your capital may, from one point of view, be considered as embodying and containing a small portion of your capital, and that if you sell it and divide the proceeds you divide some portion of that which you have spent your capital in acquiring. It may be represented that this is a return of capital. All I can say is, if that is a return of capital, it appears to me not to be such a return of capital as is prohibited by law. . . .

"As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunk in building up a property which, if put up for sale, would perhaps not yield £10,000? That is a business matter left to business men. If they think their prospects of success are considerable, so long as they pay their creditors there is no reason why they should not go on and divide profits, so far as I can see, although every shilling of the capital may be lost. It may be a perfectly flourishing concern, and the contrary view, I think, is to be traced to this, that there is a sort of notion that the company is debtor to capital. In an accountant's point of view it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or another. . . .

"If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the act to prevent any excess of money obtained by working the property over the cost of working it from being divided amongst the shareholders; and this, in my opinion, is true, although some portion of the property itself is sold, and in some sense the capital is thereby diminished. . . .

"But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense as is forbidden by the act."

The court held consequently that the stockholder's suit to enjoin the dividend must fail.

earned.[1] In fact, a corporation "which has lost part of its capital can lawfully declare or pay a dividend without first making good the capital which has been lost."[2] Thus, although a mining company for several years is obliged to pay the interest on its debts out of the capital stock, nevertheless in subsequent years, when large profits are earned, it may use such profits for dividends in any year after paying the interest on the debt for that year. The company need not first restore the capital stock.[3] This rule is of course subject to statutory restrictions, as, for instance, in New York state, where dividends can be made only from "surplus profits."[4] A dividend may be declared although the company has not yet completed its works.[5] In the case of railroads, the cost of additional rolling-stock and improvements may be charged to capital account, and need not be paid before a dividend is declared.[6] Where

[1] Hence where, in 1882, $350,000 was charged off for bad debts, but this was offset by credit for $350,000 for increase in the value of land owned by the company, this transaction was not to be considered in 1885 in ascertaining the profits of 1885. It is immaterial whether the alleged increase in the value of the land was correct or not. Bolton *v.* Natal Land, etc. Co., 65 L. T. Rep. 786 (1891). Though the capital stock has been impaired in time past, it has been held that dividends may be declared out of profits subsequently earned without setting them aside to restore the lost capital. Healey, Companies Law & Pr. 122. See also cases in last note. Where a bank sells its business for a certain sum, and subsequently buys back a portion of it for another sum, it may declare the dividend of the surplus that remains after deducting from the first-mentioned sum the second-mentioned sum, and also the capital stock. Lubbock *v.* British Bank, etc., [1892] 2 Ch. 198.

[2] Verner *v.* General, etc. Trust, [1894] 2 Ch. 239. Where the value of the assets of a solvent company has fallen below the nominal amount of the share capital, the company, in the absence of any special provisions in its articles or of a contract binding the company, is under no obligation to make good such depreciation in the value of the assets before declaring a dividend out of the profits. Depreciation in the value of the lease and good-will of a company is a loss of "fixed" as distinguished from "floating" capital. The balance sheet of a company cannot therefore be impeached on the ground that it does not charge anything against revenue in respect of depreciation of good-will. Wilmer *v.* McNamara & Co., [1895] 2 Ch. 245.

[3] Bosanquet *v.* St. John, etc., Ltd., 77 L. T. Rep. 206 (1897).

[4] See L. 1892, ch. 688, § 23.

[5] In Browne *v.* Monmouthshire R'y, 13 Beav. 32 (1851), the court refused to enjoin a company from declaring a dividend, the only ground of complaint being that the company had not yet completed its works.

[6] Rolling-stock may be carried to capital account instead of being charged to operating expense. Mills *v.* Northern R'y, L. R. 5 Ch. App. 621 (1870). For a definition of "net earn-

one company buys out another and agrees to pay a certain salary to an officer of the latter, or a lump sum in lieu thereof, such lump sum, if paid, is a part of the capital stock, and need not be considered as expenses.[1]

Insurance companies cannot declare dividends out of unearned premiums.[2] Banks cannot declare dividends out of interest not yet received.[3] The question of what constitutes profits applicable to dividends arises often in connection with preferred stock.[4]

Profits earned and invested in times of prosperity may properly be paid out as dividends subsequently and at a time when no dividends have been earned.[5] When the company has used profits for improvements, it may lawfully borrow an equivalent sum of money for the purpose of a dividend.[6] And it may

ings" as used in the federal statutes in regard to the government's claims on the Pacific railroads, see Union Pacific R. R. *v.* U. S., 99 U. S. 402 (1878); U. S. *v.* Central Pac. R. R., 99 U. S. 449 (1879); U. S. *v.* Kansas Pac. R. R., 99 U. S. 455 (1879); U. S. *v.* Sioux City, etc. R. R., 99 U. S. 491 (1879). Although ordinarily from the gross earnings there should be deducted "a reasonable amount for betterments and improvements, rendered necessary by the gradual increase of traffic, the better discharge of business, and the public accommodation," in arriving at the net earnings under the Thurman act relative to the Pacific railroads, no such deductions are to be made. U. S. *v.* Central Pacific R. R., 138 U. S. 84 (1891).

[1] Royal Ins. Co. *v.* Watson, [1897] A. C. 1.

[2] Unearned premiums received by an insurance company, on which the risks are still running, are not surplus profits out of which dividends can legally be made, there not being a sufficient surplus on hand in excess of the capital stock to meet the probable losses on risks not yet terminated. De Peyster *v.* American Fire Ins. Co., 6 Paige, 486 (1837). See also Scott *v.* Eagle Fire Ins. Co., 7 Paige, 198 (1838); Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856).

[3] "Money earned as interest, however well secured, or certain to be eventually paid, cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits." People *v.* San Francisco Sav. Union, 72 Cal. 199 (1887). In Iowa it has been held that where a bank with a capital of $106,860; assets of $156,904; liabilities of $56,065, declares and pays a dividend of ten per cent, *i. e.*, $10,686, the corporate creditors could not compel the stockholders to return the dividend. Miller *v.* Bradish, 69 Iowa, 278 (1886). In *Re* London & Gen. Bank, 72 L. T. Rep. 227, 230 (1894), the court intimates "that nothing ought to be included as annual profit which could not be realized as a profit if need should be," the court having before it the question of interest earned but not collected.

[4] See ch. XVI, *supra.*

[5] Mills *v.* Northern Railway, etc. Co., L. R. 5 Ch. 621 (1870); Hoole *v.* Great Western R'y, L. R. 3 Ch. 262 (1867); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875); *Re* Mercantile Trading Co., L. R. 4 Ch. 475 (1869).

[6] Mills *v.* Northern Railway, etc.

properly borrow money to pay a dividend if, upon a fair estimate of its assets and liabilities, it has assets in excess of its liabilities and capital stock equal to the amount of the proposed dividend.[1] The subsequent insolvency of the corporation does not invalidate a dividend declared when there were net profits.[2] The English authorities go further and hold that where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be dividends.[3] And even though the business is a hazardous one, money need not be set aside for possible disasters.[4]

Upon a reduction of the capital stock the surplus funds over and above the full amount of the capital stock as reduced may be divided among the stockholders, the only restriction being that such a distribution must leave the reduced capital stock entire and unimpaired. A stockholder may insist upon a division of such a surplus.[5] The question of dividends where one

Co., L. R. 5 Ch. 621 (1870); Stringer's Case, L. R. 4 Ch. 475, 492 (1869). A dividend may be declared if the revenue account shows profits, even though such profits are not on hand in the way of cash. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[1] Stringer's Case, L. R. 4 Ch. 475 (1869). "A company is quite as competent to declare dividends out of property which is invested for the time being in buildings, or anything else, as it is out of cash in hand, and it is not at all necessary that a company, any more than an individual, should have cash at the bank on which he can draw in order to declare dividends." Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890).

[2] Reid *v.* Eaton Iron Mfg. Co., 40 Ga. 98 (1869); Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836). In deciding whether a dividend was rightfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good, included among the corporate assets when the dividend was declared and paid, should not be regarded as losses sustained by the corporation because they afterwards proved to be unavailable. Main *v.* Mills, 6 Biss. 98 (1874); S. C., 16 Fed. Cas. 506. *Cf.* Flitcroft's Case, L. R. 21 Ch. D. 519 (1882), where the directors figured in what they knew were bad debts.

[3] The creditors of the corporation are entitled to the corpus of the estate, but not to any profits. If there is preferred stock, such profits go to that stock. Bishop *v.* Smyrna, etc. Co., [1895] 2 Ch. 265.

[4] A balance sheet sustaining a dividend is upheld where the business is extra hazardous, such as blockade running, and such dividend need not be refunded, even though the blockade runners are lost and other assets turn out to be worthless. *Re* Mercantile Co., L. R. 4 Ch. App. 475 (1869).

[5] Seeley *v.* New York, etc. Bank, 8 Daly, 400 (1878); S. C., Thompson Nat.

road is consolidated with another is considered elsewhere.[1] Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock, subject to the common-law liability for so doing.[2]

§ 547. *A stockholder may enjoin an illegal dividend.*— A court of equity will, upon the application of a stockholder, enjoin an attempt to distribute in dividends any part of the capital stock.[3] But the courts will not lightly review the decision of the board of directors in regard to whether the necessary profits actually exist.[4] If the dividend has been declared, but not paid, it has

Bank Cas., 804; aff'd, 78 N. Y. 608 (1879); Strong *v.* Brooklyn Crosstown R. R., 93 N. Y. 426, 435 (1883); Parker *v.* Mason, 8 R. I. 427 (1867). See also § 548, *infra;* Eyster *v.* Centennial Board, 94 U. S. 500 (1876).

[1] See ch. XVI, § 270, *supra.*

[2] People *v.* Barker, 141 N. Y. 251 (1894). See also §§ 548, 671, *infra,* and § 535, *supra.* Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). Where a few persons own all the stock of a company, and use the profits for personal expenses and miscellaneous purposes, irrespective of the corporation, all the stockholders knowing thereof and assenting thereto, a policy of insurance issued to one of them is his, even though the premiums were paid out of the corporate profits, it being shown that all this was done while the corporation was solvent, and that no rights of creditors then intervened, and that all the debts represented by the receiver arose subsequently. Little *v.* Garabrant, 90 Hun, 404 (1895); aff'd, 153 N. Y. 661. Even though a bond dividend results in the impairing of the capital stock, the court will not interfere if no harm can come from it. The court refused to "interfere after all danger had passed and for the sake of vindicating general principles." Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882). See also § 3, *supra.*

[3] Macdougall *v.* Jersey Imperial Hotel Co., 2 Hem. & M. 528 (1864); Bloxam *v.* Metropolitan R'y, L. R. 3 Ch. 337 (1867); Salisbury *v.* Metropolitan R'y, 38 L. J. (Ch.) 249 (1869); Carlisle *v.* Southeastern R'y, 1 Macn. & G. 689 (1850); Ward *v.* Sittingbourne, etc. R'y, L. R. 9 Ch. 488 (1874); Davison *v.* Gillies, L. R. 16 Ch. D. 347, n. (1879). "Dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution in dividends of capital." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894), a dictum. A stockholder has the right to enjoin the payment of a dividend from the capital stock, but the bill for that purpose must be explicit in its allegations. Coquard *v.* National, etc. Co., 49 N. E. Rep. 563 (Ill., 1898). See also cases in preceding section.

[4] Where the directors declare a dividend after a proper investigation of the financial position of the company, the court will not lightly interfere with the payment thereof; but where they declare it without proper investigation or professional assistance, and it is called in question, the burden of proof is upon them to show that it is to be fairly paid out of net profits. *Re* County Marine Ins. Co., L. R. 6 Ch. App. 104 (1870). See also

been held that all the stockholders must be joined as parties.[1] The court will not interfere if neither the stockholders nor the corporate creditors can be injured by the dividend.[2] The courts of one state will not enjoin a corporation created by another state from declaring a dividend, unless a fraud is being perpetrated on citizens of the first-mentioned state.[3] A corporate creditor has no standing in court to enjoin a dividend, even though it will impair the capital stock.[4] But owners of claims, even though not yet due, may prevent a distribution of capital stock upon a reduction thereof, unless security is given.[5]

§ 548. *Dividends which impair the capital stock may be illegal, and may be recovered back from the stockholders — Dividends on dissolution.*— As already shown, as against dissenting stockholders and as against corporate creditors a dividend can be lawfully declared only when sufficient net profits have been earned to pay that dividend. Accordingly, a dividend paid wholly or partly from the capital stock may be illegal, and may subject the corporation and the shareholders who are parties to it to serious liability. It is the well-determined doctrine of the courts of this country that the capital stock is a fund to be preserved for the benefit of corporate creditors.[6] Hence the

Hoole *v.* Great Western R'y, L. R. 3 Ch. App. 262 (1867).

[1] A stockholder may file a bill in behalf of himself and other stockholders to enjoin the declaration of dividends where there are no net profits; but where he has not joined all the stockholders as parties, he cannot enjoin the payment of a dividend already declared, even though the time of payment has not yet arrived. Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860). To same effect, Carlisle *v.* Southeastern R'y, 1 Macn. & G. 689 (1850). See Browne *v.* Monmouthshire R'y & Canal Co., 13 Beav. 32 (1851); Coates *v.* Nottingham Water-works Co., 30 Beav. 86 (1861).

[2] "Equity would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles." See Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882), where the court stated and acted upon the principle of law stated above.

[3] Howell *v.* Chicago, etc. R. R., 51 Barb. 378 (1868). In Massachusetts no equitable relief can be granted against a foreign corporation, which has neither officers nor place of business in that state, to compel the company to declare and pay dividends according to the stipulations of their certificates of preferred stock. Williston *v.* Michigan Southern, etc. R. R., 95 Mass. 400 (1866); Berford *v.* New York, etc. Co., 4 N. Y. Supp. 836 (1889).

[4] Mills *v.* Northern R'y, etc. Co., L. R. 5 Ch. App. 621 (1870). See also ch. XLV, § 735, *infra.*

[5] *Re* Telegraph Const. Co., L. R. 10 Eq. 384 (1870).

[6] See § 199, *supra;* Goodwin *v.* McGehee, 15 Ala. 232, 247 (1849), holding that a corporation cannot give away its effects to the prejudice of creditors; and any arrangement made by

rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the shareholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock.[1] In this country shareholders are bound to take notice of the true character and condition of the capital stock, and they cannot escape liability by reason of their ignorance.

If a dividend has been paid out of the capital stock the stockholders are conclusively presumed to have known it, and are liable to an action for a repayment. They cannot claim to hold the position of innocent or *bona fide* holders.[2] It has been

it with its stockholders to defeat the claims of creditors will be held void both in law and in equity, and that a stockholder cannot buy up claims against the company as an offset to his subscription.

[1] Curran *v.* State of Arkansas, 15 How. (U. S.) 304 (1853); Railroad Co. *v.* Howard, 7 Wall. 392 (1868); Osgood *v.* Laytin, 48 Barb. 463 (1867); aff'd, 3 Keyes, 521; Johnson *v.* Laflin, 5 Dill. 65, 86, note (1878); aff'd, 103 U. S. 800 (1880); Hastings *v.* Drew, 76 N. Y. 919 (1879); Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846); Wood *v.* Dummer, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854); Bartlett *v.* Drew, 57 N. Y. 587 (1874); Heman *v.* Britton, 88 Mo. 549 (1886); Story, Eq. Jur. (13th ed., 1886), § 1252. A stockholder who receives an illegal dividend is liable for it, even though he has paid it over to another person to whom the stock belonged. Finn *v.* Brown, 142 U. S. 56 (1891). Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle, etc. Bank *v.* Emery, 78 Tex. 498 (1890). The shareholders of a corporation have, in Louisiana, no right to appropriate any part of its assets to pay large salaries to themselves as officers of the company, until all creditors who are not stockholders have been paid. Cochran *v.* Ocean Dry Dock Co., 30 La. Ann. 1365 (1878). In Lexington Life, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856), it is held that the action to recover the dividend in such a case may be maintained by the company or its assigns where the dividend had been paid by mistake. See also, in general, Skrainka *v.* Allen, 7 Mo. App. 434 (1879); Ward *v.* Sittingbourne, etc. R. R., L. R. 9 Ch. App. 488 (1874); Clapp *v.* Peterson, 104 Ill. 26 (1882), holding that the property so withdrawn was liable for the creditor's whole debt and not merely for a *pro rata* share thereof. If a fixed per cent is drawn out by stockholders instead of a dividend, and this per cent exceeds the profits, a stockholder, upon the insolvency of the corporation, must pay back the excess received by him. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1891). Creditors may reach shares of stock that the corporation which becomes insolvent has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 158 (1892).

[2] Quoted and approved in Fort Payne Bank *v.* Alabama Sanitarium,

held in England, however, that where the by-laws provide that the directors, for salary, shall have ten per cent of the surplus profits over a certain dividend, they may recover, it although they sue for it many years afterwards, when it turns out that the assets were overestimated, but in good faith.[1]

A stockholder may by bill in equity compel a return of the dividend paid out of the capital stock.[2] A stockholder who receives dividends wrongfully declared cannot then, as a corporate creditor, hold other stockholders liable on a statutory liability for wrongfully declaring dividends.[3] In Massachusetts at an early day it was held that an action at law would not lie to reach dividends paid out of the capital stock.[4] Notes given by an insolvent corporation for unearned dividends are not legal except in *bona fide* hands.[5]

A corporate creditor may compel stockholders to refund the amount received by them on a distribution of the corporate assets upon dissolution or a sale of all the assets of the company, to the extent that his claim has not been paid, after he has exhausted his remedy against the corporation itself.[6] But aside from this it is legal for the stockholders to dispose of the assets. So long as corporate creditors are paid, no one is injured by the stockholders distributing among themselves the assets.[7] And a corporate creditor may by his acts be estopped from attacking the dividend.[8]

103 Ala. 358 (1894). A stockholder must turn back illegal dividends, although he knew nothing of the illegality. Finn *v.* Brown, 142 U. S. 56 (1891); *Re* Denham, L. R. 25 Ch. D. 752 (1883).

[1] *Re* Peruvian Guano Co., [1894] 3 Ch. 690.

[2] Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875).

[3] Thompson *v.* Bemis, etc. Co., 127 Mass. 595 (1879).

[4] Vose *v.* Grant, 15 Mass. 505, 517 (1819); Spear *v.* Grant, 16 Mass. 9, 15 (1819); Paschall *v.* Whitsett, 11 Ala. 472 (1847).

[5] Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn., 1896).

[6] See § 549, *infra*, and ch. XL, § 672, *infra*.

[7] See §§ 668, 763, *infra*. Where three persons have formed a corporation and transferred a patent to it

[8] Thus, where a company is insolvent, and bondholders have agreed to sell their bonds to a certain party at eighty cents on the dollar, and that party then agrees with the corporation to acquire and cancel the bonds and take the property from the corporation for a nominal consideration, and after he has made such agreement the bondholders decline to sell and proceed to foreclose their mortgage, and realize ninety cents on the dollar, the court will not compel the stockholders to pay to the bondholders the corporate assets which the stockholders have distributed among themselves. Brooks *v.* Brooks, 174 Pa. St. 519 (1896).

The distribution of the assets among the stockholders upon dissolution is made upon equitable principles.[1]

§ 549. *Proceedings to recover back such a dividend.*— It is in general the practice, where dividends have been paid out of the

for all its capital stock, and are the sole stockholders, there being no creditors, they may purchase the patent back and give the corporation their note for the par value of the whole capital stock. Although the corporation subsequently becomes insolvent the transaction cannot be impeached. Skinner *v.* Smith, 56 Hun, 437 (1890); aff'd, 134 N. Y. 240 (1892). A debt of a stockholder to be paid from "dividends" must be paid from the dividends of assets, if the company dissolves. Cozad *v.* McKee, 130 Pa. St. 406 (1889). Distribution of funds of incorporated association. Aston *v.* Dashaway Assoc., 84 Cal. 61 (1890). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all the facts cannot complain. Parke, etc. Co. *v.* Terre Haute, etc. Co., 129 Ind. 73 (1891).

Practically there was a division of the corporate assets among the stockholders in Boston, etc. Trust Co. *v.* Bankers', etc. Tel. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United Lines Tel. Co. *v.* Boston S. D. & Trust Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation.

Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock. The common-law liability for so doing remains of course. People *v.* Barker, 141 N. Y. 251 (1894). See also § 671, *infra*, §§ 535, 546, *supra*. After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged. Coxon *v.* Gorst, [1891] 2 Ch. 73. Although a corporation sells all its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders, without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors. A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Ft. Payne Bank, 22 S. Rep. 75 (Ala., 1897). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable, but he must first obtain a judgment against the corporation, and execution must be returned unsatisfied. Lamar *v.* Allison, 28 S. E. Rep. 686 (Ga., 1897).

[1] See § 641, *infra*.

capital stock in prejudice of the rights of corporate creditors, for a judgment creditor, upon the return of his common-law execution against the corporation wholly or partly unsatisfied, to commence an action in equity on behalf of himself and all other creditors who may come in, in the nature of a creditors' bill, against the stockholders to whom the dividend was unlawfully paid, to recover back so much thereof as was paid out of the capital stock.[1]

It is a necessary condition precedent to the right to bring this action that a valid judgment shall have been obtained against the corporation, and that execution thereon shall have been returned wholly or partly unsatisfied, and this judgment is conclusive as to the merits of the creditor's claim.[2] If the

[1] Hastings *v.* Drew, 76 N. Y. 9 (1879); Bartlett *v.* Drew, 57 N. Y. 587 (1874); McLean *v.* Eastman, 21 Hun, 312 (1880); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Curran *v.* State of Arkansas, 15 How. 304 (1853); Grant *v.* Ross, 37 S. W. Rep. 263 (Ky., 1896). See also U. S. *v.* Globe Works, 7 Fed. Rep. 530 (1881); Brewer *v.* Michigan Salt Assoc., 58 Mich. 351 (1885). See also § 548, *supra*. And see Vose *v.* Grant, 15 Mass. 505 (1819), where it was held that an action as for tort could not be maintained by a creditor against an individual stockholder who had received dividends. Spear *v.* Grant, 16 Mass. 9, 15 (1819), holding that an action at law will not lie. An action on the case for fraud lies for a conspiracy, the stock having been sold back to the corporation bank and the bank then closed. Bartholomew *v.* Bentley, 15 Ohio, 659 (1846). Where all the property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may by a bill in equity compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund. Baltimore, etc. Co. *v.* Interstate, etc. Co., 54 Fed. Rep. 50 (1893).

[2] Sturgis *v.* Vanderbilt, 73 N. Y. 384 (1878). In this case there was no recovery against a director who had sold his stock and ceased to participate in the company's affairs five years before the dissolution. Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849); Andrew *v.* Vanderbilt, 37 Hun, 468 (1885); Hastings *v.* Drew, 76 N. Y. 9 (1879), where this liability was enforced against one who had become a purchaser of stock after the cause of action arose upon which the judgment was secured, the shares being by the terms of the transfer subject to all claims against it. In New York the receiver of an insolvent corporation may maintain an action for the benefit of the creditors against the shareholders to recover the sums received by them as dividends at the time the company was insolvent; and in such an action the creditors of the corporation are proper parties defendant for the purpose of restraining them from proceeding individually against the shareholders separately to recover the unlawful dividends. Osgood *v.* Laytin, 3 Keyes, 521 (1867). See also Lexington Life, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 312 (1856), holding that an assignee of the company for the benefit of the com-

treasurer is sued he cannot interplead.[1] A receiver may institute the suit.[2] He may file a bill in equity to compel stockholders to refund dividends illegally paid to them.[3] He represents the creditors as well as the corporation and stockholders. As an officer of the court he may sue, and is not estopped by the acts of the corporation.

In the creditor's suit all the stockholders who can be reached should be made parties defendant, and as to those unknown or insolvent or beyond the jurisdiction there should be a proper averment in the bill.[4] The corporation also should be made a party defendant to the bill.[5]

pany might sue. But a receiver's suit cannot in such a case be brought for the benefit of the stockholders. Butterworth *v.* O'Brien, 39 Barb. 192 (1863). *Cf.* McLean *v.* Eastman, 21 Hun, 312 (1880).

[1] A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890).

[2] A receiver of the corporation is the proper party to sue to recover back any dividends which were paid from the capital stock. Corporate creditors cannot sue for these after the receiver goes in. It is doubtful whether the corporation itself could complain of such dividends. A sale of the assets by the receiver does not carry this cause of action. Minnesota, etc. Co. *v.* Langdon, 44 Minn. 37 (1890).

[3] Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895), rev'g 67 Fed. Rep. 273.

[4] Wood *v.* Dummer, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435; Bartlett *v.* Drew, 57 N. Y. 587 (1874). In the case last cited — a leading authority in New York — it is held that the creditor is not required to bring his suit on behalf of other creditors who may choose to come in, but may sue alone and for his own benefit exclusively, and that he need not make all the stockholders parties, but may pursue one, any, or all, as he may elect, upon the theory that with the equities between the stockholders themselves he has nothing to do, unless he choose to intervene to settle them. Brewer *v.* Michigan Salt, etc., 58 Mich. 351 (1885). See also Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886); Williams *v.* Boice, 38 N. J. Eq. 364 (1884). Many stockholders may be joined as defendants in a suit in equity to recover back illegal dividends, even though some received a greater number of dividends than others. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895).

[5] First Nat. Bank *v.* Smith, 6 Fed. Rep. 215 (1879), followed in Dormitzer *v.* Illinois, etc. Bridge Co., 6 Fed. Rep. 217 (1881). Where all the assets have been distributed, an action against the stockholders to recover back damages for a tort committed by the corporation must include the corporation as a co-defendant. Swan, etc. Co. *v.* Frank, 39 Fed. Rep. 456 (1889). In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894).

The shareholder who is compelled to pay more than his equitable proportion of any unpaid corporate debt may, in a proper proceeding, resort to his associates for contribution.[1] A transferee of stock against which creditors have this claim at the time of transfer is not liable to respond in a creditor's suit therefor.[2] The statute of limitations runs in favor of shareholders, who receive such dividends in good faith and without actual notice, from the time they are paid as against the corporation and its creditors.[3]

§ 550. *The liability herein of the corporate officers.*— The liability of the corporate officers as to dividends paid out of the capital stock is not definitely determined. That they are liable for the amount of any such dividend that they themselves receive as shareholders cannot, however, be questioned.[4]

Some cases go to the full extent of holding the directors lia-

[1] Bartlett *v.* Drew, 57 N. Y. 587 (1874).

[2] Hurlbut *v.* Tayler, 62 Wis. 607 (1885).

[3] The statute of limitations runs against an action to recover back illegal dividends from stockholders. It begins to run from the time when the dividend is paid, provided the stockholder did not know or have reason to know the condition of the company. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895); Lexington Life, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 446 (1856). See also *Re* Mammoth Copperopolis, 50 L. J. (Ch.) 11 (1880); Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849).

[4] Main *v.* Mills, 6 Biss. 98, and note (1874): S. C., 16 Fed. Cas. 506, where a dividend paid to the president, but not legitimately earned, was recovered from the president of a bank by the assignee in bankruptcy; Rance's Case, L. R. 6 Ch. App. 104 (1870), which was the case of a marine insurance company, where the directors declared a bonus on the shares of stock without making out a profit and loss account, and it was held that a director who had received such bonus on a balance sheet thus carelessly drawn up should, in consequence of his neglect of duty, repay the amount to the liquidator. It was the gross neglect of the directors which militated so strongly against them, and both the lord justices declared the court would not have so held had there been *bona fides* and regularity in the declaration of the bonus. *Re* Denham, L. R. 25 Ch. D. 752 (1883). Here it was held that an innocent director was not personally responsible for the fraudulent reports and balance sheets and the dividends paid under them, and that — having regard to the extraordinary powers vested by the articles in the chairman, and to the fact that the books had been kept and audited by duly authorized officers, and that the director sought to be charged had no reason to suspect any misconduct — he was not liable to repay any of the dividends so received by him, although they were in fact paid out of the capital.

ble absolutely for all dividends paid out of capital stock. But the better rule is that, when the directors declare a dividend in good faith and without negligence, they are not to be held liable merely because the dividend turns out to have impaired the capital stock.[1] Directors are not personally liable for dividends improperly paid, where they honestly believe in a state of facts which would justify the payment and rely upon the general manager's certificate as to the assets.[2] But where the directors negligently or wilfully and knowingly declare and pay a dividend out of the capital stock, they are personally liable to refund that dividend.[3] Where the directors of a national bank place

[1] Excelsior Petroleum Co. *v.* Lacey, 63 N. Y. 422 (1875). In Stringer's Case, L. R. 4 Ch. App. 475 (1869), it was held, in accordance with this view, that where the action of a board of directors in making a dividend was *bona fide*, they are not liable for errors of judgment in preparing a balance sheet showing the assets of the concern. In this case it appears that the directors included among the corporate assets a debt due the company by the government of the Confederate States; some cotton owned by the company but stored within the limits of the Confederacy; and certain merchant ships engaged in running the blockade, all which were estimated at their full value. These assets being subsequently destroyed and lost to the company, its bankruptcy followed. Osgood *v.* Laytin, 3 Keyes (N. Y.), 521 (1867), was an action by a receiver to recover dividends improperly declared. The court said: "Ignorance of facts that it was the duty of the managers to know — not to know which was gross ignorance — cannot excuse the managers and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors." But the directors of a bank are not liable for dividends declared in good faith, even though it subsequently turns out that debts to the bank which they considered good were found to be bad. Witters *v.* Sowles, 31 Fed. Rep. 1 (1887). However, the court in *Re* Oxford Building, etc. Soc., 55 L. T. Rep. 598 (1886), say it is settled that "directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up;" that the company, or a creditor, or a liquidator may enforce it; that the acquiescence of the stockholders does not affect creditors; that the statute of limitations does not apply; and that the innocent intent of the directors is no defense. The directors are not personally liable for dividends declared, even though, in estimating the assets, claims are included which ultimately prove to be bad, the result thereby being that the dividend was paid out of the capital. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[2] *Re* Kingston Cotton Mill Co., [1896] 1 Ch. 331.

[3] In order to ascertain profits the directors should have a revaluation. If they employ persons whom they reasonably believe to be competent and adopt their conclusions, they are not liable for mistakes. Where, however, the directors take no active, in-

a fictitious value on the assets of the bank in order to declare a stock dividend, such directors are liable for the par value of the stock to the receiver of the bank for the benefit of its creditors, unless the directors show that the stock could not have been

telligent, guiding part in the affairs of the company, and really do nothing except as suggested by the secretary, and do not examine the accounts at all, and cause the stockholders to declare dividends on a statement which omits large liabilities, so that dividends are really paid out of the capital stock, such directors are personally liable to corporate creditors for such dividends. The secretary also is liable, he being the active manager of the company. The six-years statute of limitations, however, applies, and only those dividends which have been declared within six years must be repaid. Interest, however, will be allowed. Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890); *Re* National Funds, etc. Co., L. R. 10 Ch. D. 118 (1878); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 194 (1843); Hill *v.* Frazier, 22 Pa. St. 320 (1853); *Re* Alexandra Palace Co., L. R. 21 Ch. D. 149 (1882); Salisbury *v.* Metropolitan R'y, 22 L. T. (N. S.) 839 (1870), where the suit was by a non-participating stockholder; Flitcroft's Case, L. R. 21 Ch. D. 519 (1882); Evans *v.* Coventry, 8 De G., M. & G. 835 (1857); Turquand *v.* Marshall, L. R. 4 Ch. App. 376 (1869), denying this remedy to the stockholders as a body. In Burnes *v.* Pennell, 2 H. L. Cas. 497, 531 (1849), Lord Brougham said: "I beg to be understood as going with those who view with the greatest severity the conduct of railway directors in declaring dividends which can only be paid out of capital, because I consider that that is of itself a most vicious and fraudulent course of conduct. It is telling the world that their profits are large when it may be that their profits are *nil*, or that their losses are large with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go to the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties." The payment of a dividend out of the capital stock is *ultra vires*, and incapable of ratification by the stockholders. Accordingly, where the directors mislead the shareholders by representing in the reports and balance sheets, as good, debts which they know to be bad, and thus knowingly pay dividends which in fact impair the capital stock, it is not a defense that the shareholders, relying in good faith upon the representations and reports of the directors, pass resolutions declaring the dividends at regular meetings of the corporation; and an action will lie on behalf of creditors to compel the directors to refund. In such an action the directors cannot set off any money due from the company to them, nor have they recourse to the shareholders who took the dividends *bona fide*. *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882); *Re* County Marine Ins. Co., L. R. 6 Ch. 104 (1870). See also Scott *v.* Eagle F. Ins. Co., 7 Paige, 198 (1838). In Kentucky it is doubted whether directors are liable to creditors, the courts of that state seeming to incline to hold them liable only to the corporation or the stockholders. Lexington, etc. R. R. *v.* Bridges, 7 B. Mon. (Ky.) 556, 559 (1847).

otherwise issued or sold.[1] Where the directors make even grave errors in the exercise of judgment they are not liable; but where they surrender their judgment to others, either the manager or auditors, they are liable for dividends illegally paid, especially where they include, as good, loans which they had not looked into, and where they do not take into consideration overdrafts. They will be held liable from the date when a prudent man would not have included in the profits unpaid interest. Each director is liable only for dividends declared or recommended at meetings when he was present.[2] Frequently also, when a dividend is paid out of the capital stock, the directors are made liable therefor by statute without reference to any fraud or fraudulent intent on their part.[3] In England, the auditors of a company are officials, and are liable for dividends improperly paid, based on balance sheets improperly made up by the auditors, especially where the auditors included as regular investments loans for which there was no proper security.[4] The

[1] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

[2] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. See 78 L. T. Rep. 729.

[3] In Massachusetts, officers of a corporation can be charged, under the statute in force upon the subject in that state (Stat. 1862, ch. 218, § 3; Stat. 1870, ch. 224, §§ 40, 42), with corporate debts after a judgment against the corporation, and after a demand and return upon the execution. Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532, 536 (1875); Priest *v.* Essex Mfg. Co., 115 Mass. 380 (1874). So, in New Jersey, directors are similarly liable by statute. N. J. Rev. (1877), p. 178; Williams *v.* Boice, 38 N. J. Eq. 364 (1885). The New Jersey statute imposing a liability on directors for illegally declared dividends was applied in Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). Under the New York statute making directors liable for declaring dividends from the capital stock, they are liable to the extent to which the capital stock is reduced by the dividend, and in the case of bank directors they may show that notes which it is claimed they should have charged off were actually paid later. Dykman *v.* Keeney, 10 N. Y. App. Div. 610 (1896). Under the New York statute the directors are liable to repay only such part of an illegal dividend as will recoup the corporation or its creditors for the actual loss sustained thereby. Dykman *v.* Keeney, 16 N. Y. App. Div. 131 (1897). Dividing the property is equivalent to a declaration of dividend so far as the directors are concerned. Rorke *v.* Thomas, 56 N. Y. 559 (1874). In Massachusetts the liability of the directors has been held to be enforceable by corporate creditors only. Smith *v.* Hurd, 53 Mass. 371 (1847), and cases *supra*.

[4] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. Auditors are not officers in the true sense of the word. *Re* Western, etc. Co., Ltd., 76 L. T. Rep. 239 (1897), rev'g 75 L. T. Rep. 648.

manager of a corporation who makes up the accounts may also be liable for dividends illegally declared.[1]

Under certain circumstances, in the absence of actual fraud, the directors who have been compelled to pay the claims of corporate creditors may in turn recover what they have paid in an action against the shareholders.[2] But a director from whom a recovery is had under the Pennsylvania statute,[3] as a wrong-doer, has no right of subrogation as against the corporation.[4] And claims against directors who are made liable by statute in these cases may, in the absence of actual fraud on their part, be barred by laches.[5] A statutory liability in reference to illegal dividends may not survive the death of a director who is liable.[6]

§ 551. *Guaranty of dividends by contract.*— A guaranty of dividends is often made by the corporation itself that issues the stock. The stock is then called guaranteed or preferred stock. This class of stock is fully considered elsewhere.[7]

A guaranty of dividends frequently is made by a third per-

[1] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[2] Salisbury *v.* Metropolitan R'y, 22 L. T. (N. S.) 839 (1870); *Re* Alexandra Palace Co., L. R. 21 Ch. D. 149 (1882). *Cf.* § 548, *supra.* A director who, with knowledge of the insolvency of the company, loans money to the corporation for the purpose of declaring a dividend, is not entitled, upon an assignment of the corporate effects, to repayment of any part of the loan so made until the claims of stockholders are satisfied. Kisterbock's Appeal, 51 Pa. St. 483 (1866).

[3] Act of April 7, 1849, § 9.

[4] Hill *v.* Frazier, 22 Pa. St. 320 (1853). In this case it was held that, in the creditor's suit against the director, the corporation itself is not a necessary co-defendant.

[5] *Re* Mammoth Copperopolis of Utah, 50 L. J. (Ch.) 11 (1880). The acquiescence of stockholders does not bind creditors, and the statute of limitations does not apply. *Re* Oxford, etc. Soc., 55 L. T. Rep. 598 (1886). That the statute of limitations does not apply, see also Flitcroft's Case, L. R. 21 Ch. D. 519 (1882). The statute of limitations does not commence to run against an officer of the corporation who has paid dividends to himself out of the capital stock until the fraud is discovered. Main *v.* Mills, 6 Biss. 98 (1874); S. C., 16 Fed. Cas. 506. Where the directors paid out dividends from the organization of the company in 1868 until 1878, and were then stopped at the instance of the board of trade, and the company was wound up in 1886, and in 1890 the receiver brought suit to hold the directors liable, it was held that there was not such delay as to bar the remedy, since the defendants had not been prejudiced by the delay. Masonic, etc. Ass. Co. *v.* Sharpe, [1892] 1 Ch. 154.

[6] Boston, etc. R. R. *v.* Graves, 80 Fed. Rep. 588 (1897).

[7] See ch. XVI, *supra.*

son. Such a guaranty is often made when one person sells stock to another and guarantees that the corporation will pay certain dividends thereon. It often arises, also, where one company buys out another or leases the property of another corporation and guarantees dividends on the stock or the interest on the bonds of the latter. This subject, also, is considered elsewhere.[1]

[1] See ch. XLVI, § 775, *infra*.

CHAPTER XXXIII.

LIFE ESTATES AND REMAINDERS IN SHARES OF STOCK.

§ 552. The subject.
553. The three rules in regard to stock or extraordinary cash dividends.
554. The American or Pennsylvania rule.
555. The Massachusetts rule.
556, 557. The English rule.
558. The apportionment of dividends.
559. The right to subscribe for new shares as between life tenant and remainder-man.
560. Miscellaneous questions herein.

§ 552. *The subject.*— Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the question of whether the life tenant or the remainder-man is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainder-man should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made if possible.

The courts, however, differ widely in laying down rules on this subject. These differences form the subject of this chapter.

§ 553. *The three rules in regard to stock or extraordinary cash dividends.*— When a stock or extraordinary cash dividend is declared upon shares held in trust, or owned in such a way that one person has an estate therein for life and another person the remainder over, there at once arises a contest between life tenant and remainder-man. Their interests necessarily conflict, because, if such dividend is held to be income, it belongs to the tenant for life; whereas if it is held to be a part of the *corpus*, or principal, it enures to the benefit of the remainder-man's estate. There are three well-defined rules upon this subject, which may be denominated respectively the American or Pennsylvania, the Massachusetts, and the English rule.

They lead to essentially contrary conclusions, and will be considered in order.

§ 554. *The American or Pennsylvania rule.*— This rule, inasmuch as it obtains in nearly every state in the Union, may well be called the American rule. It proceeds upon the theory that the court, in disposing of stock or property dividends, as between life tenant and remainder-man, may properly inquire as to the time when the fund out of which the extraordinary dividend is to be paid was earned or accumulated. If it is found to have accrued or been earned before the life estate arose, it is held to be principal, and, without reference to the time when it is declared or made payable, to belong to the *corpus* of the estate, and not to go to the life tenant. But when it is found that the fund out of which the dividend is paid accrued or was earned, not before but after the life estate arose, then it is held that the dividend is income, and belongs to the tenant for life.[1] This equitable rule prevails not only in Pennsylvania, where it seems to have been first clearly declared, but also in many other jurisdictions.[2]

[1] Earp's Appeal, 28 Pa. St. 368 (1857); Wiltbank's Appeal, 64 Pa. St. 256 (1870). See also the following later Pennsylvania cases in point: Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882); Vinton's Appeal, 99 Pa. St. 434 (1882); *Re* Thomson's Estate, 11 W. N. Cas. 482 (1882). *Cf.* Roberts's Appeal, 92 Pa. St. 407 (1880); Thomson's Appeal, 89 Pa. St. 36 (1879). A scrip dividend converted into stock belongs to the life tenant. Philadelphia Trust, etc. Co.'s Appeal, 16 Atl. Rep. 734 (Pa., 1889). A large dividend in cash, owing to a sale of part of the property of an unincorporated association, is income, and goes to the life tenant. Oliver's Estate, 136 Pa. St. 43 (1890). Money received by the corporation from new stock issued to obtain funds to replace profits which had been used for improvements is capital and not income, and does not go to the life tenant. Smith's Estate, 140 Pa. St. 344 (1891). Where the company in which the trustee holds stock gives to its stockholders the option to subscribe to the stock of another company, the premium at which the trustee sells this option is principal and not income. Thomson's Estate, 153 Pa. St. 332 (1893).

[2] *Connecticut:* A stock dividend based upon the profits actually invested in the business is not income or dividends such as pass to the life tenant. Spooner *v.* Phillips, 62 Conn. 62 (1892). Where an estate is merged into a corporation, the life tenant of the real estate cannot claim that a part of the capital stock represents past increase of value and that she is entitled absolutely to that part of the stock. Hotchkiss *v.* Brainerd Quarry Co., 58 Conn. 120 (1889). Where it is impossible for the company to pay arrears of dividends on cumulative preferred stock, and a compromise is made by which the dividend is to be reduced one-half and double the amount of stock is to be

Where a *cestui que trust* is to receive the income until he reaches a certain age and then is to receive the principal, he is considered a life tenant until he arrives at that age. The life tenant takes the entire interest on bonds, although the premium

given to each stockholder, this new stock goes to the remainder-man. Mills *v.* Britton, 64 Conn. 4 (1894).

Kentucky: As between a life beneficiary in corporate stock and the remainder-man, a stock dividend will be treated as income if it in fact represents a profit. A privilege given by a corporation to its stockholders to take additional stock at par is appurtenant to the old stock, and does not belong to the life beneficiary. Hite *v.* Hite, 93 Ky. 257 (1892); S. C. below, 2 R'y & Corp. L. J. 568.

Maine: For the rule in Maine, see Richardson *v.* Richardson, 75 Me. 570 (1884). A dividend consisting of stock purchased by an issue of bonds by the company belongs, not to the life estate, but to the body of the estate. Gilkey *v.* Paine, 80 Me. 319 (1888).

Maryland: See Thomas *v.* Gregg, 78 Md. 545 (1894).

New Hampshire: Lord *v.* Brooks, 52 N. H. 72 (1872); Wheeler *v.* Perry, 18 N. H. 307 (1846); Peirce *v.* Burroughs, 58 N. H. 302 (1878). An increase of stock upon consolidation and a stock dividend thereon are principal. Law *v.* Alley, 29 Atl. Rep. 636 (N. H., 1892). Where new stock is issued and the right to subscribe therefor is sold, the proceeds of such sale belong to the remainder-man, and only the income to the life tenant. A fifty per cent cash dividend is presumed to be from the profits and to belong to the life tenant. Walker *v.* Walker, 39 Atl. Rep. 432 (N. H., 1896).

New Jersey: Van Doren *v.* Olden, 19 N. J. Eq. 176 (1868); Ashhurst *v.* Field, 26 N. J. Eq. 1 (1875); 40 Atl. Rep. 278.

New York: McLouth *v.* Hunt, 154 N. Y. 179 (1897); Riggs *v.* Cragg, 89 N. Y. 479 (1882); *Re* Kernochan, 104 N. Y. 618 (1887); Riggs *v.* Cragg, 26 Hun, 89 (1881); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Woodruff's Estate, Tucker, 58 (1865), and Goldsmith *v.* Swift, 25 Hun, 201 (1881). *Cf.* Cragg *v.* Riggs, 5 Redf. 82 (1880); Scovel *v.* Roosevelt, 5 Redf. 121 (1881). Profits upon the sale of stock are principal and not income in New York. Whitney *v.* Phœnix, 4 Redf. 180 (1880). In Hyatt *v.* Allen, 56 N. Y. 553, 557 (1874), the court of appeals intimated plainly its disapproval of the rule prevailing in England upon this subject. Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Prime's Estate, N. Y. L. J., March 6, 1891, reviewing the authorities. A dividend arising from the sale of part of the assets of the company belong to the remainder-man. *Re* Curtis, N. Y. L. J., Jan. 24, 1890. Money received from stock upon the winding up of the corporation belongs to the remainder-man. *Re* Skillman's Estate, 9 N. Y. Supp. 469 (1890). Where the capital is reduced and returned to the stockholders with a surplus, the surplus goes to the life tenant. *Re* Warren's Estate, 11 N. Y. Supp. 787 (1890). Though the dividends are necessarily from the capital stock, as in mining or other similar corporations, the life tenant is entitled to them. *Re* James, 78 Hun, 121 (1894). Where all the property of a corporation, excepting the cash and certain bonds, is turned over to a new corporation for stock of the latter at the rate of ten shares of the stock in the new corporation for each share of stock in the old corporation, and then the cash and bonds

on the bonds gradually disappears as they come nearer to being due. A stock dividend representing accumulated profits goes to the life tenant, the court stating that the question is always to be decided according to the actual facts of the transaction. The court said: "For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter; but when a question arises between life tenants and remainder-men concerning the ownership of the earnings thus converted, the action of the corporation will not conclude the courts."[1]

§ 555. *The Massachusetts rule.*— This rule, which prevails in Massachusetts, Georgia, and Rhode Island, is sometimes called "the rule in Minot's Case." It regards cash dividends, whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the *corpus*.[2] There is little doubt,

are distributed among the stockholders of the old corporation, the new stock goes to the remainder-man, but the dividend of cash and bonds goes to the life tenant. Matter of Rogers, 22 N. Y. App. Div. 428 (1897). Concerning the question as to the rights of the life tenant and remainder-man where trustees buy securities at a premium or sell them at a premium, see Scovel *v.* Roosevelt, 5 Redf. 121 (1881); Townsend *v.* U. S. Trust Co., 3 Redf. 220 (1877); Duclos *v.* Benner, 5 N. Y. Supp. 733 (1888); Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Whittemore *v.* Beekman, 2 Dem. 275 (1883); Cridland's Estate, 132 Pa. St. 479 (1890). See note in 18 Abb. N. Cas. 185.

South Carolina: Profits and income existing when the trust is created are *corpus*, but subsequent profits and income are income. Cobb *v.* Fant, 36 S. C. 1 (1892).

Tennessee: Stock dividends declared from net earnings made after the death of testator, who bequeathed the stock on which the dividends were declared, for life, belong to the life tenant as income, not to the remainder-men as part of the *corpus*. Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472 (1896). For articles on "Right to dividends as between life tenant and remainder-man," see 26 Am. L. Rev. 1, and 24 Am. Rep. 169.

[1] McLouth *v.* Hunt, 154 N. Y. 179 (1897).

[2] Minot *v.* Paine, 99 Mass. 101 (1868). In this case the principle is thus stated: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." In subsequent cases this rule has been affirmed and elaborated. Daland *v.* Williams, 101 Mass. 571 (1869); Leland *v.* Hayden, 102 Mass. 542 (1869); Heard *v.* Eldredge, 109 Mass. 258 (1872); Rand *v.* Hubbell, 115 Mass. 461 (1874); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). See also Harvard College *v.* Amory, 26 Mass. 446 (1830); Balch *v.* Hallet, 76 Mass. 402 (1858); Atkins *v.* Albree, 94 Mass. 359 (1866).

however, that this rule works great hardship and injustice in many cases.

The court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely.[1]

[1] Thus, in Daland *v.* Williams, 101 Mass. 571 (1869), where the directors, having voted to increase the capital stock by three thousand shares, declared a cash dividend of forty per cent, and authorized the treasurer to receive that dividend in payment for two thousand eight hundred of the shares, the remaining two hundred shares to be sold, the court held that the transaction was virtually a stock dividend, and that the shares must go to the remainder-man's fund. *Cf.* Rand *v.* Hubbell, 115 Mass. 461 (1874). In Leland *v.* Hayden, 102 Mass. 542 (1869), where it appeared that the company had invested its surplus earnings in its own stock, and subsequently declared a dividend of that stock, the life tenant was held absolutely entitled to it. The life tenant takes the dividend where it is in cash, although the cash is derived from increased stock which is offered to the old stockholders for subscription, the profits having been used for improvements. This is not a stock dividend. Davis *v.* Jackson, 152 Mass. 58 (1890). See also Balch *v.* Hallet, 76 Mass. 402 (1858); Reed *v.* Head, 88 Mass. 174 (1863); Harvard College *v.* Amory, 26 Mass. 446 (1830); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883). In New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886), it was held, in an elaborate opinion by Devens, J., that the gain or loss arising from the sale of stock held in trust is the gain or loss of the *corpus*, and that the sum received constitutes a new principal. Accordingly, a trustee who has invested in bonds at a premium may retain annually from the income payable to the life tenant such sums as will restore to the fund at its maturity what was taken therefrom at the time of the investment. See also the dissenting opinion of Mr. Justice Holmes in this case; and *cf.* Bowker *v.* Pierce, 130 Mass. 262 (1881); Dodd *v.* Winship, 133 Mass. 359 (1882); Wright *v.* White, 136 Mass. 470 (1884); Parsons *v.* Winslow, 16 Mass. 361 (1820); Lovell *v.* Minot, 37 Mass. 116 (1838). The court will take into consideration, in determining the question as between life tenant and remainder-man, the whole character of the transaction, and the nature and source of the property distributed, with due regard to all the facts preceding, attending, and resulting from the declaration of the dividend. In Heard *v.* Eldridge, 109 Mass. 258 (1872), it is said: "The suggestion that the intention of the directors should determine the question whether the dividend is capital or income cannot be correct. . . . It is more safe to look at the character of the property and the transaction." See three interesting and valuable little pamphlets by "A Layman," wherein the merits of the question are fully and learnedly discussed, and entitled respectively "Common Sense *versus* Judicial Legislation;" "Stock Dividends: the Rule in Minot's Case Again Restated with Variations by the Supreme Judicial Court of Massachusetts," and "A Third Chapter on the Rule in Minot's Case." (N. Y.: G. P. Putnam's Sons.) See 5 Am. L. Rev. 720; Perry, Trusts (3d ed.), §§ 544, 545, and notes. In Georgia the code is construed so as to follow the Massachusetts rule.

The supreme court of the United States has held that a life tenant of stock does not take a stock dividend declared during the life tenancy.[1]

In Rhode Island the courts have adopted a rule somewhat like "the rule in Minot's Case," without the modification engrafted upon it by the subsequent decisions of the Massachusetts courts. It is a rule which in general prefers the remainder-man to the life tenant.[2]

§§ 556, 557. *The English rule.*— In England an ordinary, regular, usual cash or stock or property dividend belongs to the life tenant, while an extraordinary cash or stock or property dividend belongs to the *corpus* of the trust.[3] This rule was established in 1799 in England.

Millen *v.* Guerrard, 67 Ga. 284 (1881); Ga. Code, § 2256.

[1] Gibbons *v.* Mahon, 136 U. S. 549 (1890).

[2] Parker *v.* Mason, 8 R. I. 427 (1867); Bushee *v.* Freeborn, 11 R. I. 149 (1875); Brown's Petition, 14 R. I. 371 (1884). A stock dividend is capital and not income. Greene *v.* Smith, 17 R. I. 28 (1890).

[3] The courts, perhaps uniformly, insist upon this distinction. Extraordinary dividends may be either of cash or stock, and appear under a variety of names, such as "participations," "distributions," or, more commonly, "bonuses." See Witts *v.* Steere, 13 Ves. Jr. 363 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824). To the point that regular dividends, though increased in amount, go as income to the owner of the life estate, see Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Price *v.* Anderson, 15 Sim. 473 (1847); Bates *v.* Mackinley, 31 Beav. 280 (1862), a cash dividend; to the point that "extra" or unusual dividends, whether of cash or shares, go to augment the principal of the trust fund, see Irving *v.* Houstoun, 4 Pat. H. L. Cas. 521 (1803), a stock dividend; Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824), a stock dividend; *Re* Barton's Trust, L. R. 5 Eq. 238 (1868), a stock dividend; Paris *v.* Paris, 10 Ves. Jr. 185 (1804), a cash dividend; Clayton *v.* Gresham, 10 Ves. Jr. 288 (1804), a cash dividend; Witts *v.* Steere, 13 Ves. Jr. 363 (1807), a cash dividend. *Cf.* Gilly *v.* Burley, 22 Beav. 619 (1856); Straker *v.* Wilson, L. R. 6 Ch. App. 503 (1871); Brander *v.* Brander, 4 Ves. Jr. 800 (1799); Preston *v.* Melville, 16 Sim. 163 (1848); Murray *v.* Glasse, 17 Jur. 816 (1853); Johnson *v.* Johnson, 15 Jur. 714 (1850); Plumbe *v.* Neild, 6 Jur. (N. S.) 529 (1860); Hollis *v.* Allan, 12 Jur. (N. S.) 638 (1866). See also *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858); Lock *v.* Venables, 27 Beav. 598 (1859), holding to the effect that a specific bequest of "the dividends, interest, and proceeds" of shares will not pass a bonus on the shares. In Alcock *v.* Sloper, 2 Myl. & K. 699 (1833), the income of the testator's long annuities was given to the life tenant. Wilday *v.* Sandys, L. R. 7 Eq. 455 (1869). In Lane *v.* Loughnan, 7 Vict. L. R. Eq. 19 (1881), it was held that the premium on a lease of part of a trust estate belonged to the tenant for life and not to the *corpus*. An executor may

There are, however, recent cases in England to the effect that extraordinary cash dividends may be decreed to belong to the life tenant.[1] There of course is no question that ordinary cash dividends belong to the life tenant.[2] This rule applies even though it may be shown that the dividend in question was

plainly transfer the stock to pay the decedent's debts, although it is bequeathed for life with remainder over. Franklin *v.* Bank of England, 1 Russ. 575 (1826). In Clive *v.* Clive, Kay, 600 (1854), by the terms of the deed of settlement the net profits of the concern were to be divided ratably to such an amount as should be declared at the semi-annual meetings, and were to be paid within twenty-one days thereafter; and it was provided that a shareholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares, but the dividends on such shares were to continue in suspense until some other person should become proprietor of them. When a shareholder died sixty-nine days after a half-yearly meeting at which a dividend had been declared, but before notice had been given that such dividend was payable, having by his will bequeathed the interest and annual income arising from all his shares to one for life, and then in remainder to others, it was held that this dividend belonged to the legatee for life, and not to the general personal estate of the testator. See also Title to Dividends, 19 Am. L. Rev. 571; Bostock *v.* Blakeney, 2 Bro. Ch. 653 (1789); 2 Perry, Trusts, §§ 544, 545. Mr. Moak's note, 31 Eng. Rep. 328–332; Browne *v.* Collins, L. R. 12 Eq. 586 (1871). is to the effect that profits of a partnership accrued and earned before, but not set aside *qua* profits until after the death of the testator, belong to the *corpus* of the estate, and that profits accruing after his death go to the tenant for life as income. See also the recent and important review of the whole subject in Bouch *v.* Sproule, L. R. 12 App. Cas. 385 (1887), reversing the court below, Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885).

[1] In Sugden *v.* Alsbury, L. R. 45 Ch. D. 237 (1890), the court held that the life tenant was entitled to an extraordinary dividend payable in cash. The dividend was called a bonus, but was nothing more or less than a large dividend, being a division of accumulated profits. In Ellis *v.* Barfield, 64 L. T. Rep. 625 (1891), the court held that a large dividend was income and belonged to the life tenant, although it was used by the trustee to pay up the stock in full, and also to purchase new shares which he immediately sold; but the excess for which he sold the stock at a profit belongs to the remainder-man.

[2] A cash dividend of profits which have been earned since the last preceding dividend, such last preceding dividend having been made in a regular and reasonable time previously, belongs to a life tenant of stock, and not to the remainder-man. Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Clive *v.* Clive, Kay, 600 (1854); Murray *v.* Glasse, 17 Jur. 816 (1853); Preston *v.* Melville, 16 Sim. 163 (1848); Cuming *v.* Boswell, 2 Jur. (N. S.) 1005 (1856). *Cf.* Ware *v.* McCandlish, 11 Leigh (Va.), 595 (1841); Price *v.* Anderson, 15 Sim. 473 (1847); Witts *v.* Steere, 13 Ves. Jr. 363 (1807). As will be seen hereafter, in England a different rule prevails if the cash dividend is made from long-accumulated profits.

earned, wholly or in part, befor the commencement of the life estate.[1]

Where it is shown that dividends have been fraudulently retained in prejudice of the rights of the life tenant, and subsequently a bonus is paid upon the shares, it belongs, as income deferred, to the tenant for life, even though it be called a bonus.[2] The life tenant does not take any part of the surplus value of shares upon distribution after dissolution, if such surplus was clearly capital.[3]

In all cases, however, the intent of the grantor or testator is the pole-star, and will be carried out by the courts.[4]

§ 558. *The apportionment of dividends.*— When a life tenant dies before the date at which a dividend is declared, the question arises whether the dividend declared next after his death ought or ought not to be apportioned between the reversioner or remainder-man and the estate of the life tenant for the period of time partially covered by the life estate. It is, in general, the rule in such a case that the dividend is not apportionable, but belongs entirely to the *corpus* of the trust fund.[5] But where

[1] Bates *v.* Mackinley, 31 Beav. 280 (1862); Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872).

[2] Maclaren *v.* Stainton, L. R. 11 Eq. 382 (1871); S. C., 3 De G., F. & J. 202 (1861), reversing S. C., 27 Beav. 460 (1859); Edmondson *v.* Crosthwaite, 34 Beav. 30 (1864); Dale *v.* Hayes, 40 L. J. (Ch.) 244 (1871). *Cf.* Lean *v.* Lean, 32 L. T. Rep. 305 (1875); Lambert *v.* Lambert, 29 L. T. (N. S.) 878 (1874); *Re* Tinkler's Estate, L. R. 20 Eq. Cas. 456 (1875).

[3] *Re* Armitage, [1893] 3 Ch. 337.

[4] Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885); *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Jones *v.* Ogle, L. R. 14 Eq. 419 (1872); *Re* Box, 1 Hem. & M. 552 (1863). *Cf.* Reed *v.* Head, 88 Mass. 174 (1863); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Millen *v.* Guerrard, 67 Ga. 284 (1881); Thompson's Appeal, 89 Pa. St. 36 (1879). The life tenant takes a dividend paid immediately after the death of the testator, where the will provides that each share bequeathed by the will should carry the dividend accruing at the time of the testator's death. Lysaght *v.* Lysaght, 77 L. T. Rep. 637 (1897).

[5] Pearly *v.* Smith, 3 Atk. 260 (1745); Sherrard *v.* Sherrard, 3 Atk. 502 (1747); Wilson *v.* Harman, 2 Ves. Sr. 672 (1755); Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858); *Re* Maxwell's Trusts, 1 Hem. & M. 610 (1863); Foote, Appellant, 39 Mass. 299 (1839); Granger *v.* Bassett, 98 Mass. 462 (1868); Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). *Cf.* Hyatt *v.* Allen, 56 N. Y. 553 (1874); Brundage *v.* Brundage, 60 N. Y. 544, 551 (1875); Perry, Trusts, § 556. But in Massachusetts it has been held that sometimes dividends declared after the life tenant's death will, nevertheless, go to his estate. Thus, a life tenancy in stock for the support of the testator's widow and children was held to entitle the widow's estate to a dividend declared after

a tenant for life dies after the dividend is declared, but before the dividend becomes due, his estate will be entitled to the whole of that dividend.[1] In England, however, under the statute known as the Apportionment Act of 1870, dividends are apportionable in these cases between the estate of the life tenant and the *corpus;*[2] and in this country at common law, in one or two jurisdictions, there is a tendency to hold that dividends are apportionable.[3] In Maryland a stock dividend has been apportioned.[4]

§ 559. *The right to subscribe for new shares as between life tenant and remainder-man.*—The right to subscribe for new

her death, but for a period which expired before that event. Johnson *v.* Bridgewater Mfg. Co., 80 Mass. 274 (1859). See also Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824); Gifford *v.* Thompson, 115 Mass. 478 (1874). *Cf.* King *v.* Follett, 3 Vt. 385 (1831), in which the residuary legatee claimed from the legatee of certain stock the share of dividends earned in the lifetime of his testator, but declared after his death; the court holding that a sale or gift of stock carries with it all dividends declared after it takes effect, whether earned before or not.

[1] Wright *v.* Tuckett, 1 J. & H. 266 (1860); Paton *v.* Sheppard, 10 Sim. 186 (1839).

[2] 33 & 34 Vict., c. 35, § 2; Pollock *v.* Pollock, L. R. 18 Eq. 329 (1874), qualifying or explaining Whitehead *v.* Whitehead, L. R. 16 Eq. 528 (1873); Beavan *v.* Beavan, 53 L. T. Rep. 245 (1885). *Cf.* Capron *v.* Capron, L. R. 17 Eq. 288 (1874); and see Banner *v.* Lowe, 13 Ves. Jr. 135 (1806); Hay *v.* Palmer, 2 P. Wms. 501 (1728). The statute applies only to dividends upon the stock of corporations, strictly speaking, and not to those upon the shares in private trading corporations. Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872). And does not apply to stock dividends. Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858). Under the Apportionment Act of England, a dividend declared after the death of the tenant for life may be apportioned between his estate and the remainder-man. Bulkeley *v.* Stephens, [1896] 2 Ch. 241.

[3] In *Ex parte* Rutledge, 1 Harp. Eq. (S. C.) 65 (1824), a dividend was apportioned between life tenant and remainder-man. This is regarded as a leading case in favor of apportionment. In Pennsylvania the interest on municipal bonds and on the bonds of private corporations is apportionable; but *quere* whether or not the interest on government bonds would be. Wilson's Appeal, 108 Pa. St. 344 (1885), overruling Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453 (1850). But in Massachusetts the statute of apportionment is held not to apply to dividends upon the stock of corporations. Granger *v.* Bassett, 98 Mass. 462, 469 (1868), construing Mass. Gen. Stat., ch. 97, § 24. In New York an apportionment is provided for by Laws of 1875, ch. 542. See Goldsmith *v.* Swift, 25 Hun, 201 (1881).

[4] A stock dividend declared in 1891 to represent profits which for three years had been used for improvements should be apportioned between the life tenant and remainder-men, the testator having died in 1890. Thomas *v.* Gregg, 78 Md. 545 (1894).

shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainder-man. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the increase goes to the *corpus*.[1] The subsequent income, however, of such increase belongs, during the continuance of the life tenancy, to the life tenant as income; the new shares are part of the *corpus*, and the life tenant, being entitled to the income from the *corpus*, takes the income from the accretions thereto.[2]

§ 560. *Miscellaneous questions herein.*— The life tenant must pay calls which are made[3] and taxes levied[4] during the continuance of his estate upon shares held in trust for his benefit. And where stock to produce a fixed income is bequeathed for

[1] Atkins *v.* Albree, 94 Mass. 359 (1866); Brinley *v.* Grou, 50 Conn. 66 (1882); Biddle's Appeal, 99 Pa. St. 278 (1882); Moss's Appeal, 83 Pa. St. 264 (1877); Goldsmith *v.* Swift, 25 Hun, 201 (1881); Sanders *v.* Bromley, 55 L. T. Rep. 145 (1886). Profit upon the sale of stock is *corpus*, and not income for the life tenant. Whitney *v.* Phœnix, 4 Redf. (Surr.) 180 (1880). *Cf.* Leitch *v.* Wells, 48 N. Y. 585 (1872); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). Sometimes certificates of new stock are not stock dividends. Chicago, etc. R. R. *v.* Page, 1 Biss. 461 (1864); S. C., 5 Fed. Cas. 600. In Londesborough *v.* Somerville, 19 Beav. 295 (1854), where consols were sold just before a dividend day and the proceeds invested in realty, a tenant for life was held entitled to be paid, as income on the consols, the difference between the price obtained and the value exclusive of the next dividend. See also, in general, § 286, *supra*.

[2] Quoted and approved in *Re* Eisner's Estate, 175 Pa. St. 143 (1896); Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882), and the cases generally cited in the preceding note; *Re* Bromley, 55 L. T. Rep. 145 (1886).

[3] *Re* Box, 1 Hem. & M. 552 (1863); Day *v.* Day, 1 Dr. & Sm. 261 (1860). In case of a life estate, followed by a life estate, followed by a remainder to the nominees of the first life tenant, the estate of the first life tenant is liable for calls made after the remainder commences. Hobbs *v.* Wayet, L. R. 36 Ch. D. 256 (1887). If a call becomes due the day after the testator dies, it is the duty of the executor to pay it from the general fund. Emery *v.* Wason, 107 Mass. 507 (1871).

[4] Webb *v.* Burlington, 28 Vt. 188 (1856); Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185 (1871). *Cf.* National Albany Exch. Bank *v.* Wells, 18 Blatchf. 478 (1880). See also § 248, *supra*.

life, a subsequent increase in the earnings from that stock enures to the benefit of the life tenant.[1] But the enhanced price for which stock sells by reason of dividends earned but not declared belongs entirely to the remainder.[2] A life tenant is not entitled to have the stock transferred to him on the corporate books.[3] But the corporation, if it had notice of the trust, may be held liable for transferring shares in prejudice of the rights of the life tenant.[4] And an administrator who permits an irregular transfer in fraud of the life tenant's rights makes himself personally liable.[5] A dividend declared before but payable after the testator's death belongs to the estate.[6] A claim of the company against the life tenant for dividends paid cannot be enforced against the remainder-man's interest.[7] Where

[1] Russell *v.* Loring, 85 Mass. 121 (1861). But when a fixed income is bequeathed and the income fails or falls short, the principal must be resorted to. Bonham *v.* Bonham, 33 N. J. Eq. 476 (1881); Haydel *v.* Hurck, 72 Mo. 253 (1880). The opposite rule, however, prevails in New York. Delaney *v.* Van Aulen, 84 N. Y. 16 (1881), reversing S. C., 21 Hun, 274. *Cf.* Crawford *v.* Dox, 5 Hun, 507 (1875). See also § 304, *supra*.

[2] Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Van Blarcom *v.* Dager, 31 N. J. Eq. 783 (1879). *Cf.* Londesborough *v.* Somerville, 19 Beav. 295 (1854); *Re* Stutzer, 26 Hun, 481 (1882); *Re* Gerry's Accounting 103 N. Y. 445 (1886).

[3] Collier *v.* Collier, 3 Ohio St. 369 (1854). *Cf.* State *v.* Robinson, 57 Md. 486 (1881). If the corporation transfers the stock to the life tenant, even by orders of the court, but issues a certificate not stating the facts of life tenancy, and tells a purchaser of the certificate that it is all right, the corporation is liable to the remainder-man. Caulkins *v.* Gaslight Co., 85 Tenn. 683 (1887).

[4] Stewart *v.* Firemen's Ins. Co., 53 Md. 564 (1880). Where a life tenant transfers the stock to the remainder-man, the former's executor cannot claim dividends paid to the latter. Kennedy *v.* First Nat. Bank, 115 N. C. 223 (1894). Where a life tenant transfers the stock into his own name, the remainder-man may recover the stock upon the death of the life tenant, even though the latter was insolvent. Mercantile, etc. Co. *v.* Weld, 36 Atl. Rep. 445 (Md., 1897). A bank is liable to the remainder-man for allowing a transfer to the life tenant, even though the transfer to the life tenant is by the executors. Cox *v.* First Nat. Bank, 26 S. E. Rep. 22 (N. C., 1896).

[5] Keeney *v.* Globe Mill Co., 39 Conn. 145 (1872). See also Amiss *v.* Williamson, 17 W. Va. 673 (1881).

[6] De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867). *Cf.* Browne *v.* Collins, L. R. 12 Eq. 586, 594 (1871); Lock *v.* Venables, 27 Beav. 598 (1859). See also Cogswell *v.* Cogswell, 2 Edw. Ch. 231 (1834); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); Furley *v.* Hyder, 42 L. J. (Ch.) 626 (1873).

[7] Where a fixed per cent is paid annually to stockholders instead of div-

a life interest is given to one person with remainder over, and it is necessary that the stock be sold in order to preserve the estate, a decree of sale is valid if both the executor and life tenant are parties to such suit.[1]

idends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainder-man.

Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1891).

[1] Drovers', etc. Bank *v.* Hughes, 83 Md. 355 (1896).

CHAPTER XXXIV.

TAXATION OF SHARES OF STOCK AND OF CORPORATIONS.

§ 561. The four methods of taxing corporate interests.

A. TAXATION OF SHARES OF STOCK.

562. Relation of stockholders to the first three methods of taxation.
563. Tax on shares of stock as distinguished from the other methods.
564. Tax by a state or municipality on stockholders residing in the state creating the corporation.
565. Tax on resident stockholders in a non-resident or foreign corporation.
566. Tax on non-resident stockholders in resident or domestic corporation — Mode of collecting.
567. Double taxation.
568. Exemptions from taxation as affecting tax on shares of stock.

B. TAXATION OF NATIONAL-BANK STOCK.

§ 569. General rules.
570. Place in which shares in national-bank stock may be taxed.
571. The tax must not be greater than that imposed on other "moneyed capital."
572. The bank may bring suit to restrain illegal tax on its stockholders.

C. OTHER METHODS OF TAXING CORPORATIONS.

572*a*. General principles.
572*b*. Exemptions from taxation.
572*c*. Taxation of foreign corporations.
572*d*. Taxation must not interfere with interstate commerce.
572*e*. Inheritance tax.

§ 561. *The four methods of taxing corporate interests.*— There are, in general, four methods of taxing corporate interests. These are, first, by a tax on the franchise; second, on the capital stock; third, on the real estate and personal property of the corporation; fourth, by a tax on the shares of stock in the hands of the stockholders.[1] There is another mode of taxation which is sometimes adopted — a tax on corporate dividends; but since this is generally construed to be only a method of valuing the franchise or capital stock, it can hardly be called a fifth method of taxing corporate interests.[2]

It is entirely within the discretion of the legislature to say which one of these four methods of taxation shall be adopted, where the matter is not regulated by the state constitution.

[1] 2 Redfield, Railw. (3d ed.), p. 453; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876); State, 8 Heisk. (Tenn.) 663, 795 (1875); Louisville, etc. R. R. *v.*

[2] See § 572*a*, *infra*.

Not only this, but it is also within the discretion of the legislature to tax the corporation in two or more of these ways — to levy a double tax on the corporate interests, and even to levy a treble or quadruple tax thereon.

A. TAXATION OF SHARES OF STOCK.

§ 562. *Relation of stockholders to the first three methods of taxation.*— The stockholders in a corporation have very little to do directly with any of the first three modes of taxing corporate interests. The tax is levied directly against the corporation, and is paid by the corporate officers out of the treasury of the corporation. If the tax is unauthorized or illegal, or improperly assessed, or is based on too high a valuation, it is ordinarily the duty of the corporate officers to rectify or oppose such tax. The stockholders have nothing to do with the ordinary transaction of corporate business, of which this forms a part. Where, however, the corporate officers refuse, upon request of one or more stockholders, to oppose or decline to pay an unauthorized tax levied in any one of the three methods mentioned above, the stockholder himself may bring a suit in a court of equity, in behalf of and for the protection of the corporate interests, to enjoin the payment and collection of such unauthorized tax.[1]

[1] Dodge *v.* Woolsey, 18 How. 331 (1855); Barnes *v.* Kornegay, 62 Fed. Rep. 671 (1894); State Bank *v.* Knoop, 16 How. 369 (1853); Wilmington R. R. *v.* Reed, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873); Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Paine *v.* Wright, 6 McLean, 395 (1855); S. C., 18 Fed. Cas. 1010; Foote *v.* Linck, 5 McLean, 616 (1853); S. C., 9 Fed. Cas. 366, holding also that the corporation is a necessary party, and that if the complainant is a non-resident he may bring the suit in the United States circuit court; Davenport *v.* Dows, 18 Wall. 626 (1873), also holding that the corporation is a necessary party defendant; Bailey *v.* Atlantic, etc. R. R., 3 Dill. 22 (1874); S. C., 2 Fed. Cas. 365; Parmley *v.* St. Louis, etc. R. R., 3 Dill. 13, 25 (1874); S. C., 18 Fed. Cas. 1223, 1226. But the stockholder must allege actual tender of the amount of tax conceded to be due. Allegation of readiness to pay is insufficient. Huntington *v.* Palmer, 8 Fed. Rep. 449 (1881). See also Trask *v.* Maguire, 18 Wall. 391 (1873); Wood *v.* Draper, 24 Barb. 187 (1857); London *v.* Wilmington, 78 N. C. 190 (1878); § 494, *supra*. The case of State *v.* Flavell, 24 N. J. L. 370 (1854), denies this right. A stockholder's injunction against a tax in corporate property falls when the property is subsequently sold under execution. Secor *v.* Singleton, 35 Fed. Rep. 376 (1888). The general character of such a suit as this comes under the principles of law set forth in Part IV, *infra*.

§ 563. *Tax on shares of stock as distinguished from the other methods.*— A tax on shares of stock is clearly different from a tax upon the franchise, the corporate property, or the capital stock. Especially is it important to distinguish a tax on shares of stock from a tax on the capital stock.[1] The latter is always taxed against the corporation, is paid by the corporation, and is based on a valuation which does not necessarily depend on

[1] In Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), the court clearly recognized this distinction, and said: "The legal property of the shareholder is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise, and a tax levied upon the property of the one is not, in a legal sense, levied upon the property of the other." See also Bradley *v.* Bauder, 36 Ohio St. 28 (1880). *Cf.* Delaware R. R. Tax, 18 Wall. 206, 230 (1873); Farrington *v.* Tennessee, 95 U. S. 679 (1877), where the distinction is clearly drawn; Quincy Bridge Co. *v.* Adams County, 88 Ill. 615 (1878). In North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877), the court said: "The moneyed capital of a bank is an entirely different thing from its capital stock. The former is the property of the corporation. It may consist of cash or bills discounted, or be in part invested in real estate or in the securities of federal government. In whatever form it is invested, it is owned by the bank as a corporate entity and not by the stockholders. The stock or shares represent the interests of the shareholders, which entitle them to participate in the net profits of the bank in the employment of its capital, and is a distinct and independent interest or property in the shareholders, held by them like other property." The case of Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), holds also that a tax on the "capital stock" means the property of the corporation and not the aggregate of the shares of stock. See also State *v.* Hamilton, 5 Ind. 310 (1854), where the word "stock" was construed to mean the tangible property of the corporation. But see Trask *v.* Maguire, 18 Wall. 391 (1873). And even though the value of the capital stock is estimated by the aggregate value of the shares, it is still a tax on the capital stock. New Orleans, etc. R. R. *v.* Board of Assessors, 32 La. Ann. 19 (1880). See also State Bank *v.* Richmond, 79 Va. 113 (1884). So also where the franchise is valued in that manner for taxation. Commonwealth *v.* Hamilton Mfg. Co., 94 Mass. 298 (1866); Att'y-Gen. *v.* Bay State Min. Co., 99 Mass. 148 (1868). Hamilton Co. *v.* Massachusetts, 6 Wall. 632 (1867), holds that a tax on the excess of the market value of the stock over the value of the corporate realty and machinery is a franchise tax. In Indiana it is held that a tax on the shares of stock is the proper mode of taxation unless the statute provides otherwise. Whitney *v.* Madison, 23 Ind. 331 (1864). *Cf.* Wright *v.* Stelz, 27 Ind. 338 (1866). The mere fact that the corporation is compelled to pay the tax does not prevent its being considered a tax on the shares. National Bank *v.* Commonwealth, 9 Wall. 353, 360 (1869), per Miller, J. Stockholders are liable for taxes levied on a distillery, where the statute levies the tax on "persons interested in the use of the distillery." U. S. *v.* Walters, 46 Fed. Rep. 509 (1891).

the value of the shares of stock. A tax on the shares of stock is generally levied directly against the stockholders themselves at their place of residence, is based on the market value of the stock, and is entirely distinct from the location, interests, property, or taxes of the corporation itself. There are, however, some instances of taxation herein which are on the border-line between the two. Thus, a statute expressly laying a tax on the shares of stock, but requiring the corporation to pay that tax from the corporate funds, has been held to be a tax, not on the shares of stock, but on the capital stock. In other jurisdictions it has been held to be a tax on the shares of stock. Taxes on shares of stock in national banks are frequently so levied and collected, and are held to be upon the shares of stock and not on the capital stock.[1] A tax laid on shares owned by non-residents of the state which creates the corporation and which levies the tax is a tax on the shares of stock and not on the capital stock, even though the corporation is required to pay it and to collect the same from the owners of those shares.

§ 564. *Tax by a state or municipality on stockholders residing in the state creating the corporation.*— The right of the state to tax resident stockholders of a resident corporation on their shares of stock is undoubted, and has been unquestioned except where double taxation would result therefrom and is prohibited; or where a constitutional provision restricts this mode of taxation.[2] Generally such a tax on resident stockholders is levied on them, not in the municipality where the corporation is, but in the cities, counties, or towns where the stockholders respectively reside. This is always the rule if the statute is silent, and is the rule unless the statute expressly provides otherwise.[3]

[1] See § 570, *infra*.

[2] In Illinois, under the act of 1872 taxing railroad corporations, resident stockholders in domestic corporations are not taxed. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875). In Iowa stock is taxed under § 813 of the Code. See Cook *v.* Burlington, 59 Iowa, 251 (1882); Henkle *v.* Keota, 68 Iowa, 334 (1886). *Cf.* National State Bank *v.* Young, 25 Iowa, 311 (1868). In Iowa, where deductions for debts are allowed to persons taxed on their "credits," no deduction is allowed from the tax on shares of stock. They are not "credits." Bridgman *v.* Keokuk, 72 Iowa, 42 (1887). As to the valuation of the shares of stock, see St. Charles, etc. R. R. *v.* Assessors, 31 La. Ann. 852 (1879). If the corporation owns shares of its own stock it is taxable the same as though owned by another. Richmond, etc. R. R. *v.* Alamance Co., 84 N. C. 504 (1881).

[3] Evansville *v.* Hall, 14 Ind. 27 (1859).

Controversies sometimes arise as to the power of a municipality to tax stockholders living in the state, but not in the municipality which levies a tax on their shares of stock, the corporation itself being located within that municipality. The law plainly is that such a tax is unauthorized, illegal, and not collectible, unless the municipality is authorized by statute to levy the tax.[1] A mere general authority to the municipality to tax all property within its boundaries will authorize a tax by it of shares of stock owned by persons living within it.[2] But such authority does not sustain a tax on stockholders residing out of the municipality, although within the state. The location of such shares of stock, as property for purposes of taxation, is not where the corporation is located, but where the stockholder lives.[3] The statutes of the state may change this

A pledgor is the proper person to be assessed on stock which has been pledged. Tucker *v.* Aiken, 7 N. H. 113 (1834). A pledgee of stock is not subject to a tax levied on the shares of stock held by him. Waltham Bank *v.* Waltham, 51 Mass. 334 (1845). In Massachusetts shares held by executors or administrators are taxed in the town of which the deceased was an inhabitant at the time of his death, and shares held by trustees are taxed in the towns in which the *cestuis que trust* respectively reside. Revere *v.* Boston, 123 Mass. 375 (1877). As to the legal remedy in Massachusetts for an unjust valuation of stock for taxation, see Boston Mfg. Co. *v.* Commonwealth, 144 Mass. 598 (1887). As to taxation of stock under the Vermont law, see Willard *v.* Pike, 59 Vt. 202 (1887).

[1] A city has no inherent power to levy a tax on the capital stock of a corporation. Macon *v.* Macon Constr. Co., 94 Ga. 201 (1894); Stetson *v.* Bangor, 56 Me. 274 (1868), the court saying: "Municipalities can tax shares of stock only when authorized so to do by some law of the state. They are the creatures of state law, and derive their powers in this respect solely from state enactments;" Griffith *v.* Watson, 19 Kan. 23 (1877); Evansville *v.* Hall, 14 Ind. 27 (1859); Conwell *v.* Connersville, 15 Ind. 150 (1860). Such a tax may be levied under a general power of the municipality to tax property. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); Augusta *v.* National Bank, 37 Ga. 620 (1868). Markoe *v.* Hartranft, 6 Am. L. Reg. (N. S.) 487 (1867), holds that in Pennsylvania such a tax is unconstitutional, and that a tax must be levied where the stockholder resides. See also Craft *v.* Tuttle, 27 Ind. 332 (1866).

[2] But a municipality can levy a tax only when specially authorized so to do, and can tax only such property as the statute permits it to tax. Cooley, Taxation (2d ed.), 678. Hence, power to a municipality to levy a tax for watchmen purposes will not authorize a tax on shares of stock. Bank of Georgia *v.* Savannah, Dudley (Ga.), 130 (1832). Under a statute authorizing it, a city may levy a tax on stock in a local bank, even though some of the stockholders are non-residents. Union Bank *v.* City, 26 S. E. Rep. 821 (Va., 1897).

[3] See § 566, *infra*.

situs of the stock so as to render it taxable where the corporation is; but unless there is a statute to that effect, such a tax by a municipality is unauthorized and void.

§ 565. *Tax on resident stockholders in a non-resident or foreign corporation.*— It is undoubtedly within the constitutional power of the legislature of a state to enact a statute that persons residing in that state, who are stockholders in a corporation created by another state, shall be taxed on their shares of stock at their residence within the former state.[1] This principle of law is based on the fact that shares of stock are personal property; that they are distinct from the corporate property, franchises, and capital stock; that they follow the domicile of their owner like other personal property, and that consequently he may be taxed therefor wherever he may reside. It accordingly is a question of policy and expediency with a state whether or not it will tax its citizens who are stockholders in foreign corporations. A few of the states[2] levy such taxes. But

[1] Worthington *v.* Sebastian, 25 Ohio St. 1 (1874); Bradley *v.* Bauder, 36 Ohio St. 28 (1880), holding it valid, although the corporation is taxed in the state where it exists. To same effect, Seward *v.* Rising Sun, 79 Ind. 351 (1881); Dyer *v.* Osborn, 11 R. I. 321 (1876); McKeen *v.* Northampton County, 49 Pa. St. 519 (1865); Dwight *v.* Boston, 94 Mass. 316 (1866); Whitesell *v.* Northampton County, 49 Pa. St. 526 (1865); Great Barrington *v.* County Com'rs, 33 Mass. 572 (1835); Worth *v.* Com'rs, 82 N. C. 420 (1880); S. C., 90 N. C., 409 (1884). In Illinois, also, resident stockholders in foreign corporations are taxed on their shares of stock. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875); Cooley, Taxation (2d ed.), 57, 221; Holton *v.* Bangor, 23 Me. 264 (1843); Smith *v.* Exeter, 37 N. H. 556 (1859). A citizen of California may be taxed on mortgage bonds held by him in an Arizona railroad company, payable in New York. Mackay *v.* San Francisco, 113 Cal. 392 (1896).

[2] State *v.* Hannibal, etc. R. R., 37 Mo. 265 (1866); Ogden *v.* St. Joseph, 90 Mo. 522 (1887); Sturges *v.* Carter, 114 U. S. 511 (1884), upholding such a tax in Ohio; Newark City Bank *v.* Assessor 30 N. J. L. 1 (1862). See also Webb *v.* Burlington, 28 Vt. 188 (1856). See Pa. Act of April 29, 1844; Lycoming County *v.* Gamble, 47 Pa. St. 106 (1864). See also *Re* Short's Estate, 16 Pa. St. 63 (1851), where a decedent who died a resident of Pennsylvania left a fortune in stocks of non-resident corporations. The stocks were held subject to a collateral inheritance tax. In 1879, however, Pennsylvania adopted in large part the system of taxation that prevails in New York for the taxation of corporations. See Hunter's Appeal, 10 Atl. Rep. 429 (Pa., 1887). By the still later statute of 1885, manufacturing corporations are specially favored in the way of taxation. MacKellar, etc. Co. *v.* Commonwealth, 10 Atl. Rep. 780 (Pa., 1887). In ascertaining the value of stock for purposes of taxation the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People's, etc. Co., 39

New York pursues the more broad and liberal policy that shares of stock should not be taxed where the corporation is already taxed; that the state which furnishes facilities to the corporation for the earning of dividends should have the sole benefit of taxes on such corporate interests; that a tax on resident stockholders in non-resident corporations would generally result in a double taxation of stockholders not residing in the state creating the corporation; and that interstate comity, interests, and financial investments are promoted best by taxing corporations directly, and not levying a tax on either resident stockholders in non-resident corporations or resident stockholders in resident corporations where the corporation itself is subject to taxa-

Atl. Rep. 42 (Pa., 1898). In New Jersey now there is no tax on shares of stock except in banks. See Newark Banking Co. *v.* Newark, 121 U. S. 163 (1887). Shares of stock owned by residents in foreign corporations are not taxable if a tax is paid by the corporation itself. State *v.* Ramsey, 54 N. J. L. 546 (1892). In Texas shares of stock are not taxed where the capital or property of the corporation is taxed. Gillespie *v.* Gaston, 67 Tex. 599 (1887). California made a wise resolution when, in 1881, it repealed § 3640 of its political code, taxing shares of stock, and added the following (§ 3608) to the code: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed; but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." Sustained and applied in Burke *v.* Badlam, 57 Cal. 502 (1884); Spring Valley Water Works *v.* Schottler, 62 Cal. 69, 118 (1882). But the temptation to tax stockholders in non-resident corporations was yielded to. See San Francisco *v.* Fry, 63 Cal. 470 (1883); San Francisco *v.* Flood, 64 Cal. 504 (1884). As to Ohio, see R. S. 1886, §§ 2737, 2739, 2744, construed in Jones *v.* Davis, 35 Ohio St. 474 (1880). See also Worth *v.* Ashe County, 90 N. C. 409 (1884); Seward *v.* Rising Sun, 79 Ind. 351 (1881). As to taxation of shares of stock in foreign corporations under the Michigan statutes, see Graham *v.* St. Joseph, 67 Mich. 652 (1888). Shares of stock may be taxed although the corporation is also taxed. The corporation may be compelled to pay the tax on the shares of stock by deducting it from dividends. South Nashville Street R. R. *v.* Morrow, 87 Tenn. 406 (1889). In Ohio resident stockholders in foreign corporations may be taxed on their stock. Lee *v.* Sturges, 46 Ohio, 153 (1889). Under the Connecticut statutes, shares of stock owned by residents in foreign express companies are taxed, even though such companies are not incorporated. Lockport *v.* Weston, 61 Conn. 211 (1891). In Mayor, etc. of Baltimore *v.* Baltimore, etc. St. R'y, 57 Md. 31 (1881), it was held that stock in street railway companies in Maryland may be taxed, although by statute stock in steam railway companies cannot be.

tion.[1] The injustice of a tax on resident stockholders in foreign corporations is at once apparent when it is considered that the state creating the corporation nearly always taxes the corporation itself or all its stockholders, resident and non-resident; and that if stockholders residing elsewhere are taxed again where they reside, they are taxed both in the state of the corporation, directly or indirectly, and also directly in the state where they reside. No reduction need be allowed in the latter state for taxes levied upon the corporation in another state.[2]

§ 566. *Tax on non-resident stockholders in resident or domestic corporation — Mode of collecting.*— When it is determined by a state that it prefers to levy a tax on shares of stock rather than on the franchises, capital stock, or tangible property of the corporation, or to levy a tax on both, there is no doubt as to its right to tax the stockholders residing within the state. But more difficulty occurs as to the right of the state to tax non-resident stockholders in corporations created by the state. This right has been strenuously denied on the ground that shares of stock are not located at the domicile of the corporation, but follow the domicile of the stockholder.

[1] See Part VII, *infra*. The statute is as follows: "The owner or holder of stock in any incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock." See also People *v.* Com. of Taxes, 4 Hun, 595 (1875); aff'd, 62 N. Y. 630, holding that residents of this state, owning shares of stock in a corporation created under and by the laws of this state or of any foreign state, are not subject to be personally assessed and taxed thereon under the laws of this state. Also People *v.* Com'rs, 5 Hun, 200 (1875); *Re* Enston's Will, 113 N. Y. 174 (1889). For the purpose, however, of making the taxation of moneyed corporations correspond to taxation of shareholders in national banks, and for the purpose of taxing the latter, stockholders in banks incorporated under the laws of New York are taxed on their shares of stock. See Part VII, *infra*. The tax generally levied on corporations in New York is held to be a tax on their franchises. See People *v.* Home Ins. Co., 92 N. Y. 328 (1883); People *v.* McLean, 80 N. Y. 254 (1880); People *v.* Ferguson, 38 N. Y. 89 (1868); People *v.* Williamsburgh Gas Light Co., 76 N. Y. 202 (1879). See People *v.* New York, etc. Co., 92 N. Y. 487 (1883); People *v.* Davenport, 91 N. Y. 574 (1883); Nassau, etc. Co. *v.* Brooklyn, 89 N. Y. 409 (1882); Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449 (1860); People *v.* Com'rs, 95 N. Y. 554 (1884); Valle *v.* Ziegler, 84 Mo. 214 (1884); People *v.* Bradley, 39 Iowa, 130 (1866). *Cf.* Bank of Republic *v.* Hamilton County, 21 Ill. 54 (1858). See also Smith *v.* Exeter, 37 N. H. 556 (1859), and Jersey City Gas Light Co. *v.* Jersey City, 46 N. J. L. 194 (1884).

[2] See §§ 566, 567, *infra*.

It is the well-established rule, however, that although shares of stock have at common law a situs at the domicile of the shareholder, yet that a statute enacted by the state creating the corporation may give to the shares of stock a situs at the location of the corporation; that such a statute may thus determine the situs of shares of non-resident stockholders without changing the situs of shares of resident stockholders; and that consequently, under a statute expressly authorizing such a tax, non-resident stockholders in a resident corporation may be taxed thereon in the place where the corporation has its domicile.[1] The method of enforcing the payment of this tax

[1] In Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876), the court said that the legislature might "require the taxes to be paid by the corporation, and collected by them of the shareholder, by deducting the amount from his dividends or otherwise;" State *v.* Mayhew, 2 Gill (Md.), 487 (1845), where the corporation was to pay the tax from dividends if declared, and from profits if no dividends were declared; St. Albans *v.* National Car Co., 57 Vt. 68 (1884), holding that the statute giving shares of stock a situs at the location of the corporation may be passed after the incorporation, and that mandamus lies to compel the corporation to pay the tax. In Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 499 (1873), the court said: "Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located." See also Whitney *v.* Ragsdale, 33 Ind. 107 (1870); Tallman *v.* Butler County, 12 Iowa, 531 (1861); Faxton *v.* McCarter, 12 Iowa, 527 (1861); Mayor, etc. of Baltimore *v.* Baltimore, etc. R'y, 57 Md. 31 (1881). The last case holds that stock in street railways in Maryland may be taxed, although by statute stock in steam railways cannot be. *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); also the case of Oliver *v.* Washington Mills, 93 Mass. 268 (1865), which holds such a tax to be unconstitutional. The common-law rule is well expressed in Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836), where the court said: "The power to tax non-resident stockholders is denied, and we think correctly; from its very nature it must be a tax *in personam* and not *in rem*. Stock is in the nature of a chose in action and can have no locality; it must, therefore, of necessity follow the person of the owner. . . . Bank stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a non-resident, he is beyond the jurisdiction of the state and not subject to her laws." See also Minot *v.* Philadelphia, etc. R. R., 18 Wall. 206 (1873); Davenport *v.* Miss. etc. R. R., 12 Iowa, 539 (1861); Howell *v.* Cassopolis, 35 Mich. 471 (1877). In Bradley *v.* Bauder, 36 Ohio St. 28 (1880), the court said: "That shares of stock may be separated from the person of the owner by statute, and given a situs of their own, was held in Tappan *v.*

may be by compelling the corporation to pay it and giving it a lien therefor on the stock, or authorizing it to deduct the tax from the non-resident stockholders' dividends; or, if the statute is silent as to the mode of collection, a tax warrant or an attachment and execution therefor may be levied on the shares of stock.[1] In New York, where neither resident nor non-resident

Merchants' Nat. Bank, 19 Wall. 490 (1873). But when not so separated, that this situs follows and adheres to the domicile of the owner, is supported by a great weight of authority." See State Tax on Foreign-held Bonds, 15 Wall. 300 (1872). See also Jenkins *v.* Charleston, 5 S. C. 393 (1874). In National Com. Bank *v.* Mobile, 62 Ala. 284 (1878), the court well said: "It may be made the duty of a bank to pay for its shareholders the tax legally assessed against their respective shares, whether the stockholders reside in the state of Alabama or not. Contestations upon these points have been made time and again, sometimes by the banks and sometimes by the shareholders, to avoid this liability. But it is established by repeated adjudications, and ought to be considered definitely settled." And in First Nat. Bank *v.* Smith, 65 Ill. 44 (1872), the court said: "The separation of the situs of personal property from the domicile of the owner for the purposes of taxation is familiar doctrine of the courts of this country, and has been sanctioned by this court in various cases. . . . The act of congress itself contemplates a severance of the situs of such shares from the person of their owner by providing that they should not be taxed except in the state where the bank is established. But, apart from this, it is really much more reasonable to fix the situs of shares at the place where the bank is located, and where it must continue to do its business or wind up its affairs, than to separate by legislation tangible personal property from the person of its owner." In St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); S. C., 21 Fed. Cas. 203, the following statute was sustained: "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made." And again, in American Coal Co. *v.* County Com'rs, 59 Md. 185 (1882), the court said: "The state may give the shares of stock held by individual stockholders a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon." But where the statute merely made the bank the agent to pay the tax and to deduct it from the dividends, the bank is not liable if there have been no dividends. Hershire *v.* First Nat. Bank, 35 Iowa, 272 (1872). Non-resident stockholders in Virginia banks are taxed. Stockholders *v.* Supervisors, 88 Va. 293 (1891). Concerning the situs of stock, see also an article in 45 Alb. L. J. 330.

[1] In Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), the court said: "The bank may be required to pay the tax out of its corporate funds or be authorized to deduct the amount paid for each stockholder out of his dividend." And, in general, under the act of congress allowing taxation of shares of stock in national banks, a

stockholders in either foreign or domestic corporations, excepting banking corporations, are taxed on their shares of stock, these interstate complications, hardships, and jealousies do not arise.[1] Trover and case lie against a tax collector for selling stock for an illegal tax.[2]

situs is given by statute to the shares so as to locate them where the bank is located, even though the shareholders be non-resident. But collections cannot be enforced against the corporation unless the statute specially authorizes it. First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872). As to collection by execution, see Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847); Weld *v.* Bangor, 59 Me. 416 (1871). But a levy of execution on stock can only exist when the statute allows stock to be so taken. Barnes *v.* Hall, 55 Vt. 420 (1883). See also § 480, *supra*. As to levy under a tax warrant, see McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885). But if the stockholder pays the tax, even under protest, he cannot recover back the money paid. Sowles *v.* Soule, 59 Vt. 131 (1887). In the case of State *v.* Thomas, 26 N. J. L. 181 (1857), the court refused to compel the corporation to pay the tax on stock of non-residents, and said: "It has been decided by this court that the bonds and stocks of corporations in this state held by non-residents are not liable to taxation, though they are clearly within the letter of the act." A state may collect a non-resident stockholder's tax from the corporation and give it a lien therefor on his stock. North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877); but see Raleigh, etc. R. R. *v.* Wake County Com'rs, 87 N. C. 414 (1882). A tax collector cannot levy on and sell stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. R'y, 93 Ala. 494 (1891). The statute may provide for the sale of stock at the place where the corporation exists, in case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). It is clear, where shares of stock are sold under a tax warrant, that the corporation is not obliged to oppose the sale. McNeal *v.* Mechanics' Building, etc. Assoc., 40 N. J. Eq. 351 (1885). Where by statute taxes levied on stock are to be paid by the corporation, such taxes must be paid by the corporation although it becomes insolvent. Boston, etc. Co. *v.* Mercantile, etc. Co., 34 Atl. Rep. 778 (Md., 1896). Cooley, Taxation (2d ed.), 433, clearly upholds the rule that the state may levy a tax on shares of stock and compel the corporation to pay it, citing Maltby *v.* Reading R. R., 52 Pa. St. 140 (1866); Haight *v.* Railroad Co., 6 Wall. 15 (1867); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); U. S. *v.* Railroad Co., 17 Wall. 322 (1872); Minot *v.* Railroad Co., 18 Wall. 206 (1873); Ottawa, etc. *v.* McCaleb, 81 Ill. 556 (1876); New Orleans *v.* Saving, etc. Co., 31 La. Ann. 826 (1879); Baltimore *v.* City Passenger R. R., 57 Md. 31 (1881); St. Albans *v.* National Car Co., 57 Vt. 68 (1884); American Coal Co. *v.* Allegany County, 59 Md. 185 (1882); Barney *v.* State, 42 Md. 480 (1875); McVeagh *v.* Chicago, 49 Ill. 318 (1868); First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872); Leonberger *v.* Rowse, 43 Mo. 67 (1868); Relfe *v.* Life Ins. Co., 11 Mo. App. 374 (1882).

[1] See § 565, note, *infra*.

[2] Sprague *v.* Fletcher, 37 Atl. Rep. 239 (Vt., 1896).

§ 567. *Double taxation.*— The most objectionable feature of a tax levied on shares of stock is that almost inevitably it operates to impose a double tax on a part or all of the stockholders.[1] Such a double tax exists where either the corporate realty or personalty or franchise or capital is taxed, and a tax is also levied on the shares of stock without any deduction for the former taxation.[2] There has been some controversy as to the right of a state to levy a double tax on property. Sometimes the state constitution prohibits such taxation.[3] But, aside from constitutional restrictions, it unquestionably is within the power of the state to levy, not only a double tax, but even a treble or quadruple tax, if it so chooses.[4] The injustice of such taxation,

[1] In Ohio such double taxation is advocated and recommended. In Frazer *v.* Seibern, 16 Ohio St. 614 (1866), the court said that an equitable system of taxation "is best attained in case of a corporation or joint-stock company by taxing the stockholders, the persons who own the property, upon the full value of their shares therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property. The stockholder is thus taxed, as all other individuals who own tangible and intangible property are sometimes unavoidably taxed, once upon all he is worth, and a second time upon that part of his property which is tangible."

[2] This is practically the result. In the case of Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), however, the court says in a dictum: "The capital stock and the shares may both be taxed, and it is not double taxation." See also New Orleans *v.* Houston, 119 U. S. 265, 277 (1886). *Cf.* Ryan *v.* Com'rs, 30 Kan. 185 (1883). A tax on the tangible property and on the capital stock is not double taxation. Second Ward Sav. Bank *v.* Milwaukee, 94 Wis. 587 (1896).

[3] County Com'rs *v.* Farmers' Nat. Bank, 48 Md. 117 (1877), the constitution saying that each person shall pay a tax "according to his actual worth in real or personal property." See also San Francisco *v.* Mackey, 21 Fed. Rep. 539 (1884); Burke *v.* Badlam, 57 Cal. 594 (1881), relative to the California constitution, art. XII, § 1, that "all property shall be taxed in proportion to its value."

[4] Salem Iron, etc. Co. *v.* Danvers, 10 Mass. 514 (1813), where corporate realty was taxed although the shares of stock were also taxed. See also Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880). In the remarkable case of Toll Bridge Co. *v.* Osborn, 35 Conn. 7 (1868), it seems that the realty, capital stock, and shares of stock of a corporation were taxed, and that the chief stockholder, a railroad, was taxed on its capital stock and shares of stock, making four or five taxations of the same property. Evidently corporations were not popular in Connecticut in 1868, except for taxation purposes. *Cf.* Jones, etc. Co. *v.* Commonwealth, 69 Pa. St. 137 (1871). See also Cook *v.* Burlington, 59 Iowa, 251 (1882); State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Memphis *v.* Ensley, 6 Baxt. (Tenn.) 553 (1873); Providence, etc. R. R. *v.* Wright, 2

however, generally prevents its occurrence. The courts also do their utmost to prevent double taxation, and will construe a taxation statute so as to avoid such a result, and sometimes even in opposition to the plain words of the statute itself.[1]

R. I. 459, 464 (1853), holding that a tax on the stock does not raise a presumption that a municipality is thereby prevented from taxing the corporate realty. See also Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550, 560 (1860). Although by the charter a tax is levied on the capital stock, a tax may also be levied on the shares of stock. Memphis *v.* Home Ins. Co., 91 Tenn. 558 (1892). A tax on the bonds which are issued by a corporation does not constitute double taxation although there is also a tax on the franchises of the corporation. Commonwealth *v.* New York, etc. R. R., 150 Pa. St. 234 (1892). Where the stock is not taxable if the tangible property is taxed, the stock may nevertheless be taxed for such part of its value as the capital stock exceeds in value the tangible property. Hyland *v.* Central Iron, etc. Co., 129 Ind. 68 (1891). A tax may be levied on the capital stock even though the shares of stock are also taxed. Durham County *v.* Blackwell, etc. Co., 116 N. C. 441 (1895). The franchise may be taxed although the shares of stock are also taxed, the latter tax being collected also from the corporation. U. S. Electric, etc. Co. *v.* State, 79 Md. 63 (1894).

[1] Thus, in Illinois, in cases where the capital stock is taxed by the state, the shares of stock are held to be free from taxation. Republic Life Ins. Co. *v.* Pollak, 75 Ill. 292 (1874). See also Lackawanna County *v.* First Nat. Bank, 94 Pa. St. 221 (1880), holding that under the act of March 31, 1870, releasing corporations from all other taxes if they pay one per cent tax on the par value of the stock, the corporate realty cannot be taxed after such one per cent has been paid; State *v.* Hannibal & St. J. R. R., 37 Mo. 265 (1866); Jersey City, etc. Co. *v.* Jersey City, 46 N. J. L. 194 (1884); Cheshire, etc. Teleph. Co. *v.* State, 63 N. H. 167 (1884); Valle *v.* Zeigler, 84 Mo. 214 (1884); Tax Cases, 12 G. & J. (Md.) 117 (1841); Provident Inst. *v.* Gardiner, 4 R. I. 484 (1857); Mechanics' Bank *v.* Thomas, 26 N. J. L. 181 (1857); American Bank *v.* Mumford, 26 N. J. L. 478 (1857); State *v.* Tunis, 23 N. J. L. 546 (1852); Smith *v.* Burley, 9 N. H. 423 (1838); Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Savings Bank *v.* Nashua, 46 N. H. 389 (1866), the court saying: "It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow as a legal conclusion that the legislature could not have intended the same property would be subject to another tax, though there may be general errors in the law which would seem to imply that it was to be taxed a second time." In Michigan, where shares of stock in savings banks are taxed, a reduction being allowed for realty, which is taxed separately, the courts held that no other tax can be levied against the corporation. Lenawee, etc. Bank *v.* Adrian, 66 Mich. 273 (1887). The Kentucky tax statutes are so construed that a corporation need not pay a tax on its property in addition to the tax on the stock. Louisville, etc. Co. *v.* Barbour, 88 Ky. 73 (1888); Commonwealth *v.* St. Bernard Coal Co., 9 S.

§ 568. *Exemptions from taxation as affecting tax on shares of stock.*— An exemption of shares of stock is a contract protected by that provision of the constitution of the United States which prevents a state from passing a law which will impair the validity of contracts.[1] This provision has frequently been construed and applied in cases involving the taxation of the corporate franchises, capital stock, or tangible property. In the numerous decisions on this subject there appear two classes of cases of exemptions from taxation which affect the taxation of shares of stock. The first class involves the question whether an exemption of the corporate property, franchises, or capital stock from taxation exempts also the shares of stock from any tax; the second, whether an exemption of the shares of stock from taxation exempts the corporate property, franchises, and capital stock. As regards the former exemption, the effect thereof depends largely on the words used in the statute or charter granting the exemption. The question has given rise to a difference of opinions. In the federal courts, New Jersey, Indiana, and Kentucky, it has been decided that an exemption of the corporation from taxation on one or more of the first three methods of taxation exempts by implication the shares of stock,[2]

W. Rep. 709 (Ky., 1888). The Pennsylvania acts are construed so as to prevent double taxation. Pennsylvania Co. etc. *v.* Commonwealth, 15 Atl. Rep. 456 (Pa., 1888). Where a coal company owns all the stock of a railroad company, and taxes have been paid by the railroad company on the appraised value of its capital stock, the coal company cannot be taxed on such stock again. Double taxation is legal, but will not be imposed unless the statute clearly requires it. Commonwealth *v.* Fall Brook Coal Co., 156 Pa. St. 488 (1893).

[1] Farrington *v.* Tennessee, 95 U. S. 679 (1877). See also § 497, *supra*. An exemption of the stock of a railroad company does not exempt stock issued for constructing branch roads of that company, such construction being subsequent to a constitutional provision prohibiting exemptions. Chicago, etc. R. R. *v.* Guffey, 120 U. S. 569 (1887).

[2] State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Johnson *v.* Commonwealth, 7 Dana (Ky.), 338 (1838); King *v.* Madison, 17 Ind. 48 (1861), holding that an exemption of the capital stock exempts shares of stock. An exemption of the corporation on its property exempts also the shares of stock, and exemption of the shares of stock exempts the corporation. State *v.* Heppenheimer, 34 Atl. Rep. 1061 (N. J., 1896). Gordon *v.* Appeal Tax Court, 3 How. 133 (1845), held that an exemption prohibiting any "further tax or burden upon them," the banks, exempted the shares of stock. Again, where the charter provided that "the capital stock of said company shall be forever exempt from taxation, the shares of stock can-

although the supreme court of the United States has recently held that exemption of the capital stock does not necessarily exempt the stockholders.[1] In Tennessee, North Carolina, and Maryland an exemption is strictly construed.[2]

As regards the second class of exemptions, it seems to be established by the great weight of authority that an exemption

not be taxed. . . . Each share is a part of the whole, and, as the whole is exempt from taxation, it follows that each part or share must also be exempt." Tennessee *v.* Whitworth, 22 Fed. Rep. 75 (1884). And the purchaser and successor of a railroad, taking by statute all its rights and privileges, is also exempt in the same manner. Tennessee *v.* Whitworth, 22 Fed. Rep. 81; aff'd, 117 U. S. 139 (1886). An exemption of the corporation exempts it from a tax upon the shares of shareholders, which the company is required to pay irrespective of any dividends or profits payable to the shareholder, since this is substantially a tax on the corporation itself. New Orleans *v.* Houston, 119 U. S. 265 (1881). *Cf.* U. S. *v.* Railroad Co., 17 Wall. 322 (1872). An exemption of shares of stock from taxation is waived by the acceptance of subsequent statutes imposing a tax. Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550 (1860); Cooley, Taxation (2d ed.). 212.

[1] New Orleans *v.* Citizens' Bank, 167 U. S. 371 (1897).

[2] Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836), holding that an exemption of the capital stock did not exempt shares of stock. To same effect, Memphis *v.* Farrington, 8 Baxt. (Tenn.) 539 (1876), the court saying: "The capital stock and shares of stock are two distinct properties, and an exemption of the one does not thereby necessarily exempt the other, nor the taxation of the latter operate as a tax on the former, so as to interfere with its exemption from such burdens." A tax may be levied on the shares of stock although the capital stock is exempt. State *v.* Bank of Commerce, 95 Tenn. 221 (1895); Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880), holding that an exemption of the corporate realty does not exempt the shares of stock; Appeal Tax Court *v.* Rice, 50 Md. 302 (1878); Tax Cases, 12 G. & J. (Md.) 117 (1841). In County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), the court said: "To make out the claim to this exemption from the taxing power of the state, so essential to the support of its government, it is incumbent upon corporations to show that the power to tax has been clearly relinquished by the state; and if this has not been done in clear and explicit terms, or by necessary implication, the question whether or not the exemption has been granted must be resolved in favor of the state." Citing Providence Bank *v.* Billings, 4 Pet. 514 (1830); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Philadelphia & W. R. R. *v.* State, 10 How. 376 (1850). But a clear exemption of the shares of stock is a contract which is protected by the United States constitution. State *v.* Baltimore, etc. R. R., 48 Md. 49 (1877). A charter provision, however, that a certain tax shall be paid by the corporation does not prevent a subsequent change in that tax. Delaware Railroad Tax, 18 Wall. 206 (1873). And an exemption by the state has been held not to exempt the shares from taxation by a municipality. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847).

of the shares of stock from taxation exempts also, by implication, the corporate franchises, capital stock, and tangible property from any tax.[1] Where the charter compels a corporation to pay an annual tax on each share of stock "in lieu of all other taxes," the shareholders themselves cannot be taxed on their stock.[2] Such an exemption, however, does not prevent the state from levying a tax on the capital stock,[3] and such an exemption is lost by a judicial sale of the franchises of the company.[4] A statute conferring upon a new corporation "all the rights and privileges" of a former corporation does not confer such an exemption.[5] Nor does such exemption continue where the charter is so amended as to change an insurance company into a banking company.[6] Nor is such an exemption good where, after the granting of a charter, but before the first organization meeting, a new constitution is adopted by the state

[1] In State *v.* Bank of Commerce, 53 Fed. Rep. 735 (1892), it is held that a provision imposing a tax on each share of stock, "which shall be in lieu of all other taxes," exempts the property of the company as well as the stock from further taxation. Scotland County *v.* Missouri, etc. R'y, 65 Mo. 123 (1877), the court saying: "It is clear that a tax on the property represented by the stock is substantially a tax on the stock." See also County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), where the court said: "It is settled by repeated decisions of this court, which we are not disposed to disturb, that the exemption of the shares of the capital stock operates as an exemption of the property of the corporation, or so much of it as the corporation is fairly authorized to hold for the proper exercise of its franchises; and this upon the principle that the shares of the stock in the hands of the shareholders represent the property held by the corporation;" Cape Fear Bank *v.* Edwards, 5 Ired. L. (N. C.) 516 (1845), where the charter said: "The said bank shall not be liable to any further tax;" Mayor, etc. *v.* Baltimore & O. R. R., 6 Gill (Md.), 288 (1848); Tax Cases, 12 G. & J. (Md.) 117 (1841); Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). In Wilmington, etc. R. R. *v.* Reid, 64 N. C. 226 (1870), however, it was held that an exemption of shares of stock does not exempt the corporate franchise from taxation. Raleigh, etc. R. R. *v.* Reid, 64 N. C. 155 (1870). And in State *v.* Petway, 2 Jones, Eq. (N. C.) 396 (1856), it was held that a charter provision that the shares of stock should be taxed a certain amount did not prevent a tax on dividends.

[2] Bank of Commerce *v.* Tennessee, 161 U. S. 134 (1896). On a rehearing the decision in this case was modified so as to allow a recovery against holders of new stock, but not as against holders of old stock. Bank of Commerce *v.* Tennessee, 163 U. S. 416 (1896).

[3] Shelby County *v.* Union, etc. Bank, 161 U. S. 149 (1896).

[4] Mercantile Bank *v.* Tennessee, 161 U. S. 161 (1896).

[5] Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174 (1896).

[6] Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

forbidding such exemptions.[1] An exemption of stock does not exempt the property of the corporation where the charter provides against such latter exemption.[2] Exemptions have no effect and are of no avail beyond the boundaries of the state granting them; and accordingly a non-resident stockholder, who is taxed on his stock in the state where he resides, cannot defeat that tax by reason of exemptions enjoyed within the state creating the corporation.[3]

B. TAXATION OF NATIONAL-BANK STOCK.

§ 569. *General rules.*—It is one of the established principles of constitutional law in this country that the instruments of government by the United States shall not be taxed by any state, and also that those of a state shall not be taxed by the United States. Accordingly, the bonds issued by the United States government cannot be taxed by any state.[4] So, also, when the old United States Bank was in existence, it was held that neither the bank nor its capital stock could be taxed by a state. But it was also held that, inasmuch as the interest of the stockholders in the bank was different from the franchises, property, capital stock, and the United States bonds held by the bank, such interest of the shareholder could be taxed by a state, and that such taxation would be constitutional and legal.[5] The same rules apply to the present national banks. A state tax on the capital stock of the bank is illegal and void.[6] But

[1] Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

[2] Central R. R. etc. Co. *v.* Wright, 164 U. S. 327 (1896).

[3] Appeal Tax Court *v.* Patterson, 50 Md. 354 (1878); Appeal Tax Court *v.* Gill, 50 Md. 377 (1878). See also Railroad Co. *v.* Pennsylvania, 15 Wall. 300 (1872).

[4] Cooley, Taxation (2d ed.), 84, 85. Formerly government bonds were called stock both in England and in this country. That use of the term, however, has become practically obsolete. See Bank of Commerce *v.* New York, 2 Black, 620 (1862); Weston *v.* Charleston, 2 Peters, 449 (1829).

[5] McCulloch *v.* Maryland, 4 Wheat. 316, 436 (1819); Bulow *v.* Charleston, 1 Nott & M. (S. C.) 527 (1819). See also Berney *v.* Tax Collector, 2 Bailey (S. C.), 654 (1831); National Bank *v.* Commonwealth, 9 Wall. 353 (1869), per Miller, J.

[6] First Nat. Bank *v.* Douglas County, 3 Dill. 298 (1873); S. C., 9 Fed. Cas. 100; Collins *v.* Chicago, 4 Biss. 472 (1867); S. C., 6 Fed. Cas. 118; Salt Lake, etc. Bank *v.* Golding, 2 Utah, 1 (1876); Mayor, etc. *v.* First Nat. Bank, 59 Ga. 648 (1877); Bradley *v.* People, 4 Wall. 459 (1866); Bank of Commerce *v.* New York City, 2 Black, 620 (1862), reversing People *v.* Com'rs of Taxes, 23 N. Y. 192 (1861); S. C., 32 Barb. 509, and declaring unconstitutional the

a tax on its real estate or on its shares of stock is upheld as legal and enforceable.[1] This is the law, although a large part or all of the bank's capital stock is invested in United States bonds.[2] The authority of a state to tax shares of stock in national banks is expressly conferred by the statutes of the United States which create and regulate these banks.[3] The only ques-

New York statutes under which the national banks were taxed. New York has been exceedingly unfortunate in its efforts to tax national banks. After the decision in Bank of Commerce *v.* New York City, 2 Black, 620 (1862), came Bank Tax Case, 2 Wall. 200 (1864), declaring unconstitutional the New York statute of April 29, 1863, for the taxation of national banks, the tax still being on the capital stock. Next came Van Allen *v.* Assessors, 3 Wall. 573 (1865) (reversing Utica *v.* Churchill, 33 N. Y. 161—1865. See also First Nat. Bank *v.* Fancher, 48 N. Y. 524—1872), declaring unconstitutional the New York statute of March 9, 1865, taxing the shareholders in national banks, because the act did not prescribe expressly that the tax should be no greater than the tax on other shares of stock, and because taxes in New York on other corporations were not on shares of stock, but on the capital stock. New York then passed the act of April 23, 1866, which was sustained in People *v.* Com'rs, 4 Wall. 244 (1866). Still later came the case of People *v.* Weaver, 100 U. S. 539 (1879), reversing 67 N. Y. 516, overruling People *v.* Dolan, 36 N. Y. 59 (1867), and declaring void the New York tax of national-bank stock, for the reason that the New York court of appeals construed the New York taxation statute to allow persons taxed on ordinary securities a deduction for debts, while a similar deduction was not allowed to stockholders in banks, state or national. Supervisors *v.* Stanley, 105 U. S. 305 (1881) [see People *v.* Dolan, 36 N. Y. 59—1867], practically modified the preceding case, however, by holding that a stockholder who owed no debts could not complain, and that those who did owe debts were entitled, not to a release from the tax altogether, but only to the extent of what the state ought to have allowed as a deduction. The last case in New York was decided by Judge Wallace in November, 1886. States cannot tax national-bank currency. Horne *v.* Green, 52 Miss. 452 (1876). *Cf.* Ruffin *v.* Orange County Com'rs, 69 N. C. 498 (1873); Lilly *v.* Cumberland County Com'rs, 69 N. C. 300 (1873); Com'rs *v.* Elston, 32 Ind. 27 (1869).

[1] Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Douglas County, 3 Dill. 330 (1874); S. C., 9 Fed. Cas. 84, upholding the Nebraska statute herein of Feb. 27, 1873; Stetson *v.* Bangor, 56 Me. 274 (1868).

[2] Van Allen *v.* Assessors, 3 Wall. 573 (1865); People *v.* Com'rs, 4 Wall. 244 (1866). See also Home Ins. Co. *v.* New York, 119 U. S. 129 (1886). In taxing the stock no reduction is allowed for bonds held by the corporation. Home Ins. Co. *v.* Board of Assessors, 42 La. Ann. 1131 (1890); Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890).

[3] U. S. Rev. Stat., § 5219 (taken from act of June 3, 1864, as amended by act of Feb. 10, 1868). The case of People *v.* Weaver, 100 U. S. 539, 543 (1879), says that the effect of the act of congress, as regards the taxation of national banks, is that congress says to the states: "You may tax the real estate of the banks as other real estate is taxed, and you may tax the

tions of importance that are still unsettled turn upon the meaning and application of that statute; and, accordingly, the law is stated most clearly when it is connected with the various provisions of these statutes.

§ 570. *Place in which shares of national-bank stock may be taxed.*— The Revised Statutes of the United States expressly declare that non-resident stockholders in a national bank are to be taxed at the place where the bank is located.[1] Under this statute a non-resident of the state within which the bank is situated can be taxed on his stock only where the bank is located.[2] The state where he resides cannot also tax him on such stock. As regards residents of the state within which the bank is located, the state itself determines where the tax is to be levied.[3] If the state statute requires that the whole tax shall be paid in the city, county, or town where the bank is located, even though some of the stockholders reside in other counties or cities, the statute must be obeyed.[4] Generally, however, the

shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your state. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented." Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886). New shares cannot be taxed until the increase has been approved by the comptroller of the currency. Charleston *v.* People's Nat. Bank, 5 S. C. 103 (1873).

[1] Such was the effect of the amendment of 1866. Previous to that time there was controversy herein as to the meaning of the act of 1863. See Austin *v.* Boston, 96 Mass. 359 (1867).

[2] See McIver *v.* Robinson, 53 Ala. 456 (1875); Williams *v.* Weaver, 75 N. Y. 30 (1878); Kyle *v.* Fayetteville, 75 N. C. 445 (1876); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Lionberger *v.* Rouse, 9 Wall. 468 (1869).

[3] Austin *v.* Aldermen, 7 Wall. 694 (1886). The tax may be levied on resident stockholders in the city, county, or town where they reside. Austin *v.* Boston, 96 Mass. 359 (1867). And the cashier of the bank may be required by statute to send to the clerks of the various towns the names of such stockholders as reside in those towns. Waite *v.* Dowley, 94 U. S. 527 (1876). As to the taxation of national-bank stock in Iowa, see First Nat. Bank *v.* Albia, 52 N. W. Rep. 334 (1892). As to the assessment of bank stock in West Virginia, see Bank of Bramwell *v.* Mercer County Court, 36 W. Va. 341 (1892). Concerning the taxation of national-bank stock in Nevada, see First Nat. Bank *v.* Kreig, 21 Nev. 404 (1893). National-bank stock in Delaware may be taxed by the state. First Nat. Bank *v.* Herbert, 44 Fed. Rep. 158 (1890). As to taxation of bank stock in Washington, see First Nat. Bank *v.* Hungate, 62 Fed. Rep. 548 (1894).

[4] National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Provident Inst. *v.* Boston, 101 Mass. 575 (1869); McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872). Craft *v.* Tuttle, 27 Ind. 332 (1866), holds that

statute requires that stockholders residing in the state shall be taxed at their place of residence on stock owned by them in a national bank within that state.[1] If the statute is silent herein, then the state statutes regulating the taxation of stockholders in other corporations are to apply to stockholders in national banks situated within the state. A state statute may require a national bank to pay a tax on the stock of non-resident as well as of resident stockholders in the bank.[2] The statute may require the bank to retain from dividends the tax on the shares of stock, such tax being determined by the amount of dividends.[3] The collection of a tax on national-bank stock may be enforced by the same procedure through which taxes on other personal property are collected.[4]

§ 571. *The tax must not be greater than that imposed on other "moneyed capital."*— The most difficult, unsettled, and litigated questions connected with the taxation of shares of stock in national banks arise from the meaning and application of that provision of the statutes of the United States requiring that the taxation of national-bank shares of stock shall not be at a higher

if a municipality has no power to tax shares in state banks, it cannot tax national-bank shares.

[1] Clapp *v.* Burlington, 42 Vt. 579 (1870). See Trustees of Eminence *v.* Deposit Bank, 12 Bush (Ky.), 538 (1877); Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867). *Cf.* State *v.* Hart, 31 N. J. L. 434 (1866); State *v.* Haight, 31 N. J. L. 399 (1866)—objectionable and unfortunate decisions in all respects. The decision in Tenth Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877), however, placed New Jersey among the states which levy the tax in the most approved manner, residents being taxed where they reside, non-residents being taxed at the domicile of the corporation. See also Kyle *v.* Mayor, etc., 75 N. C. 445 (1876); Buell *v.* Fayetteville Com'rs, 79 N. C. 267 (1878); Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Smith, 65 Ill. 44 (1872); Baker *v.* First Nat. Bank, 67 Ill. 297 (1873); Clapp *v.* Burlington, 42 Vt. 579 (1870); Howell *v.* Cassopolis, 35 Mich. 471 (1877). *Cf.* Mintzer *v.* Montgomery County, 54 Pa. St. 139 (1867). For taxation of national-bank stock under the Alabama act, see Maguire *v.* Board of Revenue, 71 Ala. 401 (1882).

[2] Merchants', etc. Bank *v.* Pennsylvania, 167 U. S. 461 (1897).

[3] Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). *Cf.* First Nat. Bank *v.* Richmond, 39 Fed. Rep. 309 (1889). The taxation of the capital stock of a national bank against the bank *in solido* is invalid. It may be collected from the bank, but should be assessed against the stockholders. Deductions should also be allowed when allowed on other similar property. Leoti Nat. Bank *v.* Fisher, 45 Kan. 726 (1891).

[4] Palmer *v.* McMahon, 133 U. S. 660 (1890). A tax on national-bank stock, to be collected in the first instance from the bank, cannot be collected from the receiver of the bank, the bank being insolvent. Boston *v.* Beal, 51 Fed. Rep. 306 (1892).

rate than the taxation of other "moneyed capital" within the state. The words "moneyed capital" have been construed to mean "not only bonds, stocks, and money loaned, but all credits and demands of every character in favor of the taxpayer."[1] This has been the subject of much controversy, however; and the latest decisions go very far in upholding the tax, if substantial justice has been done.[2] Money invested in railroads, manufacturing, mining, or mortgages is not "moneyed capital" competing with national-bank capital, and hence a tax on the latter need not be at the same rate as upon the former.[3]

[1] Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886); Boyer *v.* Boyer, 113 U. S. 689 (1884). Shares of stock in banks are other moneyed capital, but shares of stock in other corporations are not necessarily so. "Moneyed capital" means money put out by way of loan, discount, etc., or invested in stocks of banks, etc., which put out money by way of loan, discount, etc. Trust companies are different from banks herein. Mercantile Bank *v.* New York, 121 U. S. 138 (1887), affirming 28 Fed. Rep. 776. A tax on national-bank stock is legal although stock in state and savings banks is not taxed directly, but the corporation itself is taxed in another way. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887). See also Hepburn *v.* School Directors, 23 Wall. 480 (1874). Other moneyed capital means capital employed in banking or loaning, and not in business. Talbott *v.* Silver Bow Co., 139 U. S. 438 (1891).

[2] People *v.* Commissioners, 4 Wall. 256 (1866); Adams *v.* Nashville, 95 U. S. 19 (1877). *Re* McMahon, 102 N. Y. 176 (1886), holds that shares of stock in railroads, manufacturing, and other corporations are not "moneyed capital" in the sense in which these terms are used in the act of congress. See also First Nat. Bank *v.* Waters, 19 Blatchf. 242 (1881). Provident Inst. *v.* Boston, 101 Mass. 575 (1869), holds that the comparison is to be made with other moneyed capital in the same town or city where the tax is levied. See also People *v.* Moore, 1 Idaho, 504 (1873). Subject to this rule the shares of national banks may be assessed at their value, even above par. Hepburn *v.* School Directors, 23 Wall. 480 (1874); People *v.* Commissioners of Taxes, 94 U. S. 415 (1876); S. C., 67 N. Y. 516 (1876), affirming 8 Hun, 536; St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); S. C., 21 Fed. Cas. 203, the court saying, also, that the assessors may ascertain that value by including "all reserve funds, profits, earnings, and other values" when the intent of the statute is to base the tax "upon an inquiry, *inter alia*, into the actual value of the property of the banks so far as this imparts or confers a value upon the shares." A stockholder cannot enjoin the tax unless he first pays such part of it as he admits is legal. Rosenberg *v.* Weekes, 67 Tex. 578 (1887). The stock is listed against the stockholder, not against the bank. Miller *v.* First Nat. Bank, 46 Ohio St. 424 (1889). The statute may authorize taxation for years past. State *v.* Simmons, 70 Miss. 485 (1893).

[3] Aberdeen Bank *v.* Chehalis County, 166 U. S. 440 (1897). "Moneyed capital means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount, or otherwise, which from time to time,

The method of taxing shares of stock need not correspond to that followed in taxing other corporations in the state.[1] The material point is that national-bank stock must not, as a result, be taxed higher than other moneyed investments. If this rule is observed, it is of little consequence whether the tax on national-bank stock is levied and assessed in the same way as other corporations are taxed.

If the state laws allow a deduction to a person taxed on bonds, notes, and similar property for debts due from him to others, a similar deduction must be allowed to stockholders taxed on their shares in a national bank.[2] If the statute does not allow the

in the course of business, are reduced again to money and re-invested." Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894).

[1] Davenport Bank *v.* Davenport, 123 U. S. 83 (1887). "There is no reason to suppose that congress cared at all about the mode the states might adopt for the collection of their taxes. A tax imposed on the capital or property of a corporation falls as effectually on the capital of the shareholder represented by his shares as does a tax upon the shares directly; and although, in legal discrimination, a tax upon the former is not a tax upon the latter, practically and substantially taxation of the capital of the corporation is taxation of the capital of the shareholder." A tax on national-bank stock was upheld, though all other stock except bank stock was exempt, the tax being on capital stock, in Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776–785 (1886), Wallace, J.; affirmed, 121 U. S. 138. The mode of collection need not be the same. The state may compel the bank to pay the tax. National Bank *v.* Commonwealth, 9 Wall. 353, 363 (1869), per Miller, J. But if the assessment is illegal, in that no notice and opportunity is given to the shareholder to appear and resist the tax, it cannot be enforced. Albany City Nat. Bank *v.* Maher, 20 Blatchf. 341 (1882). In general, *cf.* Van Allen *v.* Assessors, 3 Wall. 573 (1865); Bradley *v.* People, 4 Wall. 459 (1866); Hubbard *v.* Johnson County, 23 Iowa, 130 (1867); People *v.* Assessors, 29 How. Pr. 371 (1865); Wright *v.* Stelz, 27 Ind. 338 (1866), overruling Whitney *v.* Madison, 23 Ind. 331 (1864), on certain points; Cooley, Taxation (2d ed.), 390. *Contra*, People *v.* Bradley, 39 Ill. 130 (1866). See also Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Smith *v.* First Nat. Bank, 17 Mich. 479 (1869); Van Slyke *v.* State, 23 Wis. 655 (1869); Bagnall *v.* State, 25 Wis. 112 (1869). Where a state and also a local tax are levied on shares of stock in a state bank, and the local tax is declared illegal, the same local tax is illegal as regards shares in national banks. City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); S. C., 5 Fed. Cas. 755.

[2] Evansville Bank *v.* Britton, 105 U. S. 322 (1881), affirming 8 Fed. Rep. 867. But a deduction to individuals for United States bonds held by them will not invalidate a tax on the national-bank stock without a deduction for bonds held by the bank. Bressler *v.* Wayne County, 25 Neb. 468 (1889); People *v.* Commissioners, 4 Wall. 244 (1866); First Nat. Bank *v.* Ayers, 160 U. S. 660 (1896). In Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886), the court held that the deduction allowed to others is

same to the latter, and the courts of the state refuse to allow the deduction, then the tax is illegal. Such was the result of a tax in New York on national-bank stock.[1]

fatal to a tax on national-bank shares without that deduction only when it is "material and serious;" and that that depends on the proportion of moneyed capital which is allowed the deduction to that moneyed capital which is not allowed it. If material, the national-bank-share tax is to be allowed a similar deduction. National-bank stock cannot be taxed at a higher valuation on its actual value than other moneyed property is valued at. Deductions allowed to other moneyed capital must also be allowed on national-bank stock. Whitbeck *v.* Mercantile, etc. Bank, 127 U. S. 193 (1888). A stockholder in a national bank is entitled to the same deductions as a stockholder in a state bank. McHenry *v.* Downer, 116 Cal. 20 (1897). In Ohio the debts of a stockholder in a national bank can-

[1] People *v.* Weaver, 100 U. S. 539 (1879). The New York court held that "the effect of the state law is to permit a citizen of New York, who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can make no such deduction." The supreme court of the United States declared the tax on the national-bank shares to be invalid. But the case of Supervisors *v.* Stanley, 105 U. S. 305, 315 (1881), holds that the tax is not void absolutely. A deduction allowed to individuals for national and state securities, but not allowed on national-bank stock, invalidates a tax on the latter. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). If the stockholder owed no debts he is not injured; and even if he owes debts he cannot defeat the tax altogether, but is allowed a similar deduction. No discrimination is allowable, although the state taxes banks and nothing else. Gorge's Appeal, 79 Pa. St. 149 (1875). No discrimination, though a deduction for debts is allowed to those whose property consists of debts due them; but no deduction otherwise. First Nat. Bank *v.* St. Joseph, 46 Mich. 526 (1881). The exemption of all capital which is wholly invested in mining is not a discrimination. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). Exemption from taxation of savings banks, municipal bonds, and shares of stock in all foreign and domestic corporations other than banks does not invalidate a tax on shares of stock in national banks. Mercantile Bank *v.* New York, 121 U. S. 138 (1887); Newark, etc. Co. *v.* Newark, 121 U. S. 163 (1887); Bank of Redemption *v.* Boston, 125 U. S. 60 (1888). No discrimination exists in taxation of national-bank stock in territory where the shares of stock in corporations paying taxes on their property or capital stock are exempted from taxation. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). In Nebraska the owner of national-bank stock, in listing his shares for taxation, is not entitled to deduct his *bona fide* indebtedness from the value of such shares of stock. The decision on the former hearing of the case, reported in 25 Neb. 468, is overruled. Bressler *v.* Wayne County, 32 Neb. 834 (1891). National-bank shares in Massachusetts are taxed at their actual value, and the bank may petition for a reduction of the tax. National Bank of Commerce *v.* New Bedford, 155 Mass. 313 (1892).

A refusal to allow a deduction to stockholders in national banks similar to a deduction allowed on a tax levied on other "moneyed capital" was held to be a discrimination in contravention of the statute. Special exemptions, however, of cer-

not be deducted from the value at which the stock is taxed. Niles *v.* Shaw, 50 Ohio St. 370 (1893). In Ohio no deduction for the debts of the stockholder is made in the taxation of national-bank stock. Chapman *v.* First Nat. Bank, 47 N. E. Rep. 54 (Ohio, 1897). Deductions allowed general taxpayers of their debts from credits taxed against them give to national-bank stockholders the right to a similar reduction in the taxation of their stock. Non-resident stockholders are entitled to the same deductions. Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894).

Where a tax on stock is not illegal except in that the assessors have proceeded in a wrong manner, the court will not enjoin its collection unless the plaintiff stockholders pay in such a tax as would have been legal. Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U. S. 305 (1881); S. C. *sub nom.* Stanley *v.* Supervisors, 121 U. S. 535 (1887), holding that the stockholder cannot recover back the excess of tax where he has not attempted to have the tax remedied; Hills *v.* Exchange Bank, 105 U. S. 319 (1881), reversing National Albany Exch. Bank *v.* Wells, 5 Fed. Rep. 248. In consequence of this escape of the stockholders from taxation, a special statute was passed levying a back tax. See N. Y. Laws, 1883, ch. 341. Such a statute is constitutional. See McVeigh *v.* Loomis, 49 Ill. 318 (1868). The legislature may cure any defects in the levy of taxes in past years, provided such defects could have been so modified before the levy was made. Williams *v.* Supervisors of Albany, 122 U. S. 154 (1887), sustaining ch. 345, Laws of 1883. *Cf.* City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); S. C., 5 Fed. Cas. 755. And a deduction to other moneyed corporations for their real estate must be allowed in taxing national-bank shares. Pollard *v.* State, 65 Ala. 528 (1880), overruling McIver *v.* Robinson, 53 Ala. 456 (1875), and Sumter County *v.* National Bank, 62 Ala. 464 (1878). In general, see also Ruggles *v.* Fond du Lac, 53 Wis. 436 (1881); Miller *v.* Heilbron, 58 Cal. 133 (1881); St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); Covington, etc. Bank *v.* Covington, 21 Fed. Rep. 484 (1884). A deduction for debts, if allowed to persons taxed generally, must be allowed national-bank stockholders who are taxed on their stock. McAden *v.* Mecklenburg County, 97 N. C. 355 (1887). Deductions are to be allowed the national-bank stockholder for debts due from him to others where the state statute permits its citizens to deduct their debts from the valuation of their personal property. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887); Peavey *v.* Greenfield, 64 N. H. 284 (1887). As regards deductions for surplus funds which are already taxed, see Strafford Nat. Bank *v.* Dover, 58 N. H. 316 (1878). *Cf.* North Ward, etc. Bank *v.* Newark, 39 N. J. L. 380 (1877); First Nat. Bank *v.* Peterborough, 56 N. H. 38 (1875). As regards its realty, see Rice County Com'rs *v.* Citizens' Nat. Bank, 23 Minn. 280 (1877). In Indiana the national-bank stockholder may recover back such part of the tax as should have been deducted by reason of his indebtedness. Indianapolis *v.* Vajen, 111 Ind. 240 (1887); Exchange Nat. Bank *v.* Miller, 19 Fed. Rep. 372 (1884).

tain stocks or other forms of "moneyed capital" do not require that a similar exemption should be made on national-bank stock.[1]

Again, the national bank act cannot be evaded by an unfair assessment of the shares in national banks as compared with the assessment of other moneyed capital. It is a well-known fact and an understood matter in nearly all localities that no kinds of property are valued at their actual selling worth in making the valuation for taxation purposes. Consequently, if other moneyed capital is valued in the assessment rolls at a certain proportion of the actual value, and national-bank stock at a higher proportion, the tax is illegal and cannot be collected.[2]

[1] Thus, a special contract exemption of a few state bonds from taxation will not exempt the national bonds. Lionberger *v.* Rouse, 9 Wall. 468 (1869); Hepburn *v.* School Directors, 23 Wall. 480 (1874), where an exemption of mortgages, judgments, and contracts to sell land were immaterial herein. See also Adams *v.* Nashville, 95 U. S. 19 (1877); Supervisors *v.* Stanley, 105 U. S. 305, 317 (1881); *Re* McMahon, 102 N. Y. 176 (1886); McLoughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872); Boyer *v.* Boyer, 113 U. S. 689 (1885); Everitt's Appeal, 71 Pa. St. 216 (1872); Albany, etc. Bank *v.* Maher, 19 Blatchf. 175 (1882). See also Richmond *v.* Scott, 48 Ind. 568 (1874); Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776, 785 (1886).

[2] Pelton *v.* National Bank, 101 U. S. 143 (1879), the court saying that "any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner does tax them at a greater rate within the meaning of the act of congress." Where, however, the assessors assess ordinary securities at three-fifths of their actual value, and assess bank stock at its full actual value, and such method of unequal assessments is contrary to the constitution of the state, the court will relieve the stockholders only upon payment by them of such a tax as would have been legal. Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U. S. 305 (1881). When the national-bank stock is assessed too low, the fact that another bank is assessed still lower will not invalidate the tax against the former. People *v.* Assessors, 2 Hun, 583 (1874). In First Nat. Bank *v.* Treasurer, 25 Fed. Rep. 749 (1885), where ordinary moneyed capital was assessed at six-tenths of its actual value, while shares in national banks were assessed at a higher proportion of the real value, the collection thereof was enjoined upon the complainant paying the tax admitted to be due. As to the pleadings, see National Bank *v.* Kimball, 103 U. S. 732 (1880). Lower valuation of other property has been held to be immaterial. Wagoner *v.* Loomis, 37 Ohio St. 571 (1881). As regards taxation of national banks, a custom of assessing property at fifty per cent of its value is not proved by a few examples. Engelke *v.* Schlenker, 75 Tex. 559 (1890). If, as a matter of fact, personal property and capital of individuals escape taxation, and little

§ 572. *The bank may bring suit to restrain illegal tax on its stockholders.*— There has been some doubt as to whether a national bank could bring suit to restrain an illegal tax on its stockholders. Ordinarily a corporation cannot do so. Each stockholder must protect his own interests. But where, as in the case of national banks, the tax is paid by the bank itself, and collected by it from its stockholders, if the latter refuse to pay the bank or recognize its payment as legal, many suits would result. Accordingly, in order to avoid a multiplicity of suits, it is now well established that the bank itself may file a bill in equity to prevent and enjoin the collection of an illegal tax on its stockholders.[1] A suit to declare invalid a tax levied on national-bank stock must be in equity.[2]

effort is made to tax such capital, then a tax on national-bank stock cannot be enforced. If such stock is assessed at two-thirds of its actual value, and other personal property at one-half their value, the assessment is illegal. First Nat. Bank *v.* Lindsay, 45 Fed. Rep. 619 (1891).

[1] Quoted and approved in Knopf *v.* First Nat. Bank, 173 Ill. 331 (1898); City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); S. C., 5 Fed. Cas. 755, where the court said: "The bank is so far the trustee of the stockholders and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders who denied the legality of the tax, and gave the bank notice that it would pay at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action." This case holds also that an injunction against the collection of the illegal tax will be granted. In general, see also Albany City Nat. Bank *v.* Maher, 20 Blatchf. 341 (1882); North Ward Nat. Bank *v.* Newark, 40 N. J. L. 558 (1878). *Cf.* Dows *v.* Chicago, 11 Wall. 108 (1870); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Pelton *v.* National Bank, 101 U. S. 143 (1879); Cummings *v.* National Bank, 101 U. S. 153 (1879). *Contra*, First Nat. Bank *v.* Meredith, 44 Mo. 500 (1879). See also Union Nat. Bank *v.* Chicago, 3 Biss. 82 (1871); S. C., 24 Fed. Cas. 615. As to the rule in New York, see People *v.* Wall Street Bank, 39 Hun. 525 (1886); People *v.* Coleman, 41 Hun, 344 (1886). The same rule does not apply to a corporation which brings suit to prevent the levy upon and sale of a non-resident stockholder's stocks for non-payment of his tax. Waseca Co. Bank *v.* McKenna, 32 Minn. 468 (1884). The case of Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867), denies the right of the bank to bring the action, and says: "The corporation is not the agent of the stockholders for any such purpose." A national bank may file a bill to restrain the imposition of a tax on stock, the bank having to pay the tax. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). But the injunction against collection of the tax is granted only as to the excess of tax. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). The bank cannot file a bill in the federal court unless the tax involved is over $2,000. Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. Rep. 621 (1892).

[2] Lindsay *v.* First Nat. Bank, 156 U. S. 485 (1895).

C. OTHER METHODS OF TAXING CORPORATIONS.

§ 572a. *General principles.*— A state may tax corporations, and the rate of taxation may be greater or less than or equal to the rate at which individuals are taxed.[1] The method of assessing taxes upon corporations varies in the different states.[2] A state may distribute the taxes paid by a railroad on its rolling-stock and personalty among the counties traversed by the railroad.[3]

Where a company is really located in a city and does all its business there, but its articles of incorporation state its principal place of business as being in an adjacent town, the sole object being to evade taxation, the court will hold that for taxation purposes its principal place of business is in such city.[4]

[1] It is constitutional to tax corporations without taxing individuals. Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121 (1887); State R. R. Tax Cases, 92 U. S. 575 (1875). *Cf.* Railroad Tax Cases, 13 Fed. Rep. 722 (1882); Santa Clara Co. *v.* Railroad, 18 Fed. Rep. 385; S. C., 118 U. S. 396 (1885). A tax on railroads may be legal, although the assessment is for eighty per cent of the value, while on other property in the state the assessment is sixty per cent. Chamberlain *v.* Walter, 60 Fed. Rep. 788 (1894).

[2] See Part VII, *infra*. A tax on a gas company on gross receipts and on dividends by way of license for the right to act as a corporation is not a tax upon the property or corporate franchises, but is a license fee. Jersey City Gas-Light Co. *v.* United Gas, etc. Co., 46 Fed. Rep. 264 (1891).

[3] Columbus Southern R'y *v.* Wright, 151 U. S. 470 (1894). The rolling-stock, choses in action, etc., of a railroad have their situs at the domicile or place of business of the company, but the legislature may change this situs for purposes of taxation. Columbus Southern R'y *v.* Wright, 151 U. S. 470 (1894).

[4] Milwaukee Steamship Co, *v.* Milwaukee, 83 Wis. 590 (1892). Where the actual place of business of a corporation is at one place, but its nominal place of business is fixed elsewhere in order to evade taxation, the actual place of business is the place where the company will be taxed under the Michigan statutes. Detroit Transp. Co. *v.* Board of Assessors, 91 Mich. 382 (1892), distinguishing the New York cases. See also Galveston, etc. R'y *v.* Gonzales, 151 U. S. 496 (1894), relative to domicile and residence for purposes of jurisdiction of the federal courts. In regard to a corporation being taxed in another place in the state from the place where its principal office is located, see also *Re* McLean, 66 Hun, 122 (1892). It must be the principal place or places of business for the purposes of taxation and service of process; and in New York under somewhat similar statutes it is held that the certificate is conclusive as to this. Western Transp. Co. *v.* Scheu, 19 N. Y. 408 (1859). A domestic corporation will not be allowed to deny that it has a place of business in the state. Chapman *v.* Doray, 89 Cal. 52 (1891). Generally, the statutes prescribe that a corporation shall be taxed where its principal office or place of business is located. People

Where the capital stock is invested in patent-rights it cannot be taxed by the state.[1] A state may compel corporations to pay taxes for years past.[2]

A tax on the capital stock based upon the amount of dividend declared cannot be evaded by distributing profits without declaring a dividend. But a stock dividend does not come within the tax statute.[3] The fact that a company has declared

v. McLean, 17 Hun, 204 (1879); Pelton *v.* Northern Transp. Co., 37 Ohio St. 450 (1882); Baltimore *v.* Baltimore, etc. R'y, 57 Md. 31 (1881); Western Transp. Co. *v.* Stevens, 19 N. Y. 408 (1859); Glaize *v.* South Carolina R. R., 1 Strobh. (S. C.) 70 (1846), holding that a corporation may have a special or constructive residence extending to the territorial limits of the jurisdiction which granted its charter for purposes of taxation.

[1] Commonwealth *v.* Westinghouse Electric, etc. Co., 151 Pa. St. 265 (1892). In Holt *v.* Indiana Mfg. Co., 80 Fed. Rep. 1 (1897), it appears that the corporation enjoined state officials from levying a tax on capital stock which represented patent-rights and nothing else. The capital stock of a corporation cannot be taxed by a state where it has been issued for the right to make, use, or license certain inventions covered by patents, there having been no apparatus or tangible property received for the stock. This is on the principle that a patent-right cannot be taxed by a state. Commonwealth *v.* Philadelphia Co., 157 Pa. St. 527 (1893). Compare People *v.* Campbell, 138 N. Y. 543 (1893). The New Jersey annual tax is legal, although nearly the entire capital stock of the company was issued for patents. State *v.* State Board, 39 Atl. Rep. 638 (N. J., 1898). Where the stock is issued in payment for the exclusive right to use certain patented articles within certain territory, it is not invested in patent-rights so as to be exempt from taxation by reason of the acts of congress. Commonwealth *v.* Central, etc. Tel. Co., 145 Pa. St. 121 (1891); Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891).

[2] An attempt of the state to make a railroad corporation pay $1,250,000 back taxes, not levied under an alleged mistaken view of the law by former state officials, failed in Commonwealth *v.* Pennsylvania Co., 145 Pa. St. 266 (1892). Where the charter provides for "a tax not exceeding twenty-five cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent," the legislature may compel the company to pay such tax, and to pay it for twenty-five years past, during which time the company had evaded payment. State *v.* Seaboard, etc. R. R., 52 Fed. Rep. 450 (1892). See § 572, *supra*.

[3] Lehigh, etc. Co. *v.* Commonwealth, 55 Pa. St. 448 (1867); Commonwealth *v.* Pittsburg, etc. R'y, 74 Pa. St. 83 (1873). See State *v.* Franklin Bank, 10 Ohio, 91 (1840); People *v.* Home Ins. Co., 92 N. Y. 328 (1883). Where taxes are based upon dividends, the tax must be paid, even though a dividend is declared nearly equal to the capital stock, it being shown that the value of the stock after the declaration of the dividend was practically par, and hence that the dividend was not a distribution of the capital stock. Commonwealth *v.* Western Land, etc. Co., 156 Pa. St. 455 (1893). Where a company has in its treasury stock in

a dividend does not show that the capital stock has a value subject to taxation under the New York statutes.[1] A corporation claiming that it is taxed too much cannot enjoin collection unless it offers to pay the amount it admits to be due.[2] The court will, under the New Jersey statute, enjoin a corporation from doing business if it does not pay taxes levied upon it.[3] A purchaser of a railroad at foreclosure sale cannot revive an action begun by the mortgagor after the giving of the mortgage to enjoin the collection of taxes.[4] Where taxes are based on the aggregate value of all the shares of stock, unissued stock should not be considered, even though ten per cent has been paid on the subscription to the latter.[5]

another company, and distributes it among its stockholders, this is a dividend. Allegheny *v.* Pittsburgh, etc. R'y, 179 Pa. St. 414 (1897). Where a consolidation of three corporations is made by increasing the capital stock of one, and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheny *v.* Federal, etc. R'y, 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R'y, 179 Pa. St. 414 (1897). Where the dividends declared during the year were partly earned during prior years, the latter portion are not taxable under the Pennsylvania statute taxing the capital stock according to the dividends. Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholders in cash, this is a reduction of capital stock and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Central Transp. Co., 145 Pa. St. 89 (1891). A tax upon the receipts of a railroad is not a tax upon dividends. Com'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). A dividend declared and ordered deposited to the order of the stockholders, and so held until the further order of the court, is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). See also § 534, *supra*.

[1] People *v.* Barker, 141 N. Y. 251 (1894).

[2] Smith *v.* Rude, etc. Co., 131 Ind. 150 (1892). See also § 572, *supra*. An injunction is not the proper remedy to attack a tax erroneously laid on the capital stock. Jones *v.* Rushville Nat. Gas Co., 135 Ind. 595 (1893).

[3] *Re* Electro-Pneumatic Transit Co., 51 N. J. Eq. 71 (1893).

[4] Keokuk, etc. R. R. *v.* Scotland County, 152 U. S. 318 (1894).

[5] Boston, etc. R. R. *v.* Commonwealth, 157 Mass. 68 (1892). The whole capital stock may be taxed under a city charter, although only a part of

In ascertaining the actual value of capital stock for taxation, the price at which the stock is selling is not taken as the actual value where the market value is due to speculation and market influences.[1] Bonds of domestic corporations held by non-residents are not taxable by the states creating the corporations.[2] A statute by which Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void.[3] A railroad cannot be taxed to aid in paying a municipal subscription to its construction.[4] The franchise to build and operate a street railway is subject to taxation. A license fee may be imposed on the railway, although, under its franchise, it is also bound to pay other taxes annually.[5] The taxa-

it has been paid in. Shelby County, etc. Co. *v.* Shelbyville Trustees, 91 Ky. 578 (1891).

[1] Commonwealth *v.* Philadelphia, etc. R. R., 145 Pa. St. 74 (1891). In Louisiana the corporation may sue to reduce or annul taxation of the shares of stock. The value of the stock may be ascertained from various sources, including that of the stock for which it has been exchanged. Planters', etc. Co. *v.* Assessor, 41 La. Ann. 1137 (1889). Where all the stockholders sell their stock at a certain time, the price received may be the basis for the taxation of the corporate property. Winnepiseogee, etc. Co. *v.* Gilford, 35 Atl. Rep. 945 (N. H., 1894).

[2] Railroad Co. *v.* Jackson, 7 Wall. 262 (1868); State Tax on Foreign-held Bonds, 15 Wall. 300 (1872); Davenport *v.* Mississippi, etc. R. R., 12 Iowa, 539 (1861); Commonwealth *v.* Chesapeake, etc. R. R., 27 Gratt. 344 (1876); People *v.* Eastman, 25 Cal. 603 (1864), where the same principle was applied between counties in the same state. *Contra*, Maltby *v.* Reading, etc. R. R., 52 Pa. St. 140 (1866). As to the rule where part of the capital stock is used out of the state, see Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119 (1882); State Treasurer *v.* Auditor-General, 46 Mich. 224 (1881); People *v.* Equitable, etc. Co., 96 U. S. 387 (1884). A statute making a foreign corporation liable for taxes on interest on its bonds payable in New York city to citizens in Pennsylvania is unconstitutional. N. Y., L. E. etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894), rev'g 150 Pa. St. 245. The Pennsylvania system of taxing against corporations all bonds issued by them and owned by citizens of the state, and compelling the corporation to pay the tax and deduct it from the interest on the bonds, is constitutional. Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232 (1890).

[3] New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894). Where a state, by charter granted to a railroad company, limits the taxation to a certain amount, it cannot afterwards compel the company to deduct from coupons due on bonds owned by residents a part of such coupons and pay that part to the state. New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

[4] Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890).

[5] New Orleans, etc. Co. *v.* New Orleans, 143 U. S. 192 (1892).

tion of unincorporated associations is considered elsewhere.[1] Where a railroad company of one state is consolidated with companies of other states, the consolidated company is considered, for the purposes of taxation, to be a corporation of each state to the extent that its property is in that state. It is taxed in the state on the capital stock of the company which it absorbed.[2] The word "franchise" has been construed to mean the entire property, tangible and intangible, when so intended in a taxation statute.[3]

§ 572b. *Exemptions from taxation.*— A state, if not restricted by its constitution, may exempt the property of a corporation from taxation. Such an exemption constitutes a contract between the state and the corporation, which cannot be repealed or changed by subsequent legislation, unless the right to alter or repeal it has been reserved by the state.[4] Exemptions from

[1] See ch. XXIX, *supra*.

[2] Ohio, etc. R. R. *v.* Weber, 96 Ill. 443 (1880); Chicago, etc. R'y *v.* Auditor-General, 53 Mich. 79 (1884); Railroad Co. *v.* Vance, 96 U. S. 450 (1877). In this case a railroad corporation of Indiana which had been recognized by an act of the Illinois legislature as a corporation of that state was held for taxes upon the capital and franchises of a road leased by it in Illinois and assessed to the lessor company, but charged to the lessee company and to be collected from it. Quincy R. R. Bridge Co. *v.* Adams County, 88 Ill. 615 (1878), where a bridge company originally incorporated by two states, and consolidated by articles which were confirmed by the legislature of one of them (Illinois), was held to be a corporation of that state for purposes of taxation. *Quære*, whether the formation of an interstate railroad corporation by the consolidation of separate corporations in two states creates a new corporation. An incorporating fee is not imposed on the whole consolidated capital under the New York statute. People *v.* New York, etc. R. R., 129 N. Y. 474 (1892). The state may constitutionally charge a large fee as a condition of granting a charter. Edwards *v.* Denver, etc. R. R., 13 Colo. 59 (1889).

[3] Adams Express Co. *v.* Kentucky, 166 U. S. 171 (1897).

[4] See § 568, *supra*. An exemption of a railroad from taxation, except when the dividends exceed eight per cent, is a contract protected by the federal constitution. Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486 (1894). An exemption from state taxation is a contract between the state and the corporation which cannot be impaired by a subsequent statute. Such exemption, however will not be extended to branch lines thereafter constructed. Wilmington, etc. R. R. *v.* Alsbrook, 146 U. S. 279 (1892). See in general, Tomlinson *v.* Branch, 15 Wall. 460 (1872); Home of the Friendless *v.* Rowse, 8 Wall. 430 (1869); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Mobile, etc. R. R. *v.* Moseley, 52 Miss. 127 (1876); Jefferson Bank *v.* Skelley, 1 Black, 436 (1861), where the charter provided for the payment of six per cent of the bank's profits in lieu of taxes; Livingston County *v.* Hannibal, etc. R. R., 60 Mo. 516 (1875),

taxation, however, are not favored by the courts, and are strictly limited to the terms of the exemption. Moreover, under a res-

where, however, an exemption from county taxes was held not to include a school tax which originated after the charter was granted; Hannibal, etc. R. R. *v.* St. Joseph, 39 Mo. 476 (1867), holding that an exemption from county taxation will not prevent taxation by a city. A contract between the state and a railroad, that the latter shall pay a certain tax and no more, is not repealable by the state. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). Though a charter may be repealable, yet an amendment giving an exemption from taxation may be irrepealable, since the latter may be a contract and not a franchise. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). A bonus to the state on increase of capital stock cannot apply to previous charters having charter right to increase. Commonwealth *v.* Erie, etc. Transp. Co., 107 Pa. St. 112 (1884); Railroad Cos. *v.* Gaines, 97 U. S. 698 (1878), holding that a new corporation invested with the powers and privileges of, and subject to the obligations of the charter of, another corporation, does not take an exemption from taxation. To same effect, Railroad Co. *v.* Commissioners, 103 U. S. 1 (1880); Dauphin, etc. R'y *v.* Kennerly, 74 Ala. 583 (1883). But see East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Delaware Railroad Tax, 18 Wall. 206 (1873); Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819); Providence Bank *v.* Billings, 4 Pet. 514 (1830); Binghamton Bridge, 3 Wall. 51 (1865); Humphreys *v.* Pegues, 16 Wall. 244 (1872); Pacific R. R. *v.* Maguire, 20 Wall. 36 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); People *v.* Soldiers' Home, etc., 95 Ill. 561 (1880); University *v.* People, 99 U. S. 309 (1878), holding void a statute limiting a general exemption previously conferred to property in immediate use by a corporation; Farrington *v.* Tennessee, 95 U. S. 679 (1877); Railway Co. *v.* Philadelphia, 101 U. S. 528 (1879); Hoge *v.* Railway Co., 99 U. S. 348 (1878); Dodge *v.* Woolsey, 18 How. 331 (1855), holding that the adoption of a new constitution declaring that corporate property shall be taxed will not be allowed to impair the contract; Mobile, etc. R. R. *v.* Kennerly, 74 Ala. 566 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872), holding also that an exemption of corporate property in a city from taxation, which conflicts with the charter of the city previously granted, is not unconstitutional if the city has remaining ample means of taxation to meet its needs; Commonwealth *v.* Fayette R. R., 55 Pa. St. 452 (1867), holding that, where power to alter or repeal the exemption is reserved, the exercise of the power is no impairment of the contract; State *v.* Miller, 30 N. J. L. 368 (1863), holding that the repeal may be made by a general law; State *v.* Commissioners of Taxation, 37 N. J. L. 240 (1874), holding that, where a general exemption from taxation is granted to a corporation without reserving the power to alter or repeal it, and there is a provision for a special mode of assessing its property, it may consent to another mode of assessment without surrendering or altering its exemption from general taxation; East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Temple Grove Seminary *v.* Cramer, 98 N. Y. 121 (1885), holding that an incorporated academy does not waive or forfeit its exemption from taxation by reason of having leased its building for a boarding-house during vacations; Elizabethtown, etc. R. R. *v.* Elizabethtown, 12

ervation of power to alter, amend, or repeal the charter, the legislature may take away an exemption from taxation.[1]

Bush (Ky.), 233 (1876), holding that an exemption of railroad property from taxation precludes any imposition of taxes by the state, whether for state or local purposes. In Mott *v.* Pennsylvania R. R., 30 Pa. St. 9 (1858), a sale of a railroad and canal by the state on terms exempting the vendee from future taxes was enjoined. The exemption was held to be unconstitutional. County Com'rs *v.* Woodstock Iron Co., 82 Ala. 151 (1886), holding that an exemption of private corporations from taxation made by a general law was not a contract, but only a legislative bounty, subject to be repealed.

The act by which the exemption from taxation is made must be clear and unequivocal; the intent to confer the immunity must be beyond reasonable doubt. Ohio, etc. Trust Co. *v.* Debolt, 16 How. 416 (1853); Delaware Railroad Tax, 18 Wall. 206 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); Mobile, etc. R. R. *v.* Kennedy, 74 Ala. 566 (1883), holding that a reasonable doubt is to be construed against the exemption; Dauphin, etc. R'y *v.* Kennerly, 74 Ala. 583 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872). An exemption of a corporation from taxation upon payment of a fixed annual tax on the capital stock is not voidable. State *v.* Butler, 86 Tenn. 614 (1888). A particular mode of taxation may be changed under the reserved right to amend the charter. Detroit St. R'ys *v.* Guthard, 51 Mich. 180 (1883). See also Bank of Republic *v.* Hamilton County, 21 Ill. 53 (1858); Mayor, etc. *v.* Twenty-third Street R. R., 113 N. Y. 311 (1889). A specific rate of taxation prescribed in the charter raises no implication of a legislative contract to impose no further burdens by way of taxation. Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340 (1860). A constitutional prohibition as to exemptions from taxation does not apply to railroad corporations, they being quasi-public. Yazoo, etc. R. R. *v.* Levee Com'rs, 37 Fed. Rep. 24 (1888). A charter exemption from all taxation upon payment of a certain tax is legal. Franklin County Court *v.* Deposit Bank, 87 Ky. 370 (1888). An exemption from taxation which is a gift may be repealed. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171 (1890). An exemption from taxation may be repealed under the reserved right to amend, etc. Wagner, etc. Institute *v.* Philadelphia, 132 Pa. St. 612 (1890). An exemption from all other taxation is an exemption from local as well as state taxation. People *v.* Coleman, 121 N. Y. 542 (1890). A railroad may give up its exemption from state taxation and still retain its exemption from county taxation. State *v.* Hannibal, etc. R. R., 101 Mo. 136 (1890). A railroad that is divided by the legislature with the consent of the stockholders does not lose its exemptions. Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890). An exemption from taxation is not a franchise. Hence *quo warranto* does not lie to oust the corporation from such exemption. International, etc. R'y *v.* State, 75 Tex. 356 (1889). The decision of the state court that an exemption does not apply to certain property is not an impairment of a contract. St. Paul, etc. R'y *v.* Todd County, 142 U. S. 282 (1892). Where a contract of exemption from taxation between a state and a waterworks company is declared unconstitutional by the highest court of the state, there is no impairment of

[1] Pearsall *v.* Great Northern R'y, 161 U. S. 646, 663 (1896).

Where a corporation whose property is exempt from taxation is merged into or consolidated with another, the question of whether the exemption from taxation passes with its property to the lessee, vendee, or consolidated company is a question which turns largely on the words granting the exemption.[1]

the contract by subsequent legislation which assumes the old contract to have been invalid. New Orleans *v.* New Orleans, etc. Works, 142 U. S. 79 (1891). In Citizens' Bank *v.* Board of Assessors, 54 Fed. Rep. 73 (1893), an exemption from taxation was held to apply to extensions of the original charter. Although the charter provides that the real and personal property of the company shall be taxed the same as that of individuals, this does not exempt the capital stock from taxation. State *v.* Simmons, 70 Miss. 485 (1893). An exemption from taxation does not pass to a company that buys out the company which is exempt. Commonwealth *v.* Nashville, etc. Co., 93 Ky. 430 (1892). An exemption from local taxation is not an exemption from state taxation. Wilkes Barre, etc. Bank *v.* Wilkes Barre, 148 Pa. St. 601 (1892). An exemption from taxation does not apply to assessments for improvements. Illinois Cent. R. R. *v.* Mattoon, 141 Ill. 32 (1892). A company to generate and sell electric power is not a manufacturing company as regards taxation. Commonwealth *v.* Northern, etc. Co., 145 Pa. St. 105 (1891); Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). An exemption of manufacturing corporations from taxation was construed to exempt merely such of their property as was invested in manufacturing, in Commonwealth's Appeal, 129 Pa. St. 346 (1889); Commonwealth *v.* Mahoning Rolling-Mill Co., 129 Pa. St. 360 (1889). Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal. Amendment should be worded "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserved power. (Approving Tomlinson *v.* Jessup, 15 Wall. 454—1872, and Railroad Co. *v.* Maine, 96 U. S. 499—1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). A contract of a lessee to pay taxes upon the real and personal property, franchises, capital stock, or gross receipts does not bind the lessee to pay taxes on dividends. Jersey City Gaslight Co. *v.* United Gas Imp. Co., 58 Fed. Rep. 323 (1893). See also, on this subject, § 501, *supra*, and § 639, *infra*.

[1] An exemption from taxation pertains to the franchise as a corporation, and does not pass with the sale of the franchise to operate the road. Chesapeake, etc. R'y *v.* Miller, 114 U. S. 176 (1885); Memphis R. R. *v.* Com'rs, 112 U. S. 609 (1884); Tomlinson *v.* Branch, 15 Wall. 460 (1872); Branch *v.* Charleston, 92 U. S. 677 (1875); Central R. R. *v.* Georgia, 92 U. S. 665 (1875), reversing S. C., 54 Ga. 401; Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also cases in preceding note. Where by statute "all rights" of a railway are to pass to another, an exemption from taxation passes. Atlantic, etc. R. R. *v.* Allen, 15 Fla. 637 (1876). It certainly will not be extended to the property of other

Where a consolidation is effected after the adoption of constitutional provisions prohibiting the legislature from exempting the property of corporations from taxation, the consolidated company is looked upon as a new corporation, which is not entitled to exemptions from taxation possessed by the companies of which it is composed.[1] Consolidation being a dissolution of the old companies destroys an exemption of one of them from taxation.[2]

If the franchises and property of a corporation be transferred by a sale in foreclosure, an exemption from taxation does not accompany the transfer. The exemption is a personal privilege and not a franchise.[3] A statute exempting the property of a corporation from being taxed does not prevent the taxa-

corporations consolidated with it. Philadelphia, etc. R. R. *v.* Maryland, 10 How. 376 (1850); Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also Wait, Insolv. Corp. 381. An exemption of a corporation may not exempt also its timber lands. Todd County *v.* St. Paul, etc. R'y, 38 Minn. 163 (1888). An exemption of railroad lands from taxation may pass to the grantee railroads thereof and of the franchises. Stevens County *v.* St. Paul, etc. R'y, 36 Minn. 467 (1887). Consolidation in Missouri destroys exemption from taxation. Keokuk, etc. R. R. *v.* County Court, 41 Fed. Rep. 305 (1890). A consolidated company under the Missouri statutes relative to railroads meeting at the state line is a new corporation, and the old one is dissolved. An exemption from taxation of the old corporation is thereby lost. State *v.* Keokuk, etc. R. R., 99 Mo. 30 (1889). Although an exemption from taxation is to pass to a consolidated company, yet this is a gratuity to the new company and may be repealed. Wilmington, etc. R. R. *v.* Alsbrook, 110 N. C. 137 (1892).

[1] Memphis, etc. R. R. *v.* Berry, 112 U. S. 609 (1884); St. Louis, etc. R. R. *v.* Berry, 113 U. S. 465 (1885); Chesapeake, etc. R. R. *v.* Miller, 114 U. S. 176 (1885). Where the legislature ceded to a company to be formed "all the right, interest, and privileges of whatever kind" of a defunct railroad company, it was held that an exemption from taxation conferred on the old company was not vested in the new one. Railroad Co. *v.* Georgia, 98 U. S. 359 (1878). In this case the restriction upon granting exemptions was in a statute instead of a constitutional provision.

[2] Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301 (1894), reviewing the cases on this subject of dissolution, and holding that the presumption is always against the dissolution.

[3] Morgan *v.* Louisiana, 93 U. S. 217 (1876); Louisville, etc. R. R. *v.* Palmer, 109 U. S. 224 (1883); Wilson *v.* Gaines, 103 U. S. 417 (1880), where the transfer was under proceedings to enforce a statutory lien of a state; Arkansas Midland R. R. *v.* Berry, 44 Ark. 17 (1884). See also Picard *v.* East Tennessee, etc. R. R., 130 U. S. 637 (1889), and cases *supra*. Where the exemption is to all the property of a railroad its franchise is included. Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871). As to whether an exemption from taxation is a franchise or privilege, see Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301, 311 (1894).

tion of land held by it merely for convenience and not necessary to its operation.[1] In general, an exemption from taxation by the state is not an exemption also from municipal taxation for local purposes,[2] nor from assessments for improvements.[3]

§ 572c. *Taxation of foreign corporations.*— Any state may tax foreign corporations doing business within its borders.[4]

[1] State *v.* Commissioners, 23 N. J. L. 510 (1852); State *v.* Collectors, 25 N. J. L. 315 (1855). In these cases lands owned by a railroad and occupied by dwellings for employees, car and locomotive works, coal mines, etc., were held to be subject to taxation. See also Toll-bridge Co. *v.* Osborn, 35 Conn. 7 (1868), where lands held for wharves by a bridge company by authority of law were held taxable as real estate—a provision in its charter that all its property should be considered personal property and be divided into shares being construed to relate to the property of the stockholders as represented by the shares; *Re* Swigert, 119 Ill. 83 (1886), holding that a railroad exemption did not exempt its elevator. In ascertaining, under the New Jersey taxation statute, whether one-half of the capital is employed in the state in manufacturing, the capital employed in disposing of the manufactured product in the state is included. *Re* Consolidated Electric Storage Co., 26 Atl. Rep. 983 (N. J., 1893). For cases passing upon the exemption of manufacturing corporations from taxation in Pennsylvania, see Commonwealth *v.* Keystone Bridge Co., 156 Pa. St. 500 (1893); Commonwealth *v.* J. B. Lippincott Co., 156 Pa. St. 513 (1893); Commonwealth *v.* Thackara Mfg. Co., 156 Pa. St. 510 (1893); Commonwealth *v.* Pottsville Iron, etc. Co., 157 Pa. St. 500 (1893); Commonwealth *v.* Juniata Coke Co., 157 Pa. St. 507 (1893); Commonwealth *v.* National Oil Co., 157 Pa. St. 516 (1893).

[2] Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876); Roosevelt Hospital *v.* Mayor of New York, 84 N. Y. 108 (1881), where real estate exempted from state taxation was held to be subject to assessment by a city for the construction of a sewer. *Cf.* Applegate *v.* Ernst, 3 Bush (Ky.), 618 (1868), where a tax by a county upon a railroad to obtain money to pay a county subscription for the purpose of completing the road was held to be unlawful. See also p. 1078, n. 1, *supra*.

[3] New Jersey, etc. R. R. *v.* Jersey City, 42 N. J. L. 97 (1880).

[4] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 66 (1870); S. C., Oliver *v.* Liverpool, etc. Co., 100 Mass. 531 (1868). Goods in New York for sale, also money on deposit in New York, also other property in the state, form the proper basis for taxation of such part of the capital stock of foreign corporations as is employed in the state. Taxation for such part of the capital stock as sales in New York bear to all the sales is unjust, since many sales may be by sample. People *v.* Wemple, 133 N. Y. 323 (1892). A tax on foreign manufacturing corporations to the extent of the business which they do in the state is constitutional and enforceable. People *v.* Wemple, 131 N. Y. 64 (1892). The New York statute taxing foreign corporations doing business in the state on the same basis as domestic corporations is constitutional. Horn Silver, etc. Co. *v.* New York, 143 U. S. 305 (1892). The New York tax upon the business of all foreign and domestic corporations doing business in the state is a tax on the right to be a corporation and to do business, and is not a tax upon the franchise, even though the tax is measured by

A state may impose on foreign insurance companies a tax equal to the tax levied by the state creating the foreign corpo-

the dividends declared. The tax is legal although the corporation owns United States bonds. Home Ins. Co. *v.* New York, 134 U. S. 594 (1890). Where foreign corporations are required to report stock, bonds, etc., owned by residents for taxation, it need report only such as its books disclose, and is not to be held liable further. Commonwealth *v.* N. Y. etc. R. R., 145 Pa. St. 57 (1891). *Cf.* Commonwealth *v.* American, etc. Teleph. Co., 129 Pa. St. 217 (1889). Foreign corporations doing business in New Jersey are subject to taxation. State *v.* Berry, 52 N. J. L. 308 (1890). Where a parent corporation of Massachusetts owns stock in a branch corporation of New York and collects royalties, etc., from the latter, the parent corporation is not subject to taxation in New York. People *v.* American, etc. Teleph. Co., 117 N. Y. 241 (1889). Debts due to a foreign corporation from residents cannot be taxed in Louisiana. Barber, etc. Co. *v.* New Orleans, 41 La. Ann. 1015 (1889). The New York statute levying a tax on foreign corporations doing business in the state, the tax being upon "the amount of capital stock employed within the state," is legal, and a New Jersey corporation is liable to taxation for maintaining a sales agency and office and bank account in New York city, even though its factories, books of account, etc., are in other states. Southern Cotton Oil Co. *v.* Wemple, 44 Fed. Rep. 24 (1890).

The Pennsylvania statute imposing a quarter of a mill license tax on the capital stock of foreign corporations having an office in the state, and prohibiting such offices unless the tax is paid, the act applying to all foreign corporations except insurance companies, is constitutional. A state may exclude or impose conditions upon foreign corporations unless they are engaged in interstate or foreign commerce, or are employed by the government. Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181 (1888); Blackstone Mfg. Co. *v.* Blackstone, 79 Mass. 488 (1859); State *v.* Lathrop, 10 La. Ann. 402 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Tatem *v.* Wright, 23 N. J. L. 429 (1852); State *v.* Western Union Tel. Co., 73 Me. 518 (1882); Commonwealth *v.* Western Union Tel. Co., 98 Pa. St. 105 (1881); Norfolk, etc. R. R. *v.* Commonwealth, 114 Pa. St. 256 (1886); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212, 218 (1851); Boston Loan Co. *v.* Boston, 137 Mass. 332 (1884); Singer Mfg. Co. *v.* County Com'rs, 139 Mass. 266 (1885); Att'y-Gen. *v.* Bay State, etc. Co., 99 Mass. 148 (1868); Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881), holding, however, that a corporation created by the United States congress is not a foreign corporation within the revenue act of Pennsylvania; Commonwealth *v.* Gloucester, etc. Ferry Co., 98 Pa. St. 105 (1881); People *v.* Equitable Trust Co., 96 N. Y. 387 (1884), holding that a tax may be imposed upon the business done by a foreign corporation in New York, but not upon its property in other states, nor upon its franchise. A foreign corporation doing business in and taxed in New York is not entitled to a deduction for its debts. People *v.* Barker, 141 N. Y. 118 (1894). Otherwise as to domestic corporations. People *v.* Barker, 141 N. Y. 196 (1894). Under the New York act, in arriving at the basis of taxation of corporations, the commissioners are bound to take the statements under oath of the corporate officers, except that they may call for further information. People *v.* Barker, 139 N. Y. 55 (1893). A foreign corporation is not liable to taxation in New York, where its business is conducted in

ration on corporations foreign to the latter state.[1] Where a railroad corporation is incorporated by the United States, a state cannot tax its franchises; it may tax the tangible property, but not the franchise.[2] Where an assessment of taxes against a railroad company has been affirmed by the supreme court, mandamus may be used to compel payment of them, if there is no other adequate remedy.[3] The tax lien on a railroad may by delay be rendered subordinate to a mortgage.[4]

§ 572*d*. *Taxation must not interfere with interstate commerce.*— "It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered

another state, and all the parties interested in it and its officers reside in another state, and all its contracts made, and its product manufactured, sold, and delivered in another state; and where it transacts none of its corporate business in the state, but merely has an office there, with a salaried agent, as a convenient place to discuss with patrons questions preliminary to the making of contracts, the contracts themselves being executed out of the state, and the company having no bank account in the state. People *v.* Campbell, 139 N. Y. 68 (1893). For the New York act which applies to foreign corporations, see Parker Mills *v.* Commissioners, 23 N. Y. 242 (1861); People *v.* Horn, etc. Co., 105 N. Y. 76 (1887). They are to be taxed where their principal offices in the state are situated. People *v.* McLean, 17 Hun, 204 (1879). A corporation chartered by the federal government is not such a foreign corporation as is obliged to pay a license fee under the Pennsylvania statutes. Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881). Unless a statute otherwise provides, a lien upon corporate property for state taxes attaches in preference to pre-existing judgments or decrees; it has been held that a sale under a judgment or decree will not avoid such a lien. Osterburg *v.* Union Trust Co., 93 U. S. 424 (1876). In New York it is held that the rolling stock of a railroad is subject to seizure and sale for taxes. Randall *v.* Elwell, 52 N. Y. 521 (1873). But not so in Kentucky. Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876).

[1] Home Ins. So. *v.* Swigert, 104 Ill. 653 (1882); Phila. Fire Assoc. *v.* New York, 119 U. S. 110 (1886.

[2] California *v.* Pacific R. R., 127 U. S. 1, 40 (1888). A county ordinance requiring a railroad chartered by the United States to take out a license is void. San Benito County *v.* Southern Pac. R. R., 77 Cal. 518 (1888).

[3] Person *v.* Warren R. R., 32 N. J. L. 441 (1868); Silverthorn *v.* Warren R. R., 33 N. J. L. 173 (1868). And the party making return to an alternative mandamus must show that he has complied with the order to the extent of his ability; want of funds is not a sufficient return where it is the result of the voluntary act of the party.

[4] Cooper *v.* Corbin, 105 Ill. 224 (1883); Parsons *v.* East, etc. Co., 108 Ill. 380 (1884).

with."[1] A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears towards the whole property. This is not interfering with interstate commerce by levying a tax for the privilege of transacting such commerce.[2] A state through which a railroad runs may require, upon the consolidation of the company with companies in other states so as to make an interstate railroad, the payment of a tax on the whole consolidated capital stock.[3] But a state cannot tax corporations so as to interfere with interstate commerce. The Pennsylvania license fee which all foreign corporations keeping an office in the state are required to pay, with a few exceptions, is unconstitutional as regards a foreign railroad corporation which owns a railroad in the state, such railroad being part of an interstate system of railroads.[4] But a state may levy a tax on the capital stock of a foreign sleeping-car company which runs its cars through the state, the tax being on such part of the capital stock as the number of miles which its cars run in the state bears to the whole number of miles over which its cars run in all the states.[5]

A tax on interstate telegraph messages is unconstitutional.[6] But a state may tax a foreign telegraph company engaged in interstate telegraph business, the tax being graded according to the amount and value of the company's property in the state measured by miles, and the tax being in place of taxes levied directly on the property. Such tax is a franchise tax.[7] A city, under authority of a statute, may compel an interstate telegraph company to pay an annual license of $500 for the privi-

[1] Western Union Tel. Co. *v.* Taggart, 163 U. S. 1 (1896).

[2] Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185 (1897).

[3] Ashley *v.* Ryan, 153 U. S. 436 (1894).

[4] Norfolk, etc. R. R. *v.* Penn, 136 U. S. 114 (1890).

[5] Pullman's Car Co. *v.* Penn, 141 U. S. 18 (1891), the court holding that a tax on the capital stock on account of the property owned is a tax on the property itself. A similar decision was made concerning a tax on the capital stock of a foreign telegraph company, the capital stock being valued at the aggregate value of all its shares of stock, and the proportion of its lines within the state to those outside of it being the basis of taxation. Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40 (1890).

[6] Western Union Tel. Co. *v.* Alabama, 132 U. S. 472 (1889).

[7] Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688 (1895).

lege of doing business in such city. This is a tax, and is not a condition or restriction on the privilege of doing business in the state.[1] A state cannot prohibit the agents of foreign express companies from doing business in the state, except upon obtaining a license. Such a law is an interference with interstate commerce.[2] A tax may be levied based on the gross receipts, and, if the road is but partly in the state, on a proportion of the gross receipts determined by a mode prescribed by statute.[3] A state may tax a railroad on business that passes out of the state into another state and back into the first state again.[4] Various other decisions on taxation in its bearings upon interstate commerce are given in the notes below.[5]

[1] Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692 (1894).

[2] Crutcher *v.* Kentucky, 141 U. S. 47 (1891).

[3] Maine *v.* Grand Trunk, etc. R'y, 142 U. S. 217 (1891).

[4] Lehigh Valley R. R. *v.* Penn, 145 U. S. 192 (1892).

[5] A tax on sleeping-car companies may be illegal as interfering with interstate commerce. State *v.* Woodruff, etc. Co., 114 Ind. 155 (1888). A state tax on interstate railroad earnings is unconstitutional. Fargo *v.* Michigan, 121 U. S. 230 (1887); Phila. etc. Co. *v.* Pennsylvania, 122 U. S. 326 (1887); Delaware, etc. Canal Co. *v.* Commonwealth, 17 Atl. Rep. 175 (Pa., 1888); Northern Pac. R'y *v.* Raymond, 5 Dak. 356 (1888). A state may tax a foreign telegraph company on such a proportion of its capital stock as its lines in the state bear to all of its lines; but the state cannot enjoin the operation of the telegraph until the tax is paid. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530 (1888); Erie R'y *v.* New Jersey, 31 N. J. L. 531 (1864), holding that a state tax upon foreign corporations transporting passengers and freight through the state, graduated by the number of passengers and weight of the goods, is in violation of that clause of the United States constitution giving congress the right to regulate commerce between the states; Indiana *v.* American Exp. Co., 7 Biss. 227 (1876); S. C., 13 Fed. Cas. 24, where a tax upon transportation through a state was held to be an interference with interstate commerce and unconstitutional. So held also of a tax upon locomotives, cars, etc., of a foreign railroad company in Minot *v.* Philadelphia, etc. R. R., 2 Abb. (U. S.) 323 (1870). As to an interstate bridge, see Anderson *v.* Chicago, etc. R. R., 117 Ill. 26 (1886). Pullman cars operated wholly within the state may be taxed as a privilege. Gibson County *v.* Pullman, etc. Co., 42 Fed. Rep. 572 (1890). A foreign corporation's rolling-stock used in interstate commerce is not taxable by the state. Bain *v.* Richmond, etc. R. R., 105 N. C. 363 (1890). Interstate express companies may be taxed on the business which they do within the state. Pacific Exp. Co. *v.* Seibert, 44 Fed. Rep. 310 (1890). As to telegraph companies, see also Western Union Tel. Co. *v.* Lieb, 76 Ill. 172 (1875); Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876). A fee required of foreign corporations before doing business in the state is unconstitutional as an interference with interstate commerce. Coit *v.* Sutton, 102 Mich. 324 (1894). An ex-

§ 572e. *Inheritance tax.*— During the past ten years the various states of the Union, in their eager search for new modes and subjects of taxation in order to meet the lavish expenditures and reckless financing of state and municipal governments, have found a rich source of income in an inheritance tax levied upon and payable from the wealth of the dead. Indeed, so fruitful and easy is this mode of taxation, it is being adopted throughout the Union and will soon become almost universal. Pennsylvania led the way some sixty years ago.[1] The New York tax on inheritances, in addition to its sweeping application to all manner of inheritances, attaches to shares of stock held by residents in foreign corporations.[2] But the fact that a non-resident's certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state.[3] The New York inheritance tax applies to stock in domestic corporations although held by non-residents at the place of their residence, but does not apply to bonds issued by domestic corporations and held by non-residents at the place of their residence.[4] This statute covers bonds owned by a non-resident, but kept in a safe-deposit vault in New York, excepting United States bonds. The statute also covers certificates of stock of domestic corporations owned by non-residents, but deposited in New York.[5] The war revenue act of congress of

press company may be taxed on its gross receipts, although it pays a part thereof to a railroad, and the railroad is taxed again on the same. A statute against double taxation does not apply to this. Commonwealth *v.* U. S. Express Co., 157 Pa. St. 579 (1893). The New Jersey annual tax of one-tenth of one per cent of the capital stock is not unconstitutional as interfering with interstate commerce, even as affecting a bridge company which operates a bridge connecting two states. Lumberville, etc. Co. *v.* State Board of Assessors, 55 N. J. L. 529 (1893). An express company may be compelled to pay a license fee wherever it does business. Osborne *v.* State, 33 Fla. 162 (1894). A state may tax the rolling-stock of a foreign corporation in the proportion which the number of miles within the state bears to the whole number of miles of the road, even though the rolling-stock is used in interstate traffic. Board of Assessors *v.* Pullman's Palace Car Co., 60 Fed. Rep. 37 (1894).

[1] See the brief yet comprehensive and clear statement of the history of inheritance taxation statutes in Magoun *v.* Illinois T. & Sav. Bank, 170 U. S. 283 (1898), upholding the Illinois statute on this subject; although the tax in that state varies according to the size of the estate, and in case it is over $50,000 the tax is six per cent.

[2] *Re* Merriam, 141 N. Y. 479 (1894).

[3] *Re* James, 144 N. Y. 6 (1894); *Re* Whiting, 150 N. Y. 27 (1896).

[4] *Re* Bronson, 150 N. Y. 1 (1896).

[5] *Re* Whiting, 150 N. Y. 27 (1896).

1898 imposes an inheritance tax on all estates of personal property exceeding ten thousand dollars in value.[1] Where an English company allows the American executor of the estate of a deceased American stockholder to transfer the stock to himself as executor on the company's books without paying the English succession tax, the company is liable to the English government for such tax. The court held that such is the law, although the statutes do not expressly render the company liable for the tax.[2] In England an income tax is collected.[3] In this country such a tax might legally be levied by a state, but cannot be imposed by the federal government.[4]

[1] If the personal-property estate is more than $10,000 and not more than $25,000, the tax is seventy-five cents on each hundred dollars if the property goes to a descendant, ancestor, brother, or sister; $1.50 on each hundred dollars if the property goes to a descendant of a brother or sister; $3 on each hundred if the property goes to a brother or sister of the decedent's father or mother, or a descendant of such brother or sister; $4 on every hundred if the property goes to a brother or sister of the decedent's grandfather or grandmother, or a descendant of such brother or sister; and $5 on every hundred where the property goes to any other relative or to a stranger in blood or to a corporation. Where, however, the husband or wife of the deceased person takes property, by legacy or will or by consent, no inheritance tax under this act shall be levied. If such estate is more than $25,000 and not over $100,000, the tax shall be one and one-half times the rates specified above in each case; if the estate is over $100,000 and not over $500,000, the above rates shall be double; if over $500,000 but not over $1,000,000, the rate shall be two and one-half times as great; and if the estate is over $1,000,000 the rate shall be three times as great. The tax applies to personal property transferred prior to the death of the owner with the intent that it shall vest upon his death. The tax does not apply to real estate.

[2] Attorney-General *v.* New York, etc. Co., 78 L. T. Rep. 61 (1897). In this case the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

[3] Where there is a parent company with minor companies abroad, and dividends are paid abroad to stockholders there without the money going to England, the English income tax does not apply to such moneys. Bartholomew Brewing Co. *v.* Wyatt, [1893] 2 Q. B. 499.

[4] Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601 (1895); S. C., 157 U. S. 429.

CHAPTER XXXV.

FORMS OF ACTIONS AND MEASURE OF DAMAGES WHERE A STOCKHOLDER HAS BEEN DEPRIVED OF HIS STOCK.

§ 573. Pleading and practice in actions relative to stock.
574. Assumpsit.
575. Trespass on the case.
576. Trover.
577. Detinue and replevin.
578. Money had and received.
579. Bill in equity.
580. Pleading under the codes.
581. Measure of damages. (*a*) The first rule — Value how shown when there is no market value.
582. (*b*) The second rule.
583. (*c*) The third rule.
584. Interest, dividends, and accretions.
585. Nominal damages.
586. Damages for failure to complete a purchase of stock or for fraud inducing a purchase of stock.
587. In actions between stockbrokers and their customers.

§ 573. *Pleading and practice in actions relative to stock.*— When an owner of stock who is out of possession brings an action for its recovery, or for the recovery of the certificate, or for damages for the detention or conversion of either the stock or the certificate, it is important to determine what action will lie, in what court the action is to be prosecuted, and what is the measure of damages. Similar questions arise when suits are brought for breach of contract to subscribe for stock, or of contracts to sell and convey stock. There are certain well-settled rules as to the form of the action in these cases which are deduced from the older common-law pleading and practice. These rules, even in the code states, where forms of action are little regarded, and where the old actions have been abolished in name, are still at least partially applicable. Some knowledge, therefore, of the procedure at common law in stock cases is necessary.[1]

§ 574. *Assumpsit.*— An action of assumpsit, or *indebitatus assumpsit* at common law, lies against a corporation for unjustly refusing to register a transfer, or for refusing to issue a certificate to one entitled to it.[2] So, also, assumpsit lies for

[1] On this subject the author refers, for more particular information, to the excellent work, Andrews' Stephen's Pleadings (1894),— especially chapter II.

[2] Rex *v.* Bank of England, 2 Doug.

breach of contract to return borrowed bank stock on demand.[1] But mandamus is not a proper remedy in these cases, and it will not lie to compel a corporation to transfer.[2] The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in assumpsit, but not in both.[3] A corporation may sue in assumpsit its treasurer who has illegally issued excessive stock and converted the proceeds to his own use.[4]

§ 575. *Trespass on the case.*—An action of trespass on the case may be brought against the corporation for a denial to a stockholder of a certificate of stock,[5] and an action on the case lies for a conversion of shares of stock.[6] The appropriate rem-

524 (1780); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 397 (1813); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Hill *v.* Pine River Bank, 45 N. H. 300 (1864). *Cf.* Foster *v.* Essex Bank, 17 Mass. 479 (1821); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857). Assumpsit does not lie against a corporation for refusal to register a transfer of stock. Action on the case is the remedy. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa., 1888).

[1] McKenney *v.* Haines, 63 Me. 74 (1873).

[2] See § 390, *supra.*

[3] Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). See also § 475, *supra.*

[4] Rutland R. R. *v.* Haven, 62 Vt. 39 (1889).

[5] Bank of Ireland *v.* Evans's Charities, 5 H. L. Cas. 389 (1855); Rex *v.* Bank of England, 2 Doug. 524 (1780); Davis *v.* Bank of England, 2 Bing. 393 (1824); Coles *v.* Bank of England, 10 Ad. & E. 437 (1839); Gray *v.* Portland Bank, 3 Mass. 364, 381 (1807); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Webster *v.* Grand Trunk R'y, 3 L. Can. Jur. 148 (1859); S. C., 2 L. Can. Jur. 291 (construing the judicature act, 12 Vict., cap. 38, § 87); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); Baker *v.* Wasson, 53 Tex. 150 (1880); Smith *v.* Poor, 40 Me. 415 (1855); Catchpole *v.* Ambergate, etc. R'y, 1 El. & B. 111 (1852); Daly *v.* Thompson, 10 M. & W. 309 (1842). *Cf.* Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838). For an action of tort with a count in contract for refusal to transfer, see Bond *v.* Mount Hope Iron Co., 99 Mass. 505 (1868).

[6] Daggett *v.* Davis, 53 Mich. 35 (1884); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Parsons *v.* Martin, 77 Mass. 111 (1858); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877). A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a

edy of a purchaser against a corporation for refusal to register a transfer to himself is an action on the case, wherein the measure of damages is the value at the time of refusal to transfer.[1] A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.[2] A count in case may be joined with one in trover.[3] Trover and case lie against a tax collector for selling bank stock for an illegal tax.[4]

§ 576. *Trover.*— It is a very generally accepted rule that trover will lie for the conversion of shares of stock.[5] This is

complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between assumpsit and case in such an action.

[1] German Union, etc. Assoc. *v.* Sendmeyer, 50 Pa. St. 67 (1865); Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847).

[2] McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893). See also § 585, *infra.*

[3] Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877).

[4] Sprague *v.* Fletcher, 37 Atl. Rep. 239 (Vt., 1896).

[5] Ayres *v.* French, 41 Conn. 142 (1874); Payne *v.* Elliot, 54 Cal. 339 (1880); Kuhn *v.* McAllister, 1 Utah, 273 (1875); S. C. *sub nom.* McAllister *v.* Kuhn, 96 U. S. 87 (1877); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Boylan *v.* Huguet, 8 Nev. 345 (1873); Morton *v.* Preston, 18 Mich. 60 (1869); Jarvis *v.* Rogers, 15 Mass. 389 (1819)—a case where trover was held to lie for the value of Mississippi scrip, representing one hundred and fifty thousand acres of land. Anderson *v.* Nicholas, 28 N. Y. 600 (1864); Freeman *v.* Harwood, 49 Me. 195 (1859); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Sturges *v.* Keith, 57 Ill. 451 (1870); Budd *v.* Multnomah Street R'y, 12 Oreg. 271 (1885); S. C., 22 Am. & Eng. R. R. Cas. 27. *Cf.* Atkins *v.* Gamble, 42 Cal. 86, 100 (1871); Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866). Trover and arrest lie for conversion of certificates of stock. Barry *v.* Calder, 48 Hun, 449 (1888). The action for conversion lies, even though the plaintiff uses the term "shares of stock" and "certificates of stock" interchangeably. Godfrey *v.* Pell, 49 N. Y. Super. Ct. 226 (1883). A party whose stock has been converted may sue for damages instead of following the stock. Moore *v.* Baker, 4 Ind. App. 115 (1892). For the allegations in an action for the conversion of a bond, see Saratoga, etc. Co. *v.* Hazard, 55 Hun, 251 (1889); aff'd, 121 N. Y. 677. Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). There are many cases in the lower courts of New York on this subject. A refusal to return pledge after payment is a conversion. See Roberts *v.* Berdell, 52 N. Y. 644 (1873); S. C., 15 Abb. Pr. (N. S.) 177. As to arrest for conversion, replevin thereby being waived, see Chappel *v.* Skinner, 6 How. Pr. 338 (1851); Person *v.* Civer, 29 How. Pr. 432 (1865),

the favorite remedy when the shareholder has been unjustly deprived of his stock; and it is nowhere denied, except in Pennsylvania,[1] that this form of action is proper. But even there, for the conversion of a certificate of stock, trover will lie.[2] For the maintenance of the action of trover there must be title in the plaintiff to the subject of the action, and an actual conversion by the defendant. If either of these elements is wanting the action will not lie. Thus, trover will not lie for the conversion of a certificate where the title to the shares is divested.[3]

And, upon the other hand, withholding possession of a certificate of stock cannot amount to a conversion of the stock itself so long as the certificate is not indorsed; but it may

rev'g 28 How. Pr. 139; Niver *v.* Niver, 43 Barb. 411 (1864); Dubois *v.* Thompson, 1 Daly, 309 (1863); Cousland *v.* Davis, 4 Bosw. 619 (1859). As to conversion of railway shares in a foreign country, see Northern R'y *v.* Carpentier, 13 How. Pr. 222 (1856). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable."

[1] Sewall *v.* Lancaster Bank, 17 S. & R. (Pa.) 285 (1828); Neiler *v.* Kelley, 69 Pa. St. 403 (1871).

[2] Biddle *v.* Bayard, 13 Pa. St. 150 (1850); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Aull *v.* Colket, 2 W. N. Cas. 322 (1875). So in Michigan. Daggett *v.* Davis, 53 Mich. 35 (1884). In trover the goods ought to be set out with some degree of certainty of description; but the same certainty is not required as in detinue and replevin, damages being recovered in trover, the very articles in detinue and replevin. Neiler *v.* Kelley, 69 Pa. St. 403 (1871).

[3] Broadbent *v.* Farley, 12 C. B. (N. S.) 214 (1862). Trover does not lie against a person to whom stock is given to sell and use the proceeds to start in business. Borland *v.* Stokes, 120 Pa. St. 278 (1888). Where several shareholders mutually agree to contribute a number of shares each, to be sold for the benefit of the corporation, one of them cannot, after the rest have contributed their proportion, refuse to allow his shares to be sold as agreed; and if the corporation takes them under the agreement and sells them, he cannot have an action of trover. Conrad *v.* La Rue, 52 Mich. 83 (1883). In trover for a certificate of stock, the acceptance by the plaintiff of the certificate ends the suit, and nothing further can be recovered. Collins *v.* Lowry, 78 Wis. 329 (1890).

amount to a technical conversion of the certificate.[1] A transfer of a certificate of stock in the usual form may constitute a transfer of the right to bring suit for the conversion of such stock.[2] It is well established that a refusal of a corporation to register a transfer in the name of one entitled to the stock is a conversion of the shares.[3] In New York a transferee may try his right to registry in an action for dividends,[4] but not after commencing an action for conversion.[5] Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.[6] A failure or refusal by the corporation to issue a certificate to an original subscriber, when by the terms of the contract of subscription it ought to be issued, may be treated as a conversion.[7] So, also, a failure to deliver stock according to a contract for delivery,[8] or to return borrowed stock on de-

[1] Daggett *v.* Davis, 53 Mich. 35 (1884). *Cf.* Morton *v.* Preston, 18 Mich. 60 (1869). Where an administrator sells stock pledged to the deceased in his life-time as security for a loan of money, and receives the proceeds and properly accounts to the estate, this is not a conversion of the shares, and the pledgor cannot have an action of trover. If any action lies it is for money had and received. Von Schmidt *v.* Bourn, 50 Cal. 616 (1875). For an example of an insufficient complaint in trover for shares, in that there was no sufficient averment of a conversion or of facts from which a conversion might be inferred, see Edwards *v.* Sonoma Valley Bank, 59 Cal. 136 (1881); and see also Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886).

[2] Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

[3] Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore, etc. R'y *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852). Trover lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company. Ralston *v.* Bank of California, 112 Cal. 208 (1896). But see New London Nat. Bank *v.* Lake Shore, etc. R'y, 21 Ohio St. 221, 232 (1871). The corporation may interplead in certain cases. See § 387, *supra*. In suing for damages for conversion against the corporation for depriving a person of his stock, the latter need not tender the certificates. Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893).

[4] Robinson *v.* National Bank of New Berne, 95 N. Y. 637 (1884).

[5] Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878).

[6] Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893).

[7] See § 61, *supra*.

[8] Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North *v.* Phillips, 89 Pa. St. 250 (1879); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861). Trover lies against a vendor for the conversion of stock, even though the certificate was not

mand, or at the time when by agreement it ought to be returned, and an unauthorized sale of stock by a pledgee in violation of the terms of the contract of bailment,[2] or by a broker in violation of his contract,[3] are examples of conversion of stock. Where an agent writes the stockholder's name on the back of the certificate of stock, and disposes of it without authority, he is guilty of conversion and may be arrested.[4] The right to arrest depends largely, of course, on the statutes of the state wherein suit is brought.[5] In Oregon it is said that any interference subversive of the right of the owner of stock to enjoy and control it is a conversion.[6] Trover will not lie by a trustee, on stock which stands in the name of the *cestui que trust*, against a person taking title from a co-trustee. A suit in equity is the proper remedy.[7] Where a certificate of stock is supposed to be burned, but is afterwards found, a conversion for refusal to deliver dates from the time when it is found.[8] Proof of demand is necessary in order to support the action of trover, where the defendant came into lawful possession of the stock and had an interest in it.[9]

§ 577. *Detinue and replevin.*— The common-law action of detinue will lie for the recovery of a certificate of stock unlaw-

transferred. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

[1] McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). Where a person loans stock to another to borrow money upon, conversion does not lie for a failure to return the stock. Barrowcliffe *v.* Cummins, 66 Hun, 1 (1892). Where bonds are loaned to use temporarily upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. Birdsall *v.* Davenport, 43 Hun, 552 (1887).

[2] Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866); Freeman *v.* Harwood, 49 Me. 195 (1859); Fisher *v.* Brown, 104 Mass. 259 (1870). For refusal of pledgee to return property, the action of pledgor may be in tort or contract. International Bank *v.* Monteath, 39 N. Y. 297 (1868). Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

[3] See ch. XXV, *supra;* Sadler *v.* Lee, 6 Beav. 324 (1843).

[4] Reigner *v.* Spang, 5 N. Y. App. Div. 237 (1896).

[5] See § 457, *supra.*

[6] Budd *v.* Multnomah Street R'y, 12 Oreg. 271 (1885).

[7] Onondaga, etc. Co. *v.* Price, 87 N. Y. 542 (1882); S. C., in a court of equity, as White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661 (1888).

[8] McDonald *v.* Mackinnon, 104 Mich. 428 (1895).

[9] Moynahan *v.* Prentiss, 51 Pac. Rep. 94 (Colo., 1897).

fully detained.[1] In this action the judgment is conditional, either to restore the thing detained, or pay the value and damages for the detention. The more modern action of replevin or its equivalent will doubtless lie for the recovery of a certificate, as for any other tangible personal property.

§ 578. *Money had and received.*— A pledgor whose stock has been wrongfully sold by the pledgee, in violation of the contract of bailment, may have an action against the pledgee for money had and received.[2]

§ 579. *Bill in equity.*— A bill in equity may be maintained by a *bona fide* purchaser of stock against the corporation to compel a transfer of the stock upon the corporate books.[3] A bill in equity may be filed also to relieve a stockholder from an unauthorized forfeiture;[4] to rescind a subscription obtained by fraud;[5] to compel a specific performance of an agreement to sell stock;[6] to remedy a purchase, sale, or transfer of stock induced by fraud;[7] and to redeem stock held in pledge.[8] A preliminary injunction against transferring stock is also frequently granted.[9] A bill in equity is the proper remedy to

[1] Williams *v.* Peel River, etc. Co., 55 L. T. Rep. 689 (1886); Williams *v.* Archer, 5 C. B. 318 (1847), where it was held that detinue lay to recover two hundred and fifty scrip certificates; Peters *v.* Heyward, Cro. Jac. 682 (1624), where detinue was allowed for a bond detained. As to replevin in *cepit* for bonds wrongfully received in pledge from a pledgee, see Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889). Concerning the nature of stock and a certificate of stock, and as to whether trover or replevin will lie, see 1 University Law Rev. 218 (1894).

[2] Von Schmidt *v.* Bourn, 50 Cal. 616 (1875); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834). *Cf.* Jones *v.* Brinley, 1 East, 1 (1800); Rex *v.* St. John Madermarket, 6 East, 182 (1805). In an old case a contrary rule is laid down. Nightingal *v.* Devisme, 5 Burr. 2589 (1770). In a suit for profits received by defendant as agent for plaintiff in buying and selling stock, the value of the stock need not be alleged with any particular definiteness. Herrlich *v.* McDonald, 80 Cal. 460 (1889). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. Holden *v.* Metropolitan Nat. Bank, 151 Mass. 112 (1890).

[3] See § 391, *supra*.

[4] See § 134, *supra*.

[5] See §§ 155, 156, *supra*.

[6] See § 338, *supra*.

[7] See § 356, *supra*.

[8] See § 475, *supra*.

[9] Heck *v.* Bulkley, 1 S. W. Rep. 612 (Tenn., 1886), holding also that a violation of the injunction is a bar to damages upon a dissolution of it. The preliminary injunction, being an equitable remedy, is not granted if only legal relief is sought by the action. See McHenry *v.* Jewett, 90 N. Y. 58 (1882). A principal who is suing an agent to obtain shares of

obtain possession of shares of stock.[1] In a suit by a claimant of stock to obtain the stock from another person, the corporation is a proper but not a necessary party.[2] A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.[3]

§ 580. *Pleading under the codes.*— In general, a pleading under the code is not a safe pleading, unless it conforms substantially to the rules of pleading at common law. Some verbiage may be omitted, but the relief granted by the various common-law actions cannot be obtained even under the code without the necessary averments entitling the plaintiff to that relief. It is the allegation of the facts, and not the method of alleging them, that constitutes a sufficient pleading under the code.[4]

stock may enjoin the agent from transferring the same *pendente lite*. Chedworth *v.* Edwards, 8 Ves. Jr. 46 (1802). Where a proposed consolidation is attacked by a stockholder, a preliminary injunction, granted so as not to render useless the whole suit in case it is successful, will not be disturbed by the court of appeals. Young *v.* Rondout, etc. Co., 129 N. Y. 57 (1891).

[1] This rule of law has frequently been applied in actions by a pledgor to obtain from a pledgee the stock which has been pledged. The rule itself is well established. White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661; Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Bryson *v.* Rayner, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Koons *v.* First Nat. Bank, 89 Ind. 178 (1883). Where a stockholder transfers the certificate on the back to a person, and leaves it in his own safe-deposit box, and writes a letter to such person directing him to distribute it among a list of charitable corporations, but no list is attached, the latter takes no title, and the executors may compel him to transfer the certificate to them. Bliss *v.* Fosdick, 76 Hun, 508 (1894).

[2] Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895); Johnson *v.* Kirby, 65 Cal. 482 (1884). *Cf.* Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). And see §§ 338, 361 and § 3, *supra*.

[3] Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). See also cases in § 361, *supra*.

[4] Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). *Cf.* Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16 (1885). In Nevada there is a statutory action of claim and delivery. Bercich *v.* Marye, 9 Nev. 312 (1874). See Webster *v.* Grand Trunk R'y, 3 L. Can. Jur. 148 (1859); S. C., 2 L. Can. Jur. 291, for a construction of that provision of the judicature act (12 Vict., c. 38, § 87) which governs actions of this nature in the Canadian provinces. In Kuhn *v.* McAllister, 1 Utah, 273 (1875), it is held that the language used in the pleadings in these actions is not material, or that the language is that of one form of action or another, or of no form, but that the question is whether the facts entitle the plaintiff to recover. A declaration in an action for the wrongful conversion

§ 581. *The measure of damages — (a) The first rule — Value how shown when there is no market value.*— Great difficulty has been experienced in determining what shall be the measure of damages for the conversion of stock. As the manner and conditions of the conversion vary, so also will the measure of damages vary from nominal damages to the highest value of the stock with dividends and interest, and also any special damages which the plaintiff can establish. In general, the courts incline to the rule that the true measure of damages is the value of the stock at the time of the conversion,[1] or a reasonable time after.[2] By the phrase "the value of the stock" is

of the shares of the capital stock of a corporation is sufficient for the purposes of pleading if it states the ultimate facts to be proven. The circumstances which tend to prove those facts may be used for the purpose of evidence, but they have no place in the pleadings. McAllister *v.* Kuhn, 96 U. S. 87 (1877), affirming Kuhn *v.* McAllister, 1 Utah, 273 (1875). As to a misjoinder of causes of action under the California code, where the plaintiff sues to recover certain stock, see Johnson *v.* Kirby, 65 Cal. 482 (1884). Upon the question of what is, in New York, a sufficient pleading in an action to compel delivery of stock, see Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). See also 2 Chitty, Pleadings, p. 618; Lowell, Transfers, § 11.

[1] *Re* Bahia, etc. R'y, L. R. 3 Q. B. 584 (1868); Williams *v.* Archer, 5 C. B. 318 (1847); Tempest *v.* Kilner, 3 C. B. 249 (1846); Shaw *v.* Holland, 15 M. & W. 136 (1846); Pott *v.* Flather, 5 Rail. & Can. Cas. 85 (1847); Davidson *v.* Tulloch, 6 Jur. (N. S.) 543 (1860); Wells *v.* Abernethy, 5 Conn. 222 (1824); O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); McKenney *v.* Haines, 63 Me. 74 (1873); Sturges *v.* Keith, 57 Ill. 451 (1870); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845); White *v.* Salisbury, 33 Mo. 150 (1862); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); Boylan *v.* Huguet, 8 Nev. 345 (1873); Bercich *v.* Marye, 9 Nev. 312 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Fisher *v.* Brown, 104 Mass. 259 (1870); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). See also Eicholz *v.* Fox, 12 Phila. (Pa.) 382 (1878); Larrabee *v.* Badger, 45 Ill. 440 (1867); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841). *Cf.* Moody *v.* Caulk, 14 Fla. 50 (1872); Orange, etc. R. R. *v.* Fulvey, 17 Gratt. (Va.) 366 (1867); Jefferson *v.* Hale, 31 Ark. 286 (1876); Third Nat. Bank *v.* Boyd, 44 Md. 47 (1875); Thomas *v.* Sternheimer, 29 Md. 268 (1868).

[2] Colt *v.* Owens, 90 N. Y. 368 (1882); Baker *v.* Drake, 53 N. Y. 211 (1873); S. C., 66 N. Y. 513 (1876); Gruman *v.* Smith, 81 N. Y. 25 (1880); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874); Brewster *v.* Van Liew, 119 Ill. 554

usually to be understood the market value.[1] The fact that the shares of stock have no known market value will not prevent recovery, where the actual value is ascertainable, in an action to recover damages. The value may be proven by showing the value of the property and business of the corporation as compared with the liabilities.[2] The question of what was the market

(1886); Budd *v.* Multnomah Street R'y, 15 Oreg. 413 (1887). Upon what is reasonable time herein in transactions on the stock exchanges, see Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 Hurl. & N. 617 (1861).

[1] By the "market value of stock" is meant the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry a reasonable range in point of time is allowable. Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). *Cf.* Stewart *v.* Cauty, 8 M. & W. 160 (1841); Sturges *v.* Keith, 57 Ill. 451 (1870); Seymour *v.* Ives, 46 Conn. 109 (1878). The measure of damages for non-delivery of stock at a certain date is presumptively the par value. The defendant is obliged to prove differently if this price is incorrect. Harris's Appeal, 12 Atl. Rep. 743 (Pa., 1888). If there is no market value of stock, proof of a few sales is competent. Brown *v.* Lawton, 6 N. Y. Supp. 137 (1889).

[2] The value of stock may be ascertained by comparing the corporate assets with the liabilities. Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). The value of stock may be shown "by proof of the value of the property and business of the corporation, its good-will, and dividend-earning capacity." State *v.* Carpenter, 51 Ohio St. 83 (1894). The value of the stock may be determined "from all the facts and circumstances of the case." McCloy *v.* Cox, 12 Ind. App. 27 (1895). "In the absence of better evidence, the market value of all the property of the corporation may be shown, with the view to arriving at the proportional value of the shares in controversy." Hewitt *v.* Steele, 118 Mo. 463 (1893). Where there is no market value, value may be shown by past dividends, the value of the corporate assets, and the price of individual sales not under compulsion. If there is no market value, it is presumed to be worth par. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). The value of stock may be shown by its dividend-paying qualities. Greer *v.* Lafayette County Bank, 128 Mo. 559 (1895). The actual value of the tangible property of the corporation cannot be resorted to, to ascertain the value of the stock, if there is any better evidence of the value of the stock. State *v.* Sattley, 131 Mo. 464 (1895). Where stock has no market value its actual value may be shown, and proof may be given of the value of the corporate assets and dividends paid, and the character and permanency of the business, and the control of the stock, and other circumstances. A sale of a single share of stock which carries the control does not fix the market value, but a sale two years prior may be shown. If there is no evidence the par value is presumed to be the actual value. Moffitt *v.* Hereford, 132 Mo. 513 (1896). The value of the stock four years afterwards, without a showing as to the relative condition of the company on the two dates, is

value at the time of the conversion is generally a question for the jury;[1] and it may be shown by tables of prices current pub-

not admissible. Jones *v.* Ellis, 68 Vt. 544 (1896). The fact that there is no market value for stock does not show that the stock is without value. Pabst, etc. Co. *v.* Montana, etc. Co., 48 Pac. Rep. 234 (Mont., 1897). The value may be proved by other sales. Kuhn *v.* McKay, 49 Pac. Rep. 473 (Wyo., 1897). In ascertaining the value of stock in a corporation owning undeveloped property, where the stock has no market value, particular sales, prices, and options on the stock may be shown. Moynahan *v.* Prentiss, 51 Pac. Rep. 94 (Colo., 1897). In ascertaining the value of stock for the purposes of taxation, the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People's, etc. Co., 39 Atl. Rep. 42 (Pa., 1898). "In actions for conversion of personal property, such as these shares are, the damages are not limited to the market value of the stock. Its actual value, to be determined under all the circumstances, such as the dividend-making capacity, the good-will, etc., is the measure of damages." Freon *v.* Carriage Co., 42 Ohio St. 30, 38 (1884). In Hitchcock *v.* McElrath, 72 Cal. 565 (1887), the court allowed evidence to be given showing the market value of all the property of the corporation, there being no other method of ascertaining the value of the stock. See also McGuffey *v.* Humes, 85 Tenn. 26 (1886). The value of stock may be shown by showing the value of the property of the corporation, the amount of capital stock, and the amount of debts. It may be shown, also, by proving how much could be borrowed on the stock at the place where the company's headquarters were. Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891). See also Simpkins *v.* Low, 54 N. Y. 179 (1873). Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damages for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the stock. Barnes *v.* Brown, 130 N. Y. 372 (1892). The value of stock may be shown by the value of its assets, where there is no known market value. Redding *v.* Godwin, 44 Minn. 355 (1890). The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Not the nominal but the true value of the shares is what the plaintiff is entitled to recover. Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845). Where a railroad is sold to be paid for in bonds, a failure to deliver the bonds enables the vendor to recover their par value from the vendee. Texas Western R'y *v.* Gentry, 69 Tex. 625 (1888).

[1] 1 Sedgw. Damages (7th ed.), 585, and cases cited; Dos Passos, Stockbrokers, 801. See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876); Harris *v.* Tumbridge, 83 N. Y. 92 (1880), and notes *supra*. Where there is no evidence that the

lished in the newspapers or otherwise at the time of the conversion, and these may be read in evidence.[1]

A conversion arises at the time when the stockholder, being entitled to the immediate possession or delivery of the stock or the certificate, makes a demand for it which is refused. Accordingly, where a demand has been made and refused, the measure of damages is the value of stock on the day of the demand and refusal.[2]

stock is worthless, the question of value should be submitted to the jury; the rule of damages in a case for fraud as to representations as to the value of the stock being the difference between the value of the stock as represented, and what it was in fact worth. Maxted *v.* Fowler, 94 Mich. 106 (1892).

[1] Cliquot's Champagne, 3 Wall. 114 (1865); Whelan *v.* Lynch, 60 N. Y. 469 (1875). A price-current or market report is admissible in certain cases to prove the fluctuations and value of stock. Seligman *v.* Rogers, 113 Mo. 642 (1893).

[2] So when stock held as collateral is improperly sold by the pledgee, the value on the day when the pledgor pays his debt and demands his stock is to be taken. Fisher *v.* Brown, 104 Mass. 259 (1870). In Freeman *v.* Harwood, 49 Me. 195 (1859), shares of stock standing in the name of the defendant as collateral security for a debt which had been paid were sold for non-payment of an assessment and bought by defendant. It was held that the defendant was liable in trover for the value of the shares at the time of the sale, with interest, and all dividends received thereon, deducting the amount of the assessment and the expenses of the sale. In Sturges *v.* Keith, 57 Ill. 451 (1870), it is held that where the demand and refusal constitute the conversion, or afford presumptive evidence of it, the date of such demand and refusal is the proper time for estimating the value. Again, where the corporation wrongfully refuses to register a transfer and to issue a certificate, the measure of damages is the value of the stock on the day when the transfer was demanded and refused. Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore R'y *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852), where it is said that while the rule as announced above is the proper one, yet, when the jury allows a larger sum, the question of the measure of damages not having been pressed at the argument, the court will not reduce the verdict. So also where there is a failure to return borrowed stock on demand, or according to the terms of the bailment, the value on the day of demand, or on the day when the stock ought by contract to have been returned, is the measure of damages. McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Day *v.* Perkins, 2 Sandf. Ch. 359 (1845). *Cf.* Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805); West *v.* Wentworth, 3 Cow. 82 (1824); Clark *v.* Pinney, 7 Cow. 681 (1827); Wilson *v.* Mathews, 24 Barb. 295 (1857); 2 Sedgwick, Damages (7th ed.), 141, 365, n. In an old case, where borrowed stock was not returned, the plaintiff was allowed to recover the value at the time of the transfer to the borrower, no ac-

Where the pledgee of stock wrongfully sells it, the injured party may recover the highest market price between the time of notice of sale and a reasonable time within which he might have bought the stock elsewhere.[1]

The New York court of appeals, after many variations, has settled on the rule that "in the absence of special circumstances, in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract, where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation."[2]

§ 582. (*b*) *The second rule.*— In another line of cases the true measure of damages in these actions is said to be the value of the stock on the day of the trial.[3] In an English case it is said

count being taken of an increase in value. Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). See also McKenney *v.* Haines, 63 Me. 74 (1873). In McArthur *v.* Seaforth, 2 Taunt. 258 (1810), it was held that, upon the failure to replace stock, the measure of damages was the price on the day of such failure or the price on the day of the trial, at plaintiff's option. Upon a failure to deliver stock according to contract or on demand, the value at the time of the demand is the value to be taken. Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878). *Cf.* Pott *v.* Flather, 5 Railw. & Can. Cas. 85 (1847); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841); Shaw *v.* Holland, 15 Mees. & W. 136 (1846); Tempest *v.* Kilner, 2 C. B. 300 (1845); S. C., 3 C. B. 249 (1846); Gainsford *v.* Carroll, 2 Barn. & C. 624 (1824). Williams *v.* Peel River, etc. Co., 55 L. T. Rep. 689 (1886), holds that suit for damages for wrongful detention lies against a party who has wrongfully obtained possession of stock, and that the measure of damages, where the defendant afterwards abandons his claim, is the intervening fall in the value of the stock. Bankers of trustees wrongfully sold out stock and applied the proceeds to their own purposes. The measure of their liability is the amount paid in replacing the stock. Sadler *v.* Lee, 6 Beav. 324 (1843). As to damages in cases of trust, see Story's Eq. (13th ed.), §§ 1263, 1264.

[1] Wright *v.* Bank of Metropolis, 110 N. Y. 237 (1888); Galigher *v.* Jones, 129 U. S. 193 (1889), the court saying in the latter decision that the measure of damages is "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock." For an illegal sale the pledgor may recover the "highest price which his stock reached within a reasonable time after its illegal sale by defendants." Smith *v.* Savin, 141 N. Y. 315 (1894), where five weeks were held to be reasonable, the pledgor not having discovered the sale for some time.

[2] Barnes *v.* Brown, 130 N. Y. 372 (1892).

[3] Owen *v.* Routh, 14 C. B. 327 (1854);

that this is a sound rule in the ordinary cases of conversion of stock, but that in cases of failure to deliver stock the true measure of damages is the value when the demand is made and refused.[1] This second rule has found little favor, and there is believed to be no sound reason for its adoption.

§ 583. (*c*) *The third rule.*— It has been held in still another class of decisions that the measure of damages for the conversion of stock is the highest market value of the stock between the date of the conversion and the day of the trial. This is the rule in California in some cases.[2] So, also, in South Carolina,[3] Georgia;[4] and it was formerly the rule in New York[5] and

Shepherd *v.* Johnson, 2 East, 211 (1802); Bercich *v.* Marye, 9 Nev. 312 (1874). *Cf.* Williams *v.* Archer, 5 C. B. 318 (1847); and see Wilson *v.* Little, 2 N. Y. 443, 450 (1849), wherein there is a *quere* as to whether this may not be the better rule. In Fowle *v.* Ward, 113 Mass. 548 (1873), it is held that the measure of damages is the value of the stock upon the day when the bill in equity is filed, it being an equitable action by a pledgor against a pledgee. The measure of damages may be the price at which the defendant sold the securities, if already sold, and, if not sold, then the amount of depreciation in value since plaintiff demanded them, together with intervening dividends. Simmons *v.* London Joint Stock Bank, [1891] 1 Ch. 270.

[1] Shaw *v.* Holland, 15 M. & W. 136, 145 (1846).

[2] Cal. Code, § 3336, is as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." This is held to apply to the conversion of the shares of stock. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); Dent *v.* Holbrook, 54 Cal. 145 (1880). *Cf.* Thompson *v.* Toland, 48 Cal. 99 (1874). The courts have held that this section of the code applies to the conversion of shares of stock, but they have not worked out a very consistent rule on the subject. In Douglass *v.* Kraft, 9 Cal. 562 (1867), the "highest value" rule is adopted, but in later cases the court seems to incline toward the modern New York rule. Hamer *v.* Hathaway, 33 Cal. 117 (1867); Page *v.* Fowler, 39 Cal. 412 (1870); Dent *v.* Holbrook, 54 Cal. 145 (1880); Tulley *v.* Tranor, 53 Cal. 274 (1878); Thompson *v.* Toland, 48 Cal. 99 (1874); Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882).

[3] Kid *v.* Mitchell, 1 Nott & M. (S. C.) 334 (1818).

[4] Central R. R. etc. Co. *v.* Atlantic, etc. R. R., 50 Ga. 444 (1873). For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. San Antonio, etc. R'y *v.* Wilson, 4 Tex. Civ. App. 178 (1893).

[5] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Romaine *v.* Van Allen, 26 N. Y. 309 (1863). In an action to recover damages for the unlawful conversion

Pennsylvania.[1] The courts of the two latter states have, however, in later cases wholly receded from this position; and in both the rule is now established, in such actions, that the measure of damages is not the highest price of the stock, but the value at the date of the conversion.[2] Where an agent conceals from his principal the amount of stock received by the agent for property, and keeps a part of the stock, the principal may hold him liable for the highest market value of the stock reached between the act and a reasonable time after discovery of the act by the principal.[3]

of grain, the rule in New York was held to be the highest price up to the time of trial. Lobdell *v.* Stowell, 51 N. Y. 70 (1872). To same effect, Kent *v.* Ginter, 23 Ind. 1 (1864). See 1 Sedgwick, Damages (7th ed.), 578, and note (a). *Cf.* Burt *v.* Dutcher, 34 N. Y. 493 (1866); Scott *v.* Rogers, 31 N. Y. 676 (1864); Devlin *v.* Pike, 5 Daly (N. Y.), 85 (1874). For the modern rule in New York, see § 581, *supra*.

[1] Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856); Musgrave *v.* Beckendorff, 53 Pa. St. 310 (1866); Reitenbaugh *v.* Ludwick, 31 Pa. St. 131, 141 (1858). In Pennsylvania, where one was accountable for stock as trustee, and converted it, he was held chargeable with the highest market value. Reitenbaugh *v.* Ludwick, 31 Pa. St. 131 (1858); North *v.* Phillips, 89 Pa. St. 250 (1879). *Cf.* Bates *v.* Wiles, 1 Handy (Ohio), 532 (1855). Where, upon a reorganization, an old stockholder is wrongfully refused his stock in the new, he may recover the highest market price of the same up to the time of the insolvency of the corporation. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890).

[2] North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Work *v.* Bennett, 70 Pa. St. 484 (1872); Neiler *v.* Kelley, 69 Pa. St. 403 (1871). *Cf.* Wilson *v.* Whitaker, 49 Pa. St. 114 (1865). So also in the later New York cases. Baker *v.* Drake, 53 N. Y. 211 (1873); S. C., 66 N. Y. 518 (1876); White *v.* Smith, 54 N. Y. 522 (1874); Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Colt *v.* Owens, 90 N. Y. 368 (1882); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). *Cf.* Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614 (1850); Matthews *v.* Coe, 49 N. Y. 57 (1872); Bryan *v.* Baldwin, 52 N. Y. 232 (1873). See also Seymour *v.* Ives, 46 Conn. 109 (1878); McGuffey *v.* Humes, 85 Tenn. 26 (1886). It is now held in Pennsylvania that where a corporation, through innocent mistake, permits a transfer on its books of shares of stock under a forged power of attorney, the owner's measure of damages is the value of the stock at the time of the transfer, with interest from the date of the verdict, and not the highest price reached by the stock between the date of the conversion and the time of bringing suit, with the dividends since declared. Pennsylvania Co. *v.* Philadelphia, etc. R. R., 153 Pa. St. 160 (1893).

[3] McKinley *v.* Williams, 74 Fed. Rep. 94 (1896). Where a person holds land for himself and a partner, and transfers the same to a corporation for stock and conceals all the facts from his partner, the latter may recover the value of his share of the stock, and the measure of the value is the highest value between the day

§ 584. *Interests, dividends, and special damages.*— It is settled law that, in addition to the value of the stock at the date of conversion, the plaintiff may recover legal interest upon such valuation from the date of the conversion to the day of the trial. It follows as of course that, if the plaintiff has been damaged in an ascertained sum, he may, in an action for damages, recover not only that sum, but interest thereon for the time during which he has been wrongfully deprived of his stock.[1] In addition to interest the plaintiff may recover also all accretions to the property made during the time when he was deprived of it. He is therefore entitled to judgment for all dividends paid upon the stock between the date of the conversion and the day of the trial.[2] The reason why the plaintiff

of receiving the stock and the day when the plaintiff received notice thereof. Morris *v.* Wood, 35 S. W. Rep. 1013 (Tenn., 1896).

[1] O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Boylan *v.* Huguet, 8 Nev. 345 (1873); Fisher *v.* Brown, 104 Mass. 259 (1870); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Seymour *v.* Ives, 46 Conn. 109 (1878); McKenney *v.* Haines, 63 Me. 74 (1873); Freeman *v.* Harwood, 49 Me. 195 (1859); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); White *v.* Smith, 54 N. Y. 522 (1874); Sturges *v.* Keith, 57 Ill. 451 (1870); Baltimore, etc. R'y *v.* Sewell, 35 Md. 238, 257 (1871); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1878); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799); *Re* Bahia, etc. R'y, L. R. 3 Q. B. 584 (1868); Blyth *v.* Carpenter, L. R. 2 Eq. 501 (1866); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852). In the Civil Code of California, § 3336, interest in these cases is expressly provided for. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); 2 Sedgwick, Damages (7th ed.), 391. The measure of damages is the market value at the time of conversion, with interest. Darling *v.* Potts, 118 Mo. 506 (1893). For refusal of the corporation to deliver stock which the plaintiff bought of it, the measure of damages is the value at the time of such refusal, with interest. Salt, etc. Co. *v.* Hickey, 36 Pac. Rep. 171 (Ariz., 1894). Where the measure of damages is based upon the market value of stock, interest may be added. Kuhn *v.* McKay, 51 Pac. Rep. 205 (Wyo., 1897).

[2] Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Baltimore, etc. R'y *v.* Sewell, 35 Md. 238 (1871); Bercich *v.* Marye, 9 Nev. 312 (1874); Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856). *Cf.* Boston, etc. R. R. *v.* Richardson, 135 Mass. 473, 477 (1883). Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the

recovers dividends in addition to the value of the stock and interest is that often the dividends involved were earned, wholly or in part, before the conversion, but that such net earnings were distributed by dividends declared after the conversion, and that the market value, at the time of the conversion, does not always represent fully the undistributed profits. The plaintiff may also recover any special damages which legitimately arise out of matters in existence at the date of conversion, and which he has sustained by reason of the detention of his stock.[1]

§ 585. *Nominal damages.*—In certain cases, where the plaintiff has been guilty of laches, or where the stock is of no actual value, or where the stock could, for a reasonable time after the conversion, have been purchased in the market for the same or a lower price, or in any other case where the plaintiff has suffered only a technical conversion without any actual pecuniary loss, only nominal damages can be recovered.[2] Thus, the measure of damages for the conversion of a mere certificate of

dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). Where several years elapse between the commencement of the suit and the trial, the case not having been prosecuted with reasonable diligence, the value at the time of the conversion, with interest, is the measure of damages. Dividends are not to be added unless a separate demand for them is alleged and a separate cause of action therefor set forth. Ralston *v.* Bank of California, 112 Cal. 208 (1896). In an action for the conversion of stock the measure of damages is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. Dividends accruing after the conversion are not added, nor interest on such dividends. Citizens', etc. R. R. *v.* Robbins, 144 Ind. 671 (1896).

[1] Boylan *v.* Huguet, 8 Nev. 315 (1873); 2 Sedgwick, Damages (7th ed.), 391; Bodley *v.* Reynolds, 8 Q. B. 779 (1846); Davis *v.* Oswell, 7 Car. & P. 804 (1837). *Cf.* Seymour *v.* Ives, 46 Conn. 109 (1878).

[2] Thus, where a borrower of shares fails to return them until after the corporation is dissolved, the lender having made no demand during the existence of the company, the measure of damages, in an action to recover the shares, will be the market value of them at the time the cause of action accrued; that is, at the time of demand. And if at that time the stock is worthless, only nominal damages are recoverable. Fosdick *v.* Greene, 27 Ohio St. 484 (1875). See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Hope *v.* Lawrence, 50 Barb. 258 (1867). In an action by a vendee on a contract for the sale of specific stock, which, without the knowledge of the vendor, had already been sold to another by his agent, the plaintiff can recover only nominal damages. Wilson *v.* Whitaker, 49 Pa. St. 114 (1865); Skinner *v.* City of London, etc. Corp., L. R. 14 Q. B. D. 882 (1885). See Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876). A transferee's action upon the case for dam-

stock cannot be placed at the value of the shares themselves which the certificate represents, if the ownership of the shares is not affected.[1]

§ 586. *Damages for failure to complete a purchase of stock and for fraud inducing a purchase of stock.*— The measure of damages for the failure of a purchaser of stock to complete his contract is considered elsewhere.[2] The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."[3] At common law an action to recover

ages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage. McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893).

[1] Daggett *v.* Davies, 53 Mich. 35 (1884), by Cooley, C. J.

[2] See § 336, *supra.*

[3] Redding *v.* Godwin, 44 Minn. 355 (1890). In an action for damages for fraud inducing the plaintiff to purchase stock, the measure of damages is "not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase." The defendant "was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation." Smith *v.* Bolles, 132 U. S. 125 (1889). The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. Rockefeller *v.* Merritt, 76 Fed. Rep. 909 (1896). In Smith *v.* Duffy, 57 N. J. L. 679 (1895), the measure of damages for fraud in the sale of stock was held to be the actual loss suffered by the vendee, irrespective of the market price of the stock. The measure of damages for fraud in the sale of stock is the difference between the real value of the stock at the time of sale and what the value would have been had the representations been true. The market value may be shown as bearing upon the real value. Warner *v.* Benjamin, 89 Wis. 290 (1895); Titus *v.* Poole, 73 Hun, 383 (1893). A person who purchases bank stock from the bank itself may hold the bank liable for damages, where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. Exchange Bank *v.* Gaitskill, 37 S. W. Rep. 160 (Ky., 1896). As to the measure of damages in an action against a broker for fraud inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work,

back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.[1]

§ 587. *Damages in actions between stock-brokers and their customers.*—This subject is considered elsewhere.[2]

70 Hun, 296 (1893). The measure of damages in an action by a vendee for fraud in the sale of stock is the difference between the selling price and the real value at the time of the sale. High *v.* Berret, 148 Pa. St. 261 (1892). In an action for damages for deceit inducing the plaintiff to purchase stock, the measure of damages is "a sum of money equal to the difference between the value of the property as it was in fact and the value as it would have been if the representations had been true." In this kind of action no tender of the stock is necessary or proper. Testimony as to the value of the property of the corporation and of a sale of stock by a witness is admissible. Vail *v.* Reynolds, 118 N. Y. 297 (1890). As to the measure of damages where worthless stock is sold for land and fraudulent misrepresentations are made and the company fails, see Titus *v.* Poole, 60 Hun, 1 (1891). Where one has been induced by fraudulent misrepresentations to buy or subscribe for shares of stock, the measure of damages, in an action against the vendor, is the difference between the value of the stock as represented and the actual value. Miller *v.* Barber, 66 N. Y. 558, 568 (1876); Hubbell *v.* Meigs, 50 N. Y. 480, 491 (1872). And where one with intent to cheat and defraud induces another, by false and fraudulent representations, to purchase shares for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase was made from him or from another at his instance. Hubbell *v.* Meigs, 50 N. Y. 480 (1872); 28 N. Y. App. Div. 1 (1898).

[1] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[2] See §§ 460, 461, *supra*.

CHAPTER XXXVI.

STOCKHOLDERS' MEETINGS — CALLS, TIME, PLACE, AND CLASSES OF MEETINGS.

§ 588. Introductory.
589. The place of meeting of stockholders must be within the state creating the corporation.
590, 591. First meeting under a special charter.
592. Meetings of directors—Place—Notice — Action without meeting — Quorum.
593. By whom and when meetings are to be called — Mandamus — Fraud in the call.
594. When the stockholders are entitled to notice of corporate meetings.
§ 595. The essential elements of a notice of a meeting are time, place, and business.
596. Service of the notice.
597. Notice must be served a reasonable time before the meeting.
598. The division of meetings into ordinary and extraordinary.
599. Waiver of notice.
600. Notice is presumed to have been regularly given.
601. Adjourned meetings.

§ 588. *Introductory.*— The stockholders of a corporation constitute the origin, existence, and continuance of the corporation itself. They elect its officers, control its general policy, and within the charter limits may prolong or dissolve its existence at their pleasure. All these vital powers of the stockholders can be exercised by them only in corporate meetings, duly convened and properly organized for the transaction of business. Accordingly, the method of calling together a corporate meeting, the time and place of that meeting, the notice to be given to the stockholders, and the various incidents relative to a proper convening of the members of the corporation, are of great importance. They constitute the subject of this chapter.

§ 589. *The place of meeting of stockholders must be within the state creating the corporation.*— The first and most general rule as to the place where stockholders may hold corporate meetings is that the place of meeting should be within the boundaries of the state which created the corporation. Through its agents, of course, the corporation may make contracts, carry on business, sue and be sued, and buy and sell property in another state.[1]

[1] See chs. XIII, §§ 237–240, *supra*, and XLI, §§ 696–700, *infra*.

But there is a difference of opinion as to the effect of business transacted at a stockholders' meeting held beyond the borders of the state creating the corporation. Upon the one hand, it is held that all the acts and proceedings of such a meeting are wholly invalid and void; that the corporation is not bound thereby, and that the meeting is as though it had never been.[1]

But it is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing.[2] So also are the stockholders

[1] Craig Silver Co. *v.* Smith, 163 Mass. 262 (1895). Directors elected at a stockholders' meeting held out of the state, and to which all did not agree, are not directors. The old board holds over. Hodgson *v.* Duluth, etc. R. R., 46 Minn. 454 (1891); Miller *v.* Ewer, 27 Me. 509 (1847), where a mortgage executed by the authority of directors who were elected at the organization meeting of corporators held outside of the state which granted the charter was declared void. Cited and followed in Freeman *v.* Machias Water, etc., 38 Me. 343 (1854), where a forfeiture of stock was declared illegal; Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874), where it was held that a forfeiture of stock by authority of a by-law adopted by stockholders of a Vermont corporation at a meeting held in New York was not valid; Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406 (1876); aff'd, 67 N. Y. 280; Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885), the organization being held out of the state; Camp *v.* Byrne, 41 Mo. 525 (1867), to the same effect. In Copp *v.* Lamb, 12 Me. 312 (1835), thirty years' user was held to have cured any defect. A Virginia corporation cannot be organized by an organization meeting in New York. Nor can the charter be assigned by a blank assignment after an organization in Virginia. The assignment must be of the stock. The corporation is neither *de facto* nor *de jure*. Suits against it fail. Welch *v.* Old Dominion, etc. R'y, 10 N. Y. Supp. 174 (1890). Stockholders' meetings held out of the state are voidable if not void, and at the instance of minority stockholders may be good ground for an injunction. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894). Where a charter is taken out in one state and the organization meetings are held in another state, the presumption is that no corporation is organized; and unless proof is given that the statutes of the first-named state authorized the holding of the organization meeting in another state, the stockholders are liable as partners. Duke *v.* Taylor, 37 Fla. 64 (1896). Where parties take out a charter in Tennessee, but, instead of holding their organization meetings in Tennessee, hold them in Florida, where they do all their business, they are liable in Florida as partners. Taylor *v.* Branham, 35 Fla. 297 (1895). The dicta in this decision as to the liability of stockholders generally in foreign corporations doing business in Florida are startling, to say the least.

[2] Heath *v.* Silverthorn Lead Min. etc. Co., 39 Wis. 146 (1875), holding that the corporation may be estopped to deny the validity of acts done outside

who participate in the meeting.[1] As to the creditors of the corporation the authorities differ.[2] If the corporation has been incorporated in two or more states, it is lawful to hold meetings of the stockholders in either state.[3] And proceedings at a meet-

the state, when the rights of third parties intervene, even though that meeting was the organization meeting. The legislature may validate the acts passed at such a meeting. Graham *v.* Boston, etc. R. R., 118 U. S. 161, 178 (1886), aff'g S. C., 14 Fed. Rep. 753 (1883). *Cf.* Grenada Co. *v.* Brogden, 112 U. S. 261 (1884), and the various cases of municipal subscriptions, ch. VI, § 94, n., *supra.*

[1] A *bona fide* holder of a note given by a stockholder in payment of his subscription may enforce it, even though the organization and all other meetings of the company were held out of the state. Camp *v.* Byrne, 41 Mo. 525 (1867). In Ohio, etc. R. R. *v.* McPherson, 35 Mo. 13 (1864), the charter declared the directors to be the corporation. They met out of the state and organized and made a call on subscriptions. The court upheld the call. But the mere neglect on the part of a shareholder, who did not attend a meeting of this kind, or a mere failure to take affirmative action for a period of time short of that prescribed by the statute of limitations, will not deprive that shareholder of his right to attack the proceedings as irregular and in fraud of his rights. Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874). A stockholders' meeting held outside of the state cannot be attacked by those who participate in it or receive the benefits of it. A statute against holding elections out of the state does not prevent stockholders' meetings for other purposes. Handley *v.* Stutz, 139 U. S. 417 (1891). An increase of capital stock which is voted at a stockholders' meeting held out of the state is valid if all the stockholders assent. "No valid objection can be made to a stockholders' meeting held in a foreign jurisdiction, provided all the shareholders give their consent to such meeting or ratify its action." Handley *v.* Stutz, 41 Fed. Rep. 531 (1890). By-laws enacted by a board of directors of a Texas corporation at a meeting of stockholders held in Paris are void, and a stockholder may disregard them, although he was represented by proxy at the meeting. The directors are not even *de facto.* Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339 (1883). A special charter must be accepted before the corporation exists, and such acceptance cannot be at a meeting held out of the state. Hence a bill by a stockholder to set aside a forfeiture of his stock was dismissed by the court. Smith *v.* Silver, etc. Co., 64 Md. 85 (1885). A stockholders' meeting out of the state is "irregular, if not void." Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890).

[2] Where a meeting of stockholders other than the first organization meeting is held out of the state, and directors are elected, the acts of those directors cannot be attacked by corporate creditors on the ground that the election was illegal. Wright *v.* Lee, 2 S. D. 596 (1892). For cases to the contrary see notes *supra.* Where a person takes title to land for a corporation to be formed, and thereafter he joins in the formation of the corporation, he cannot defend an action against the corporation to obtain title by setting up that its organization meetings were held outside of the state. Tuckaseegee, etc. Co. *v.* Goodhue, 24 S. E. Rep. 797 (N. C., 1896).

[3] Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Covington, etc.

ing in any one of the states are valid in respect to the property of the corporation in all of them, without a repetition of the meeting in any other of those states.[1]

§§ 590, 591. *First meeting under a special charter.*— Where an act incorporates three specified persons and their "associates," those three alone organize the company and are entitled to subscribe the capital stock or to allow others to subscribe.[2]

Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce.[3]

Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, and adopt by-laws, without the capital being first subscribed and without the others if they do not object.[4] As to an over-subscription for stock, the rules that govern the subject are considered elsewhere.[5] The survivors of those who by special act are made a corporation may call the first meet-

Bridge Co. *v.* Mayer, 31 Ohio St. 317 (1877). See also Ohio, etc. R'y *v.* People, 123 Ill. 467 (1888); and ch. LIII, § 910, *infra*.

[1] Same cases.

[2] Lechmere Bank *v.* Boynton, 65 Mass. 369 (1853). See also p. 452, note; also p. 1111, note 5. The grant of corporate powers to one person and his associates and successors does not require of such person that he should take associates before the act would take effect, or corporate powers be exercised, but confers upon him alone the powers of the corporation, and his acts within the grant of powers become the acts of the corporation. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839). Where a special charter named the incorporators and commissioners, and the notice called for by the charter of the opening of the books of subscription was given, and all incorporators attended the meeting and verbally subscribed for stock, and gave checks to apply on the same, and a meeting of the stockholders was held and directors elected, and the directors held their meeting and elected officers, and annual meetings were held thereafter for five years, when the company was practically abandoned, and the checks were never used,—all this amounted to a legal organization of the corporation. Moreover, the corporation itself existed by the charter itself, without action on the part of the incorporators. A company thus organized may enjoin from exercising its franchises a subsequent attempted organization of the company made sixteen years thereafter, the subsequent organization having been made by part only of the incorporators. The incorporators cease to have any powers after the first organization meeting. The remedy may be in equity, and need not be in *quo warranto*. Union Water Co. *v.* Kean, 52 N. J. Eq. 111 (1893).

[3] Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1881).

[4] McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892).

[5] See §§ 57, 58, *supra*.

ing many years after the act was passed, and may open books for subscription to the stock.[1] But where a company is chartered in 1860, and does not organize until 1884, an exemption from taxation contained in the charter is lost by reason of a constitutional provision enacted in 1870 forbidding such exemptions.[2]

§ 592. *Directors' meetings.*— The various questions connected with directors' meetings, the place where such meetings may be held, the notice that is required, the question of whether the directors may act without meeting, and the requirements as to a quorum, are discussed elsewhere.[3]

§ 593. *By whom meetings are to be called — Mandamus — Fraud in the call.*— Where the time and place of a meeting and the business to be transacted at that meeting are not so fixed by charter or otherwise that the stockholders are bound to take notice of them, it is necessary that the meeting be called in accordance with the by-laws or by the highest existing corporate authority.[4]

In the absence of any special authority to any particular person to call meetings, it has been held that the general agent of the corporation may make the call,[5] but that the secretary cannot.[6] The president and secretary have no power to call a

[1] Marmora, etc. Co. *v.* Murney, 1 C. P. Rep. (Can.) 29 (1850).

[2] Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

[3] See § 713*a*, *infra*.

[4] Evans *v.* Osgood, 18 Me. 213 (1841), holding that, where a proprietors' meeting could be called "by a petition signed by twelve of them at least," it was not a legal call if eleven signed, although they owned twelve shares; Congregational Soc. of Bethany *v.* Sperry, 10 Conn. 200 (1834); State *v.* Pettineli, 10 Nev. 141 (1875), where the by-laws of a corporation provided that meetings of the stockholders should be called by the trustees, and it was held that any other mode of calling, such as by the president, was insufficient. Angell & Ames, Corp., § 491, to the effect that "want of authority may be waived by the presence and consent of all who have a right to vote." In Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), the charter provided for annual elections, but no by-laws had been made fixing the time. The authority to call an election being in the directors, it was held not sufficient for a majority of these to sign the notice without stating that it was given by order of the board, and without designating themselves as directors. See also Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that notices of meetings could not be proved by parol where there was a by-law requiring the clerk to post written notice.

[5] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[6] The secretary and a person holding proxies on stock owned by the state cannot call a meeting to elect officers; nor can a statute order an

stockholders' meeting.[1] The board of directors may always call a meeting of the stockholders.[2] Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.[3] And even though, on account of vacancies in the board of directors, it cannot act, yet the remaining directors may call a stockholders' meeting to hold an election.[4]

Statutory provisions as to who shall call the meeting, whether it be the first and organization meeting, or a subsequent one, may be waived by unanimous consent of the incorporators or stockholders.[5]

election in a brief time. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky., 1888).

[1] Dusenbery *v.* Looker, 67 N. W. Rep. 986 (Mich., 1896).

[2] Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky., 1888). The board of directors may fix the time if the charter or by-laws do not. Commonwealth *v.* Smith, 45 Pa. St. 59 (1863).

[3] Southern, etc. Bank *v.* Rider, 73 L. T. Rep. 374 (1895).

[4] Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882). *Cf.* n. 2, p. 1495.

[5] See § 234, notes, *supra*, also §§ 590, 599, *infra*. Although the charter prescribes that the commissioners who receive the subscriptions shall call the first meeting by publishing a notice, yet this call may be waived, and the stockholders may meet and organize without a call, if all assent. Judah *v.* American, etc. Ins. Co., 4 Ind. 333 (1853); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864), where the statute provided that, as soon as ten per cent on the capital stock should be subscribed, the persons named in the certificate of incorporation, or any three of them, might give notice of an election of directors. It was held simply directory, and not indispensable to an election, that the notice be so given. In Newcomb *v.* Reed, 94 Mass. 362 (1866), the court declared the purpose of such statutes to be to avoid such difficulty as would arise where two parties should attempt to organize separately under the same charter. It was there held that persons elected officers at a meeting held in variance with such statutory direction were directors nevertheless, and were subject to the statute liability for corporate debts. Where three persons are appointed to make a call, and one of them calls the meeting of incorporation, the other two making no objection, the organization of the company at the meeting so called is valid. Walworth *v.* Brackett, 98 Mass. 98 (1867); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), holding that if the call for the meeting to elect the first directors be signed by the commissioners authorized to make the call individually, and not by virtue of a formal order of the commissioners, or if their names be signed to such a call by the secretary without objection by them, these irregularities will not affect the validity of the proceedings at the meeting. Although the charter runs to certain persons, and associates and assigns, they need not have associates

If, upon the organization of a corporation, a majority of the subscribers refuse to proceed in calling a meeting, the minority may call it, and bind the corporation.[1]

Where the statute requires due notice to be given, it need not be given by any particular person nor in any particular form.[2] A charter provision or by-law authorizing the calling of a meeting in a certain way does not necessarily prevent the meeting being called in a different way; but unless waived the rule is otherwise, where the charter or by-law is peremptory.[3] The president and cashier of a bank have no authority to call a stockholders' meeting, where the charter provides that stockholders' meetings may be called by the board of directors or any three stockholders.[4] The officers or agents of a corporation whose duty it is to call meetings may, in case they neglect or refuse to issue the call, be compelled by mandamus to call a meeting at the instance of a shareholder who is injured by reason of their failure.[5] Courts have no power to call corporate meetings except by mandamus.[6]

or assigns. Hughes *v.* Parker, 20 N. H. 58 (1849).

[1] Busey *v.* Hooper, 35 Md. 15 (1871).

[2] West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62 (1891).

[3] Where a by-law provides that special meetings may be called by the president, or in his absence by the secretary, on application made by ten members in writing, the directors may call a special meeting without such an application. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864). But where a by-law authorizes the trustees to call a meeting, a meeting called by the president is irregular. State *v.* Pettineli, 10 Nev. 141 (1875). When the by-laws require a call to be posted in writing, a call by parol is insufficient. Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839). The manner of making the call may be prescribed by by-law; and when so prescribed, provided the by-law is reasonable, calls made in that way are valid, even though the charter said that three stockholders might call a meeting. Taylor *v.* Griswold, 14 N. J. L. 222 (1834).

[4] Matthews *v.* Columbia Nat. Bank, 79 Fed. Rep. 558 (1897).

[5] People *v.* Cummings, 72 N. Y. 433 (1878); State *v.* Wright, 10 Nev. 167 (1875); People *v.* Governors of Albany Hospital, 61 Barb. 397 (1871); McNeely *v.* Woodruff, 13 N. J. L. 352 (1833); Regina *v.* Aldham, etc. Ins. Soc., 6 Eng. L. & Eq. 365 (1851). A mandamus to compel the calling of a meeting of the stockholders to elect directors should be against the board of directors and not against the president and secretary. Dusenbury *v.* Looker, 67 N. W. Rep. 986 (Mich., 1896). Mandamus lies to compel the

[6] The fact that foreclosure proceedings are pending and a receiver is in possession does not give the court jurisdiction to call a stockholders' meeting to hold an election. Taylor *v.* Philadelphia, etc. R. R., 7 Fed. Rep. 381 (1881).

If there is any fraud in the calling of the meeting, the proceedings of the meeting may be attacked in the courts. The fraud may consist in concealing the notice,[1] or in changing the time of the meeting,[2] or in misstating the business.[3] In general, a court of equity will restrain the directors from fixing the time for an annual meeting at a date when many members are in the country, the purpose being to prevent them from exercising their right to vote.[4]

calling of a special stockholders' meeting in accordance with the by-laws. Bassett *v.* Atwater, 65 Conn. 355 (1895). The court will not order the directors to call a meeting for business other than an election when they or a certain proportion of the stockholders may call it. MacDougall *v.* Gardiner, L. R. 10 Ch. App. 606 (1875). In Goulding *v.* Clark, 34 N. H. 148 (1856), it is held that, where there is no officer competent to call a meeting, there is no way of convening except by a reorganization of the company or a published notice given under the statutes. All the stockholders, of course, could convene and thereby waive notice. See § 599, *infra*. The proper officer may be commanded by mandamus to send out notices of the annual election. People *v.* Hart, 11 N. Y. Supp. 670 (1890); People *v.* Hart, 11 N. Y. Supp. 673 (1890). Mandamus lies to compel a meeting of vestrymen. People *v.* Winans, 9 N. Y. Supp. 249 (1890). Where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the court will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those entrusted with the management of the affairs of the company. Foss *v.* Harbottle, 2 Hare, 461 (1843); Isle of Wight R. Co. *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883). Mandamus lies to compel the annual election of the entire body of directors or trustees. Commonwealth *v.* Keim, 38 Leg. Int. 32 (1881); People *v.* Fairbury, 51 Ill. 149 (1869). Dictum that mandamus lies to compel election. *Re* Union Ins. Co., 22 Wend. 591 (1840).

[1] See § 596, *infra*.

[2] In a stockholder's suit to enjoin a consolidation the court will consider the legality of an election, the time of holding which was illegally changed by the board of directors. Nathan *v.* Tompkins, 82 Ala. 437 (1886).

[3] If directors convene a meeting to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to entrust their votes, the court will grant an injunction to restrain the holding of the meeting or to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884).

[4] Cannon *v.* Trask, L. R. 20 Eq. 669 (1875). A majority of the board of directors cannot lengthen their term of office by shortening the time of the annual meeting of the stockholders, in violation of the stockholders' by-laws, so that the election is held when they control the stock. Nathan *v.* Tompkins, 82 Ala. 437 (1886).

§ 594. *When the stockholders are entitled to notice of corporate meetings.*— If the time and place at which a corporate meeting is to be held and the business to be transacted are distinctly fixed in the charter or by a by-law, this is of itself sufficient notice to all the stockholders, and no further call or notice of that meeting is necessary, unless the charter or by-laws require it.[1] But a by-law which fixes the day of meeting without also fixing the hour is insufficient as a notice of the meeting.[2] And it is a general and settled rule of law that notice, in some way or other, must be given to every person entitled to be present at a corporate meeting.[3] When, therefore, no sufficient notice is given by charter or statute or by-law, each stockholder is entitled to an express notice of every corporate meeting.[4] No usage can operate to excuse a failure to give

[1] Warner *v.* Mower, 11 Vt. 385, 393 (1839); State *v.* Bonnell, 35 Ohio St. 10, 15 (1878). If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is necessary. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893). As to whether notice is necessary of the annual meeting, where the corporation has long been defunct, see Morrill *v.* Little Falls Mfg. Co., 60 Minn. 405 (1895).

[2] The fact that one of the by-laws of the corporation fixes the day upon which the annual meeting of the corporation shall be held is not of itself a sufficient notice of the hour and place at which the meeting is to be held. There must be an express notice of the hour and place of meeting. Otherwise, unless all the stockholders are present and consent, either in person or by proxy, the meeting cannot legally be held. San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875). Though the by-laws of a corporation fix the date of the annual meeting, that of itself will not be notice of the meeting. Notice must be given of the place of the meeting; and a provision of the charter for the calling of all meetings is a mandatory provision, applicable alike to general and special meetings. U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C., 1879).

[3] "To support the validity of corporate acts, each member must be actually summoned." Angell & Ames, Corp., § 492. A member who is expelled at a meeting of which he had no notice may cause the proceedings to be set aside. Medical, etc. Soc. *v.* Weatherly, 75 Ala. 248 (1883). "Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation." Dillon, Mun. Corp., § 200.

[4] Stow *v.* Wyse, 7 Conn. 214 (1828), the court saying, in a dictum: "If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given: and this, in such case, would be indispensable." Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844), a dictum; Jackson *v.* Hampden, 20 Me. 37 (1841); Rex *v.* Langhorn, 4 Ad. & El. 538 (1836); S. C., 6 Nev. & M. 203

such a notice.[1] These rules are based on the necessity of protecting the rights of stockholders, and especially of the minority. A stockholder who takes part in a meeting cannot raise the objection that other stockholders were not notified of the meeting.[2]

§ 595. *The essential elements of a notice of a meeting are time, place, and business.*— The contents of the notice depend upon the character of the meeting. There are three matters concerning every corporate meeting of which the members are entitled to notice, namely: the time, the place, and the business proposed to be transacted. Some or all of these may be known to him by virtue of a charter provision or a by-law or a statute. But if any one of them is not known in that way, the stockholders are entitled to an actual notice thereof. Accordingly, it is the rule that, in the absence of other valid notice, the call must specify the time and place of meeting and the business to be considered. Although the time of a meeting is fixed by charter, nevertheless the meeting may be held at a subsequent time and be valid.[3] The precise hour at which the meeting is to be held must be stated in the notice.[4]

In general, the notice need not specify the business to be considered where the meeting is one prescribed by charter, or where the business is prescribed by charter or statute or by-law, and no other business is to be transacted.[5] But if the meet-

(1836); Smyth *v.* Darley, 2 H. L. Cas. 789 (1849), the last four cases being municipal corporation cases. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852), where a meeting called by a general agent in the absence of a statute or by-law was upheld though one member was mentally incapable of receiving notice.

[1] Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844); Rex *v.* Hill, 4 Barn. & C. 426 (1825), where an ancient custom of calling a meeting for an election of burgesses by ringing a bell was held not to be sufficient notice.

[2] Nickum *v.* Burckhardt, 47 Pac. Rep. 788 (Oreg., 1897). See also § 599, *infra*.

[3] People *v.* Cummings, 72 N. Y. 433 (1878); Hughes *v.* Parker, 20 N. H. 58 (1849). Elections need not be held on the day fixed by the by-laws. They may be held at any subsequent time. Beardsley *v.* Johnson, 121 N. Y. 224 (1890); S. C., 1 N. Y. Supp. 608 (1888).

[4] San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875).

[5] Notice need not be given of special business to be transacted at the regular annual meeting of the stockholders. Chicago, etc. R'y *v.* Union Pac. R'y, 47 Fed. Rep. 15 (1891); Sampson *v.* Bowdoinham Steam-mill Co., 36 Me. 78 (1854), holding that the notice of the annual meeting need not specify that the officers are to be

ing is to be held at a time not provided by the charter, the call must specify particularly the time and also the business;[1] and the better rule is that, where unusual business is to be transacted, even at a regular meeting, the notice of that meeting should state the unusual business.[2] Thus, at a meeting called

elected, even though the by-laws require the notice to state the business; Warner *v.* Mower, 11 Vt. 385 (1839), where a provision of the by-laws relating to notices was considered as not affecting those for stated meetings, and holding that a notice of a stated annual meeting need not specify the business to be transacted, there being nothing in the by-laws limiting or specifying the business. It is believed, however, that the rights of stockholders will be best preserved by requiring notice to be given of any extraordinary business that may come before an annual meeting.

[1] *Re* Bridport Old Brewery Co., L. R. 2 Ch. 191 (1866); *Re* Silkstone Fall Colliery Co., L. R. 1 Ch. D. 38 (1875). *Cf.* Wright's Case, L. R. 12 Eq. 335, n., 345, n. (1868); Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), holding that at common law all notices of meetings for special or exceptional purposes were required to state the object of the call. Citing Ang. & A. Corp., § 492. A meeting to organize and elect directors is invalid where no notice of the business is given. *Re* London, etc. Co., L. R. 31 Ch. D. 223 (1885); Shelby R. R. etc. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), in which a sale of a railroad was set aside because authorized at a meeting of stockholders called by a notice not sufficient in point of time, and defective in not stating the object of the meeting; Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381, 400 (1859), holding that, though the notice was insufficient, yet one who was represented by proxy cannot object, especially where he delayed a long time in complaining. A notice of a meeting of a benevolent society called to dissolve must state the object of the meeting. St. Mary's, etc. Assoc. *v.* Lynch, 64 N. H. 213 (1887). A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative. Imp. Bank of China *v.* Bank of Hindustan, L. R. 6 Eq. 91 (1868); Anglo-Californian Gold Min. Co. *v.* Lewis, 6 H. & N. 174 (1860); Stearic Acid Co., 9 Jur. (N. S.) 1066 (1863). Notice of a meeting to consider the giving of a mortgage is sufficient to enable the meeting to authorize a mortgage. Evans *v.* Boston Heating Co., 157 Mass. 37 (1892). One and the same meeting may be both ordinary and extraordinary: ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given. See Cutbill *v.* Kingdom, 1 Exch. 494 (1847); Graham *v.* Van Diemen's Land Co., 1 H. & N. 541 (1856).

[2] The annual meeting cannot vote an increase of the capital stock unless special notice of that business has been given, even though the by-laws provide that any business may be transacted at the annual meeting without special notice; the statute, however, prescribing that an increase of capital stock may be at "any meeting called for the purpose." Jones *v.* Concord, etc. R. R., 38 Atl. Rep. 120 (N. H., 1892). By custom any business may be transacted at the an-

to alter the by-laws and transact other business, an election cannot lawfully be held.[1] Nor can an assessment be levied at a special meeting when the stockholders were not duly notified that that matter would come up for consideration.[2] A notice of a meeting to increase stock need not specify what the money is to be used for.[3] Where a special meeting is called to rescind the by-laws and adopt others in their place, the notice of the meeting may state that a copy of the proposed by-laws can be inspected at the company's office and will be submitted at the meeting.[4] At a special meeting which has been called for a particular purpose, only the business specified in the call can lawfully be transacted.[5] The transaction, however, of business other than that for which the meeting was called will not invalidate the entire proceedings at that meeting. There is only an invalidity *pro tanto*.[6]

The notice of the business to be transacted must "be a fair notice, intelligible to the minds of ordinary men. . . . The court does not scrutinize these notices with a view to excessive criticism to find out defects, but it looks at them fairly."[7]

nual meeting without special notice thereof being given, but any specific restriction as to any particular business modifies such rule. Mutual F. Ins. Co. *v.* Farquhar, 39 Atl. Rep. 527 (Md., 1898).

[1] People's Ins. Co. *v.* Westcott, 80 Mass. 410 (1860). Nor an amotion made. Rex *v.* Liverpool, 2 Burr. 723 (1759); Rex *v.* Doncaster, 2 Burr. 738 (1759).

[2] Atlantic De Laine Co. *v.* Mason, 5 R. I. 463 (1858).

[3] Jones *v.* Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892).

[4] Young *v.* South African, etc. Synd., [1896] 2 Ch. 268. Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

[5] Warner *v.* Mower, 11 Vt. 385 (1839).

[6] *Re* British Sugar Ref. Co., 3 Kay & J. 408, 413 (1857); *Re* Irrigation Co. of France, L. R. 6 Ch. 176 (1871). But it is held that at a special meeting, all the members being present and consenting, business other than that specified in the call may lawfully be transacted. Rex *v.* Theodorick, 8 East, 543 (1807).

[7] Henderson *v.* Bank of Australasia, 62 L. T. Rep. 869 (1890); South School District *v.* Blakeslee, 13 Conn. 227 (1839). A notice that in case certain things happen a meeting will be held is not good. It is conditional and not absolute. Alexander *v.* Simpson, L. R. 43 Ch. D. 139 (1889). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement must specify such payment, in addi-

§ 596. *Service of the notice.*— If the particular form of the notice or the manner in which it shall be served is prescribed by charter or by-law or by statute, the notice must be given in that manner, unless notice is waived by unanimous consent; otherwise all the proceedings of the meeting are invalid.[1] Under a statute requiring "fourteen days' public notice at the least . . . by advertisement," it has been held that fourteen clear days' notice must be given.[2] The New York statutes, on the contrary, exclude the day of publication and include the day of the event.[3] In the absence of an express provision as to

tion to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., 78 L. T. Rep. 237 (1898).

[1] Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), where there was no such publication as was required by statute, and there was no waiver; Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), where a consolidated company sued a subscriber to stock in one of the old companies, and he defeated the action by showing that the statutory notice of the proposed consolidation had not been given; Reilly *v.* Oglebay, 25 W. Va. 36 (1884), where a notice by *the secretary*, when the statute required it to be given by the *board of directors* or by *stockholders holding one-tenth of the capital*, was held insufficient, although it was shown that he had the authority from stockholders holding the required amount of stock; Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that, where a by-law required notice to be posted, parol proof of such posting was incompetent unless the written notice was shown to have been lost; Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851), where a notice was held bad because the statute declared it should be printed in a newspaper circulating in the district of the principal place of business, while in this case there was no proof that the paper selected ever circulated there. Hence the removal of directors at such a meeting was illegal. Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851). As to waiver, see § 599, *infra*.

[2] *Re* Railway Sleepers Supply Co., L. R. 29 Ch. D. 204 (1885), holding that where by statute a second meeting to confirm the action of a first meeting must be held "at an interval of not less than fourteen days," both of the days on which the meetings were held must be excluded; Reg. *v.* Aberdare Canal Co., 14 Q. B. 854 (1850), holding that where notice must be published "at least sixteen days before such meeting" in condemnation proceedings, a notice published January 27th for a meeting February 12th was insufficient; Reg. *v.* Shropshire Justices, 8 Ad. & E. 173 (1838), not a corporation case, but holding that notice of appeal to be "fourteen days at least" before the opening day must be fourteen days exclusive of the day of serving notice and of the day of the event. To same effect, Norton *v.* Salisbury Town Clerk, 4 C. B. 32 (1846).

[3] L. 1892, ch. 677, § 27; Code Civ. Proc., § 787.

the manner of serving a notice of a meeting, it is the common-law rule that each member of the corporation is entitled to notice, either personal or by writing, which he receives.[1] The physical or mental incapacity of one of the stockholders will not excuse a failure to give him notice of a meeting; but it is very clear that the meeting may lawfully convene and transact business, although one of the members is incapable, by reason of imbecility, of receiving the notice.[2] The absence of a stockholder from home does not excuse a failure to leave the notice.[3] And where one of the stockholders dies after notice of a meeting, but before the meeting convenes, and no administrator is appointed in time to act at that meeting, there is on this account no ground to impeach the regularity of the meeting.[4] It has been held that a pledgee of shares is not entitled to a notice of corporate meetings if the pledgor receives notice.[5] Where stock is owned by a firm, notice to one of the firm is sufficient.[6] If the notice is fraudulently concealed from the owner of a majority of the stock, even where the notice is published in accordance with the statute, the election will be set aside.[7]

§ 597. *Notice must be served a reasonable time before the meeting.*— The notice must be served upon the stockholders a

[1] Notice to non-residents by letter was upheld in Stebbins *v.* Merritt, 64 Mass. 27 (1852). For dicta to the effect that the notice must be personal, see Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877); Stow *v.* Wyse, 7 Conn. 214 (1828). See also § 592, *supra*, as to the kind of notice required of directors' meetings, and § 594, *supra*, and notes.

[2] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[3] Jackson *v.* Hampden, 20 Me. 37 (1841). In Porter *v.* Robinson, 30 Hun, 209 (1883), it is held that notice need not be given to a member of a board of school trustees, the board being a body corporate, who is absent from the state and cannot attend the meeting, and that a failure to notify such a member will not render the proceedings at the meeting irregular or invalid. Members of English joint-stock companies residing abroad are not entitled to any notice of corporate meetings. *Ex parte* Union Hill Silver Co., 22 L. T. Rep. 400 (1870).

[4] Freeman's Nat. Bank *v.* Smith, 13 Blatchf. 220 (1875); S. C., 9 Fed. Cas. 760.

[5] McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850).

[6] Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737, 747 (1880).

[7] Where, in addition to irregularities, the notice of the election at a deferred day, which is published in accordance with the charter, is concealed from the leading stockholder, the court will set the election aside. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872).

reasonable or customary time before the day of the meeting.[1] Where by statute it is provided that thirty days' notice shall be given of certain corporate meetings, that length of time applies to notices of other meetings of the same corporation.[2]

§ 598. *The division of meetings into ordinary and extraordinary.*— Corporate meetings of stockholders are frequently divided, both by the judges and the text-writers, into two classes — the first being special or extraordinary, and the second being ordinary, regular, stated, or general. By reason of this attempt at classification much confusion has been introduced into the law without any corresponding advantage. The terms employed to distinguish the various kinds of meetings are used in different senses by different writers, so that it is difficult to define them in such a way as to avoid confusion.[3]

§ 599. *Waiver of notice.*— A stockholder may expressly or by his acts waive his right to have a notice of a corporate meeting duly served upon him.[4] Although a stockholder is present

[1] *Re* Long Island R. R., 19 Wend. 37 (1837). *Cf.* Covert *v.* Rogers, 38 Mich. 363 (1878), where a similar rule is declared as to notice to directors of their meetings. The legislature cannot unreasonably shorten the time of the next meeting. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502 and 701 (Ky., 1888). A reorganization under the English statute will not be sustained as against American stockholders, where the entire business of the English company is to own and work American mines, and the by-laws of the company provide for a longer notice than is specified in the English statute. The notice of the meeting to reorganize not having reached the American stockholders in time to attend the meeting, the American courts will not sustain the reorganization. Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7 (1893).

[2] Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876).

[3] For instance, in England, all meetings of stockholders are called "general" meetings, and are either "ordinary" (*i. e.*, regular) or "extraordinary" (*i. e.*, special). In England the same meeting may be both ordinary and extraordinary. See Lindley on Companies, p. 308.

[4] The acts of a meeting are valid, though held without notice, if all are present or subsequently ratify and approve of the action. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); affirmed as to this point, but reversed as to others, in Handley *v.* Stutz, 139 U. S. 417 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892). A stockholder who takes part in a meeting cannot afterwards object that it was not properly called. Weinburgh *v.* Union, etc. Co., 37 Atl. Rep.

at a meeting at which an increase in capital stock is voted, yet he may object thereto on the ground that special notice was not given that the question of the increase would be voted on at that meeting, inasmuch as if such notice had been given other stockholders might have attended and changed the result.[1]

Difficulty as to waivers has been encountered where by statute or by charter the notice must be published or must be given a specified length of time before the meeting is held. This question arises often in regard to the first and organization meeting of the company, or in regard to a meeting to increase the capital stock, or to issue bonds, or to give a mortgage, or to effect a consolidation. The rule, however, is now well established that such statutory notice is for the benefit of the stockholders themselves, and, if they waive it, the meeting and all the proceedings are as valid as they would be had the full statutory notice been given.[2]

1026 (N. J., 1897). Objections to the regularity of the notice which was given are waived if all are present at the meeting and do not object to such irregularity. Stebbins *v.* Merritt, 64 Mass. 27 (1852); Richardson *v.* Vermont, etc., 44 Vt. 613 (1872), holding that objections to the proceedings of a meeting called by a notice which did not state what its object was had been waived by a ratification at a later meeting; Jones *v.* Milton, etc. Turnp., 7 Ind. 547 (1856), where the stockholders not notified appeared and voted by proxy; Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 606, *infra*. Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, adopt by-laws, etc., without the capital being first subscribed and without the others, if they do not object. McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892). Notice may be waived. People *v.* Twaddell, 18 Hun, 427 (1879).

[1] Jones *v.* Concord, etc. R. R., 38 Atl. Rep. 120 (N. H., 1892).

[2] A provision that notice must be given to stockholders thirty days before they vote in favor of a mortgage may be waived by them, and a waiver may be by failure to object. Bridgeport Electric, etc. Co. *v.* Meader, 72 Fed. Rep. 115 (1896). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. Atlantic Trust Co. *v.* The Vigilancia, 73 Fed. Rep. 452 (1896). Where a mortgage is approved by the representatives of all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement, as required by statute. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory provision that a certain notice must be given of a meeting to authorize a mortgage may be waived. Central Trust Co. *v.* Condon, 67 Fed. Rep. 84 (1895). Although the statutes of Montana require that a mortgage may be given only after a stockholders' meeting convened by publication

Participation as an officer in issuing the call is a waiver by him of informalities as to that call;[1] and recognition of an agent appointed at a certain meeting, by dealing and offering to deal with him as the agent of the company, is a waiver of

of notice, etc., has voted it, yet all the stockholders, by voting therefor, waive the required notice, and no one can complain. The mortgage is valid. Campbell *v.* Argenta, etc. Co., 51 Fed. Rep. 1 (1892). Although the constitution provides that there shall be sixty days' notice of the meeting to authorize the issue of bonds, yet where all the stockholders assemble and authorize the issue without any notice, and the bonds pass into *bona fide* hands, they may be enforced. The absence of a nominal stockholder whose stock is really owned by one of those present is immaterial. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). A constitutional provision in regard to notice being given of a meeting for increasing the stock or bonds of a corporation is for the benefit of the stockholders and may be waived by them, or the omission of it may be ratified by them. Nelson *v.* Hubbard, 96 Ala. 238 (1892). The voluntary dissolution of a company under the statute, but without the ten days' notice required by the statute, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). In general, see Columbia Nat. Bank's Appeal, 16 W. N. Cas. (Pa.) 357 (1885); Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889); Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880), where no notice was given, although prescribed by the charter and by-laws. It was held to have been waived by the presence of all the stockholders at the meeting and their participation in its action; *Re* British Sugar Ref. Co., 3 Kay & J. 408 (1857), where it was adjudged that a shareholder who had received a circular notice of the meeting and was present could not question the legality of the meeting on the ground that the charter required, in addition to the circular, publication in a newspaper, which was not made.

A person who takes part in a meeting cannot object that it was held on five days' notice instead of fourteen, as required by the charter. Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864). A failure to give the statutory notice of the first meeting is immaterial where all but one stockholder were present and he afterwards ratified all that was done. Babbitt *v.* East, etc. Co. (N. J., 1876); Stew. Dig., p. 208, § 13. To same effect, § 234, note, *supra*, and § 593, *supra;* also § 288, *supra*. A stockholder who knows of and approves of a proposed sale of a railroad by a stockholders' vote as allowed by statute cannot have the sale set aside on the ground that he was not notified of nor present at the meeting voting such sale,

[1] Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Schenectady, etc. Plankroad Co. *v.* Thatcher, 11 N. Y. 102 (1854). The stockholder who, as a director, votes to call the annual meeting at an irregular time cannot question the acts of such meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

the right to notice of that meeting.[1] One stockholder cannot avail himself of the neglect of the corporate officers to give due notice to another stockholder who does not himself complain.[2] But the failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of

but he must be paid the value of his stock. Young *v.* Toledo, etc. R. R., 76 Mich. 485 (1889). The constitutional provision that bonds or stock shall not be increased except in a certain way does not apply to an original issue of bonds. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). Directors elected at a meeting called on thirteen days' notice instead of fourteen, as required by statute, may make calls, where their election has been confirmed by a subsequent annual general meeting. Briton, etc. Assoc. *v.* Jones, 61 L. T. Rep. 384 (1889); People *v.* Peck, 11 Wend. 604 (1834), holding that a failure to comply with a statutory requirement regarding notice will not affect the proceedings of a meeting of a religious corporation where there is no claim that every voter was not present, or that evil resulted from the omission, and no fraud was involved. If all parties attended, they thereby admitted notice. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852); Rex *v.* Chetwynd, 7 Barn. & C. 695 (1828), where the election of a burgess at a meeting of which no notice was given was held valid, because it appeared that all the members of the electing body were present; Rex *v.* Theodorick, 8 East, 543 (1807). *Cf.* U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C., 1879), where it was held that, although the date for the annual meeting is fixed by a by-law, the notice by publication provided for by the charter is necessary. See also *Re* Long Island R. R., 19 Wend. 37 (1837), in which it was said in a dictum that a notice regulated by statute "of course cannot be modified or dispensed with." If all the incorporators meet and organize, a statutory requirement as to notice is waived and is not necessary. Ratification afterwards by one who was not present is equally sufficient. Benbow *v.* Cook, 115 N. C. 324 (1894).

[1] Bryant *v.* Goodnow, 22 Mass. 228 (1827).

[2] Nickum *v.* Burckhardt, 47 Pac. Rep. 788 (Oreg., 1897); Schenectady, etc. Plank-road Co. *v.* Thatcher, 11 N. Y. 102 (1854). In this case the court said: "The court rejected the offer of the defendant to prove that no notice had been given of the first election of directors. I think this was properly rejected on the ground that the defendant could not avail himself of a neglect to give notice to any other stockholder. The defendant himself was present at that meeting and voted, and was elected a director. He has not suffered by an omission to serve notice, and he is not in a situation to object as to others." A stockholders' meeting held without notice or call cannot be objected to by those who participate or receive the benefits of it. Handley *v.* Stutz, 139 U. S. 417 (1891). A stockholder who takes part cannot object that another stockholder had no notice. *Re* Union Hill Silver Co., 22 L. T. Rep. 400 (1870); *Re* British, etc. Co., 3 Kay & J. 408 (1857). A party who did not attend the meeting cannot object that the inspectors were not sworn. *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). See also § 620, *infra*, and § 594, *supra*.

the meeting stated what was to be done.[1] A stockholder in a corporation may be estopped from questioning the validity of a stockholders' meeting by reason of his participation in the proceedings by proxy, where his agent was authorized to act at lawful meetings.[2] The waiver of all the stockholders is essential in order to validate an election held at a meeting not properly called.[3] But where the treasurer has acted as such for several months without objection, notes signed by the treasurer cannot be repudiated on the ground that his election was invalid because the stockholders' meeting was not properly called.[4] He is a *de facto* officer.[5]

§ 600. *Notice is presumed to have been regularly given.*— It is a presumption of law that proper and valid notice of a corporate meeting has been duly given to every stockholder, and that the meeting itself was regularly and lawfully held. The burden of proof is therefore upon him who alleges want of notice or insufficiency of notice, or attacks the regularity and validity of the proceedings.[6]

§ 601. *Adjourned meetings.*— An adjourned meeting is but a continuation of the meeting which has been adjourned; and when that meeting was regularly called and convened and duly adjourned, the shareholders may, at the adjourned meeting, consider and determine any corporate business that might lawfully have been transacted at the original meeting.[7]

[1] McFadden *v.* Leeka, 48 Ohio St. 513 (1891).

[2] Columbia Nat. Bank *v.* Matthews, 85 Fed. Rep. 934 (1898).

[3] State *v.* Pettineli, 10 Nev. 141 (1875).

[4] Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505 (1893).

[5] See § 623, *infra*.

[6] McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850); Porter *v.* Robinson, 30 Hun, 209 (1883); Sargent *v.* Webster, 54 Mass. 497 (1847); South School, etc. *v.* Blakeslie, 13 Conn. 227, 235 (1839); Lane *v.* Brainerd, 30 Conn. 565 (1862); Pitts *v.* Temple, 2 Mass. 538 (1807); Wells *v.* Rodgers, 60 Mich. 525 (1886), holding that notice is presumed, and the burden of proof in attacking the legality of the meeting is on the plaintiff. See also § 606, *infra*. All the stockholders are presumed to have had notice of a meeting that has been held. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). *Cf.* Wiggin *v.* Freewill, etc. Church, 49 Mass. 301, 312 (1844).

[7] Approved in State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897); Granger *v.* Grubb, 7 Phila. 350 (1870); Farrar *v.* Perley, 7 Me. 404 (1831); Scadding *v.* Lorant, 3 H. L. Cas. 418 (1851). *Cf.* People *v.* Batchellor, 22 N. Y. 128 (1860), where the New York city board of aldermen appointed a day for the election of a city officer. At a subsequent stated meeting this resolution was rescinded, and then an election

But where there is an absence of good faith, and an adjourned meeting is held in such a way as to prevent certain of the stockholders from knowing of it, the proceedings are invalid.[1] Where the original meeting was duly called and convened, the stockholders are not entitled to any other notice of the adjourned meeting than that which is implied in the adjournment.[2] But nothing can, without notice, be transacted at an adjourned meeting except the business which might have been transacted at the first meeting if a quorum had been present.[3]

was thereupon held. *Held*, that the election was void, as some members were absent from the former meeting and had no notice of the election. A board of aldermen cannot elect an assessor and then at an adjourned meeting reconsider and elect some one else. State *v.* Phillips, 79 Me. 506 (1887). See also Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), where the stockholders at the first meeting proceeded to an election in spite of an adjournment by the commissioners, and the election was upheld. A meeting adjourned for want of a quorum may at the adjourned meeting proceed to business, if a quorum is present; and no notice of the adjourned meeting is necessary where the charter or by-laws provided for such adjournment. Smith *v.* Law, 21 N. Y. 296 (1860), involving a meeting of the board of directors.

[1] State *v.* Bonnell, 35 Ohio St. 10 (1878). Where an election is held, after many adjournments, and a minority are present and elect directors, who repudiate a contract which exists with the holder of a majority of the stock, the latter being ignorant of the intent to elect officers, equity will enjoin the repudiation of the contract. New York, etc. Co. *v.* Parrott, 36 Fed. Rep. 462 (1888).

[2] Smith *v.* Law, 21 N. Y. 296 (1860); Warner *v.* Mower, 11 Vt. 385 (1839). *Cf.* U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C., 1879), where it was held that the proceedings of an original meeting being invalid by reason of insufficient notice, the adjourned meetings were invalid also, they being merely continuations of the original. To same effect, Wiggin *v.* Freewill, etc. Church, 49 Mass. 301 (1844).

[3] Regina *v.* Grimshaw, 10 Q. B. 747 (1847). No business can be done at an adjourned meeting that could not have been done at the original meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

CHAPTER XXXVII.

ELECTIONS AND OTHER CORPORATE MEETINGS.

§ 602. Scope of the subject.
603. Elections are to be by the stockholders and may be compelled by mandamus.
604. The meeting must be held at the prescribed hour, which must be reasonable.
605. Inspectors of election — Conducting and closing elections.
606. Conducting and closing meetings generally — Irregularities and informalities — Minutes of meeting.
607. The quorum — A majority of the stockholders attending a meeting may transact business.
608. The majority of votes cast shall elect.
609. Is every share of stock entitled to one vote?
609*a*. Cumulative voting.
610. Proxies.
611. The transfer book as evidence of a right to vote.
612. The right of trustees, pledgees, administrators, etc., to vote.
613. The corporation cannot vote upon shares of its own stock.
614. Issuing stock in order to carry an election.
615. Where one corporation owns a majority of the stock of a rival company, may it vote the stock and control the latter company?
616. Illegal or fraudulent elections — The remedy of injunction against elections and against voting particular stock.
§ 617. Illegal or fraudulent elections — The remedies of quo warranto and mandamus.
618. Illegal or fraudulent elections — The remedy by injunction against directors acting, and the remedy of a suit in equity where the validity of the election arises incidentally.
619. Illegal or fraudulent elections — Statutory remedy by petition to a court of equity.
620. Who may complain of an illegal election — A new election is not granted if the result will be the same.
621. Restrictions on the right to vote.
621*a*. Restrictions on right to sell stock and contracts against selling.
621*b*. "Pools," "corners," and combinations in stock.
622. Contracts as to directors, elections, voting, and control — Combinations of stockholders — Voting trusts and pooling agreements.
623. Who may be a director or corporate officer? — Qualification shares.
624. Acceptance and resignation of office and failure to elect officers — Removal of directors.
625. Stockholders can act only at corporate meetings.
626, 627. Stockholders cannot carry on the business or enter into contracts for the corporation.

§ 602. *Scope of the subject.*— The business which the stockholders of a corporation in meeting assembled have the power to transact is not extensive, but it is of great importance. They elect the directors, pass upon amendments to the charter, de-

termine whether any increase of the capital stock shall be made, make the by-laws, and dissolve or continue the corporation. These constitute the chief functions of a stockholders' meeting. They are extraordinary in their character, and although they are exercised at long intervals are of vital importance. This chapter treats of the business which may be transacted at stockholders' meetings and of the methods of its transaction.

§ 603. *Elections are to be by the stockholders, and may be compelled by mandamus.*— At common law the directors of a corporation are to be elected by the stockholders in corporate meeting assembled.[1] Generally this is declared to be the law by charter or statutory provisions. A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner.[2] In most corporations the president, and also the vice-president, secretary, treasurer, and agents of the corporation, are elected or appointed, not by the stockholders, but by the directors. All these matters are generally regulated by the charter or a statute.

At common law mandamus lies to compel an election of corporate officers.[3]

All corporations for profit have power to elect a board of directors.[4]

The legislature may amend the charter so as to increase the

[1] It has been held that stockholders cannot fill vacancies in the board of directors at a special meeting, when elections can only be at annual meetings. Moses *v.* Tompkins, 84 Ala. 613 (1888). The soundness, however, of this decision may well be doubted. The by-laws may and generally do give this power to the directors. And see dictum in *Re* Union Ins. Co., 22 Wend. 591 (1840).

[2] Durkee *v.* People, 155 Ill. 354 (1895).

[3] See § 593, *supra*.

[4] A bank may have directors though the statute does not provide for them. All private corporations may have directors. Hurlbut *v.* Marshall, 62 Wis. 590 (1885). "The power inheres in the corporation to hold an election," where the charter or statutes are silent. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). "The power of electing both officers and members is an incident to every corporation. It is not necessary that such a power should be expressly conferred by the charter." Commonwealth *v.* Gill, 3 Whart. (Pa.) 228, 247 (1837).

number of directors;[1] but it cannot deprive the members of the corporation of the privilege of electing its directors.[2]

Although the corporation is not a going concern, nevertheless it may have an election of directors.[3]

§ 604. *The meeting must be held at the prescribed hour, which must be reasonable.*— The particular time at which corporate meetings shall be held is often prescribed in the charter or a statute or in the by-laws of the corporation. When not so prescribed it is fixed by the officers who call together the corporate meeting. But, in whatever way it is decided upon, the meeting must be convened at the time decided upon or within a reasonable time thereafter.[4] Accordingly, if the meeting is convened before the hour at which it is called and business is transacted, the proceedings will be invalid.[5] A meeting called

[1] Mower *v.* Staples, 32 Minn. 284 (1884). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Child *v.* Coffin, 17 Mass. 64 (1820); Langley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); S. C., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greeneville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony, etc. R. R., 87 Mass. 221 (1862). See also §§ 499, 500, *supra*.

[2] The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational corporation. Louisville *v.* President, etc., 15 B. Mon. (Ky.) 642 (1855). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Trustees, etc., 7 Gill & J. (Md.) 7 (1834). Under the reserved power to amend or repeal a charter, the legislature may amend the charter of an agricultural college which has private stockholders, but to which the state contributes funds, so that, instead of the state having four directors out of eleven, the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892). But see Sage *v.* Dilliard, 15 B. Mon. (Ky.) 340, 357 (1854), and §§ 500, 501, notes, *supra*.

[3] Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

[4] Where a meeting was held by a minority of the stockholders several hours after the time fixed in the notice, and an adjournment made until the following day, at which adjourned meeting, without the knowledge of the other members, an election was held, the election was unfair and invalid. State *v.* Bonnell, 35 Ohio St. 10 (1878). But a delay of a hour and five minutes after the time specified in the notice is not, as a matter of law, an unreasonable delay which will vitiate the proceedings. South School District *v.* Blakeslee, 13 Conn. 227, 235 (1839). The court will not sustain an election where the majority were given to understand that the election would go over to a later hour in the day, even though no formal adjournment was had. State *v.* Smalley, 7 Ohio C. C. 400 (1893).

[5] So, where a meeting was called for twelve o'clock, but was called to order

to order at sun time and then postponed to standard time, before any proceedings are had, is legal.[1]

Frequently the particular office or place for meeting within the state is specified in the charter or by-laws of the corporation. In that event a meeting held at a different place will be irregular, and the proceedings at such a meeting void and ineffectual, if objected to.[2]

§ 605. *Inspectors of election — Conducting and closing elections.*— Ordinarily a chairman and inspectors of election are elected or appointed by the stockholders. The presiding officer at a stockholders' meeting need not be a stockholder,[3] and he need not be elected with any particular formality.[4]

The inspectors of election need not be stockholders.[5] If in-

and organized fifteen minutes before twelve, it was held to be a surprise and a fraud upon such of the stockholders as were not actually present at that hour, and that in consequence the proceedings were irregular and void. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869). Where commissioners, after calling a meeting of subscribers, ordered the election postponed, but the subscribers nevertheless refused to postpone and proceeded with the election, the election is not void, unless, in the opinion of the court, a postponement was clearly necessary. Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834). *Quære*, in this case, whether the election might not have been avoided if any considerable number of the shareholders were deprived of their election franchise by the failure to postpone. See also § 605, *infra*.

[1] Proctor, etc. Co. *v.* Finley, 33 S. W. Rep. 188 (Ky., 1895).

[2] Where the customary place of meeting of a corporation is abandoned, and a new place fixed upon in a regular and lawful manner, a meeting at the old place is irregular, and the proceedings at such a meeting are invalid. Miller *v.* English, 21 N. J. L. 317 (1848). The meeting must be held at the usual place. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653 (1855). *Cf.* McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850), holding that a meeting at a residence is good, if all assent, even though the statute requires the meetings to be at the counting-room of the company.

[3] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[4] Acquiescence in a person's assuming to act as chairman of a stockholders' meeting validates his acting as such. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[5] People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869). Although an inspector is required by by-law to be a stockholder, yet the election of one who is not a stockholder is voidable and not void. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869). An inspector may be a candidate for directorship. *Ex parte* Willcocks, 7 Cow. 402 (1827). A stockholder may be an inspector, but it is better to have an outside disinterested person. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881). Where the scrutineers or inspectors are also candidates for election as directors, and they pass upon an instrument which affects the right to vote a majority of the stock, such stock being in the

spectors are provided for by the charter, and they do not act or are enjoined from acting, the stockholders may appoint others to take their place.[1] The duties of the inspectors are ministerial and not judicial. Their discretion and powers of investigation are very limited.[2] The exclusion of a vote at an election may be upheld by the court on grounds different from those given at the election itself.[3]

A requirement that the election shall be by ballot does not invalidate an election by show of hand if no one objects.[4] Where a ballot contains the names of both candidates, one in print and one in writing, it is defective and is not counted for either candidate.[5] After the ballot has been counted and announced, it is too late to permit the ballot to be opened to receive the votes of any who have not voted.[6]

Where no time is specified by law during which the polls must be kept open, it rests within the sound discretion of the inspectors to say when the polls shall close.[7] So also it is held that holding the polls open after the hour specified in the notice for them to close will not, where the inspectors exercise a reasonable discretion, invalidate an election.[8]

name of another person, but they claiming the right as beneficial owners to vote it, their decision practically controls the election, and if they decide in their own favor the court will set the election aside. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881).

[1] People *v.* Albany, etc. R. R., 55 Barb. 344, 357 (1869). See also *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). The failure of the inspector so appointed to take the prescribed oath will not invalidate the election. *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839). Where by statute an election is to have "inspectors," one inspector is insufficient. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888); but see N. Y. L. J., June 29, 1889.

[2] See § 611, *infra; Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). The office of the inspectors is ministerial rather than judicial. Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). Inspectors at elections having once accepted a vote and declared the result cannot then reject it and declare a different result. Hartt *v.* Harvey, 32 Barb. 55 (1860).

[3] Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

[4] Christ Church *v.* Pope, 74 Mass. 140 (1857). It is not necessary that the voting be by ballot, even though the statute so prescribes. San Joaquin Land, etc. Co. *v.* Beecher, 101 Cal. 70 (1894).

[5] People *v.* Pangburn, 3 N. Y. App. Div. 456 (1896).

[6] Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

[7] *Re* Chenango County Ins. Co., 19 Wend. 634 (1839).

[8] *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). An election is not vitiated by the fact that the polls are kept open after the designated hour and votes received. Rudolph *v.*

§ 606. *Conducting and closing meetings generally — Irregularities and informalities — Minutes of meeting.*— The form or mode of conducting an election is in general not material, provided it violates no positive provision of the charter or of a statute regulating it, is orderly and in good faith, and is conducted by authorized or proper persons.[1] And as a general rule of law, where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the corporators have been fairly expressed, and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting it.[2]

Nevertheless, although it is a general rule that, in the transaction of the ordinary business of a corporation, no particular formalities are necessarily to be observed, the motions must be put in an intelligible way and then voted upon.[3]

The parliamentary usages are the same as in other bodies, and mere irregularities in the manner of conducting the business are immaterial if the sense of the meeting has been fairly expressed.[4]

Southern, etc. League, 23 Abb. N. Cas. 199 (1889); People *v.* Albany, etc. R. R., 55 Barb. 344, 356, 360 (1869).

[1] Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874).

[2] Philips *v.* Wickham, 1 Paige, 590 (1829).

[3] A motion must be plainly and clearly made, separate from a rambling speech, before the chairman can be held to be wrong in rejecting it. Henderson *v.* Bank of Australasia, 62 L. T. Rep. 869 (1890). A general understanding or assent or want of dissent is not equivalent to a question being put and voted upon. The statement by a minister of what salary he wished and the failure of members to object is not a sufficient expression of the meeting. Landers *v.* Frank, etc. Church, 114 N. Y. 626 (1889).

[4] Philips *v.* Wickham, 1 Paige, 590 (1829); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866); Downing *v.* Potts, 23 N. J. L. 66 (1851), in which it was held that non-compliance with a statute requiring a list of stockholders entitled to vote to be made out ten days before an election will not of itself make void an election, such provision being only directory. A motion may be put by the chairman, although it has neither been made nor seconded. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Although the meeting has voted down two motions to make calls, it may then pass another motion for a larger one. *Re* British, etc. Co., 3 Kay & J. 408 (1857). In England, by statute, any five stockholders may demand a poll. *Re* Phœnix, etc. Co., 48 L. T. Rep. 260 (1883); Hurrell & Hyde, Directors and Officers, 78. Even if, on a poll demanded by five members, each share has one vote, yet until such poll is demanded voting is by show of hands. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). In general, see also Gorham *v.* Campbell, 2 Cal. 135 (1852); Hardenburgh *v.* Farmers', etc. Bank, 3

After the meeting is organized the majority cannot withdraw and organize another meeting.[1] Where a part of the stockholders secede from the meeting, and hold another on the pretext of disorder, but in fact by reason of a previously devised plan, the election by the seceders is not legal.[2] The chairman cannot adjourn a meeting against the will of the stockholders. The stockholders may proceed to hold the meeting without him.[3]

Although the chairman declares a resolution duly carried, yet the court may review his decision.[4] Where the chairman refuses to poll the vote and declares the meeting adjourned, the courts will not necessarily interfere.[5] If any fraud, surprise, or deceit has been practiced in conducting the meeting a different rule prevails.[6] There should be applied to stockholders' meetings the rule in directors' meetings that the majority cannot exclude the minority from being heard, by delegating power to a committee; and "even if the minority had a voice given to them, still, if there existed a combination among the majority before that voice was heard, to overbear it," the acts of such a

N. J. Eq. 68 (1834); People *v.* Peck, 11 Wend. 604 (1834). See also § 605, *supra*. In State *v.* Pettineli, 10 Nev. 141 (1875), the court held that an election was illegal where there was no presiding officer and no inspectors. Although the notice of a special stockholders' meeting states that the resolution will be presented and passed upon, to give to each share one vote, provided such share has been held by the party for six months prior to an election, an amendment proposed at the meeting striking out the latter part of the resolution must be considered and put to vote by the chairman. Henderson *v.* Bank of Australasia, L. R. 45 Ch. D. 330 (1890).

[1] Their acts are void; but if the statute requires a majority in interest of the stock to elect, the election is invalid. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[2] Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893).

[3] State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897). If the president illegally adjourns the meeting and excludes the stockholders from the room, they may adjourn to another room and hold the meeting. State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897).

[4] Young *v.* South African, etc. Synd., [1896] 2 Ch. 268.

[5] The courts will not interfere although the chairman of the meeting refused to poll the vote on a motion to adjourn, but declared the meeting adjourned on a *viva voce* vote and left. In regard to the right to be heard the court said the court would not sustain a bill "for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinions *viva voce* at a meeting of the shareholders." MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875).

[6] Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); People *v.* Albany, etc. R. R., 55 Barb. 344 (1869); State *v.* Pettineli, 10 Nev. 141 (1875); Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). See also §§ 596, 604, 605, *supra*.

body would be illegal.[1] The right to object to an informality may be waived, and a failure upon the part of those members not present to protest promptly, upon learning of the informality, is a waiver.[2] The presumption is that all proceedings were regular and lawful.[3] The minutes of a meeting duly signed are the best evidence of what the meeting did.[4]

§ 607. *The quorum—A majority of the stockholders attending a meeting may transact business.*— The right of the majority to rule in the management of the affairs of a private corporation is fully established.[5] They may control the company's business,

[1] Great Western R'y *v.* Rushout, 5 De G. & Sm. 290, 310 (1852).

[2] State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); Rex *v.* Trevenen, 2 B. & Ald. 339 (1819). Shareholders who receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein if what is done might have been validly sanctioned by them if present; but not if what is done is altogether illegal, and beyond the power of even all the shareholders. See Phœnix Life Ass. Co.'s Case, 2 J. & H. 441 (1862); Irvine *v.* Union Bank of Australia, L. R. 2 App. Cas. 366 (1877). Compare Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868); Spackman *v.* Evans, L. R. 3 H. L. 171 (1868); Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868); Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43 (1871). See also § 607, *infra*. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. St. R'y, 45 Fed. Rep. 518 (1891).

[3] Blanchard *v.* Dow, 32 Me. 557 (1851), where it was presumed that the election was by ballot; Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864), where it was presumed that the requisite amount of stock was subscribed before the election took place. See also §§ 599, 600, *supra*.

[4] Harrison *v.* Morton, 83 Md. 456 (1896). See also § 714, *infra*. The failure of incorporators or stockholders to make a record of their proceedings at that time does not invalidate their action. Benbow *v.* Cook, 20 S. E. Rep. 453 (N. C., 1894). The corporate minutes may be signed after the meeting has been held. Miles *v.* Baugh, 3 Q. B. 845 (1842); Southampton, etc. Co. *v.* Richards, 1 M. & Gr. 448 (1840); Lindley, Partn. 551. Concerning the mode of proving the corporate minutes, see § 714, *infra*.

[5] Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862); Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69, 76 (1873); East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1859); McBride *v.* Porter, 17 Iowa, 203 (1864); Faulds *v.* Yates, 57 Ill. 416 (1870); Leo *v.* Union Pacific R. R., 19 Fed. Rep. 283 (1884); S. C., 17 Fed. Rep. 273 (1883); Barnes *v.* Brown, 80 N. Y. 527 (1880); Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Dudley *v.* Kentucky High School, 9 Bush (Ky.), 576 (1873). See also Livingstone *v.* Lynch, 4 Johns. Ch. 573 (1820), in which Chancellor Kent clearly states that the right of the majority to rule is one of the chief differences between a corporation and a partnership. The majority rule at common law. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1875); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517, 537

prescribe its general policy, make themselves its agents, and take reasonable compensation for their services.[1] The minority, however, have a right to be heard; and it is the duty of the majority to give a due consideration to their arguments and wishes concerning the management of the corporate business.[2]

The question has arisen whether a meeting can be held and business transacted when a majority in interest of the stockholders are not present. But the law is clear that those stockholders who attend a duly-called stockholders' meeting may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present.[3]

(1854). A majority of the stockholders control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business, even though the management may not seem to be wise. The majority rule. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). Where a statute requires a three-fourths vote in value for a reorganization of a company, the stock not voted is not counted to make up the three-fourths, even though the trustees who represent the stock refuse to assent or dissent. *Re* Neath, etc. R'y, [1892] 1 Ch. 349. Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* Chelsea, 128 N. Y. 537 (1891).

[1] Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); S. C. *sub nom.* Winthrop Iron Co. *v.* Meeker, 109 U. S. 180 (1883). See also § 662, *infra*.

[2] But see MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875).

[3] Those of the stockholders who attend the meeting constitute a quorum, although they are a minority. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893); Granger *v.* Grubb, 7 Phila. 350 (1870); Craig *v.* First, etc. Church, 88 Pa. St. 42 (1878), where the principle is elucidated that this is the rule for a meeting composed of an indefinite number of persons, like stockholders, but that where a definite number is involved, as in a board of directors, then a majority must be present. Brown *v.* Pacific Mail, etc., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420; Field *v.* Field, 9 Wend. 394 (1832); Gowen's Appeal, 10 W. N. Cas. 85 (Pa., 1880); Madison Ave. Bapt. Church *v.* Oliver St. Bapt. Church, 5 Robt. (N. Y.) 649 (1867); Everett *v.* Smith, 22 Minn. 53 (1875). As to the rule concerning directors, see § 592, *supra*. It has been held that one person cannot constitute a quorum; that at least two members are necessary to make a corporate meeting. Sharpe *v.* Dawes, 46 L. J. (Q. B.) 104 (1876). In this case one stockholder "met," did all necessary business, and then voted himself a vote of thanks. In *Re* Sanitary Carbon Co., 12 W. N., p. 223 (1877), where one stockholder, having also proxies of the remaining three stockholders, held a meeting "voted himself into the chair, proposed a resolution to wind up voluntarily, declared the resolution passed, and appointed a liquidator," the court reluctantly followed the preceding case and declared the "meeting" invalid.

Nevertheless, where by statute the quorum is to be a majority of the stockholders, this means a majority in interest.[1]

Of those who attend the stockholders' meeting a majority rule. Their acts are as valid as though they constituted a majority of all the stockholders, or constituted a majority at a meeting in which a majority of the stockholders were present.[2] The presumption always is that a legal majority voted for any act or proceeding that appears to have been passed.[3]

Two important limitations and exceptions to the above principles are to be borne carefully in mind.

First, the majority cannot bind the minority to submit to an act by the corporation where such act is beyond the express and implied powers of the corporation as given to it by its charter. Such an act is *ultra vires*. A large amount of litigation has arisen from the attempt of the majority to carry out *ultra vires* acts. The minority may object, and even a single stockholder may have the *ultra vires* act enjoined or set aside.[4] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[5]

The second exception arises where the legislature amends the charter of the corporation, and the majority of the stockholders attempt to accept that amendment and act upon it. In such a case, if the amendment materially changes the scope and purpose of the enterprise, the minority may object and may prevent the acceptance of the amendment.[6]

The question of how far the majority rule when that majority are interested in a contract which the corporation has made,

[1] Weinburgh *v.* Union, etc. Co., 37 Atl. Rep. 1026 (N. J., 1897).

[2] Austin Min. Co. *v.* Gemmel, 10 Ont. Rep. (Can.) 696 (1886); Columbia, etc. Co. *v.* Meier, 39 Mo. 53 (1866), and same cases as in the preceding notes; Gowen's Appeal, 10 W. N. Cas. 85 (1881). Such of the stockholders as attend a duly called stockholders' meeting constitute a quorum, and a majority of that quorum control the meeting. *Re* Rapid, etc. Co., 15 N. Y. App. Div. 530 (1897).

[3] Citizens' Mutual, etc. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864).

[4] This subject is fully treated in Part IV, *infra*.

[5] McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Where the stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and did not object cannot complain. Steinway *v.* Steinway, 2 N. Y. App. Div. 301 (1896).

[6] See ch. XXVIII, *supra*.

and which is being passed upon by a stockholders' meeting, is considered elsewhere.[1]

§ 608. *The majority of votes cast shall elect.*— It is the well-settled rule in corporations having a capital stock divided into shares that a majority of the votes cast at any election shall elect.[2] And this majority, moreover, need not be an actual numerical majority of all the votes which all the stockholders have, but only a majority of the votes cast.[3] Accordingly, a majority of the votes cast will elect, even though a majority of the shares of stock are not voted at all, and even though the owners are present at the meeting and refuse to vote.[4]

[1] See ch. XXXIX, *infra*.

[2] People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869); State *v.* Fagan, 42 Conn. 32 (1875), a municipal corporation case. See also § 607, *supra*.

[3] See § 607, *supra;* Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878); *Re* Union Ins. Co., 22 Wend. 591 (1840), holding also that a plurality elects. At a municipal corporation meeting only those who vote are counted. Persons not voting at all are not counted. Smith *v.* Proctor, 130 N. Y. 319 (1891). In regard to voting in church elections in New York, see People *v.* Keese, 27 Hun, 483 (1882).

[4] Gowen's Appeal, 10 W. N. Cas. 84 (1881), where the supreme court held that "those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of the election regularly made by those who do attend." The question was whether an election held by a meeting of railroad stockholders at which a majority of all votes was not cast could be considered valid. State *v.* Green, 37 Ohio St. 227 (1881), was a case of election of clerk by a city council, and it was held that, all being present and engaged in holding the election, half the members may not defeat an election by refusing to vote and then objecting because a quorum had not voted. Commonwealth *v.* Wickersham, 66 Pa. St. 134 (1870), was the election of a county school superintendent, which was required to be "*viva voce* by a majority of the whole number of directors present." A person receiving exactly half that number could not be declared elected, although one director refused to vote on the last ballot. "He remained, and being present was entitled to be counted." "The legal intendment [of his action] was that he voted for neither or for the minority candidate." But, under a by-law requiring a majority of the stock to be present, it has been held that the majority must be a majority of the whole stock, and not merely of the stock subscribed for. Ellsworth, etc. Co. *v.* Faunce, 79 Me. 440 (1887). If the statute requires a majority of the directors to elect a director or president, one who is present but does not vote must be counted. People *v.* Conklin, 7 Hun, 188 (1876). See also § 713*a*, *infra*, on this point. Stockholders may vote for less than the whole number of directors to be elected. Vandenburgh *v.* Broadway R'y, 29 Hun, 349 (1883). But where a meeting was called to elect three directors and a majority of the stockholders voted for five directors, only a small minority voting for three, the

Although less than the full number of directors to be elected receive a majority or plurality, yet those receiving such majority or plurality are elected, and another ballot or election may be had to elect the remainder.[1]

§ 609. *Is every share of stock entitled to one vote?* — At common law, in public or municipal corporations, each qualified elector has one vote, and only one. This was a natural rule, since each duly-qualified citizen voted as a citizen and not as the holder of stock. But the same rule should not apply to private corporations. Stockholders are interested not equally, but in proportion to the number of shares held by them. Naturally and reasonably each share should be entitled to one vote. It has been held, however, that at common law each stockholder had but one vote, irrespective of the number of shares held by him.[2] Where the statutes are silent on the subject, a by-law may give to each shareholder one vote for each share

latter votes were held the only valid ones, and the three voted for were declared elected. State *v.* Thompson, 27 Mo. 365, 369 (1858). Where twenty-three directors are to be elected, a vote electing twenty-two is effectual to elect those twenty-two. *Re* Union Ins. Co., 22 Wend. 591 (1840). A new election may be held to elect the remaining one. *Re* Union Ins. Co., 22 Wend. 591 (1840). This case holds also that a plurality is sufficient to elect.

[1] *Re* Union Ins. Co., 22 Wend. 591 (1840). Less than the full board may be elected. The old board goes out, however, and none of them hold over. People *v.* Fleming, 59 Hun, 518 (1891). Where five candidates receive a plurality and three others receive a less number, but the latter are a tie, the board being seven, the five are duly elected and may act as a board, even though no second ballot is taken to vote off the tie. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). Where at an election four persons received the necessary votes, they will be elected directors, although the whole number of directors to be elected is seven. A subsequent election cannot elect the whole seven, but can elect only the remaining three. Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893). See also § 620, *infra*.

[2] Taylor *v.* Griswold, 14 N. J. L. 222 (1834), declaring that a by-law to the contrary is void. This decision in the latter respect is wrong, and in the former respect is unfortunate. At common law stockholders voted by show of hands, and a large stockholder had no greater vote than a small one. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Stockholders each have one vote; not even a special provision in the articles filed under a general act can change this rule. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1873). For an interesting statement of the origin of the practice of giving each stockholder one vote only, and of the gradual changes made in the rule, see Harvard Law Rev., Nov., 1888, p. 156. A by-law may limit the votes of a person who holds stock in excess of ten shares. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). See § 621, *infra*.

up to ten, and may fix the proportion of votes which he may cast in excess of that number.[1]

Generally the charter or statutes prescribe that each share of stock shall be entitled to one vote.[2] And a statutory or charter provision to this effect applies not only to elections, but also to all other questions that may come before the stockholders' meetings.[3] An election to be held by a "majority of stockholders" means a majority in interest.[4] A stock vote need not be taken unless called for.[5] And although each voter is given one vote, when in fact each share of stock is entitled to one vote, yet if for eight months the stockholders acquiesce in the election the court will not by mandamus order a new election.[6]

§ 609*a*. *Cumulative voting.*— In the constitutions of several of the states there are provisions for enabling a minority in interest of the stockholders to elect a minority of the directors. This is effected by what is known as a system of cumulative voting. By it each shareholder is entitled to as many votes for directors as equal the number of shares he owns multiplied by the number of directors to be elected. Thus, if there are six directors to be elected, a stockholder who owns one hundred shares may poll six hundred votes; and these votes he may give entirely to one or two or more of the six candidates, as he may see fit. In this way any minority of the stockholders exceeding one-sixth part, acting together, may elect one member of a board of six directors, and thus secure a representation in that body. A larger minority might secure the election of two members of such a board, the possibility of increasing the minority representation increasing as the minority increases, without it ever becoming possible for a minority, upon a full vote, to

[1] Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A by-law may authorize one vote for each share of stock, and a provision to this effect allows such vote on all questions. Proctor, etc. Co. *v.* Finley, 33 S. W. Rep. 188 (Ky., 1895), approving the text above.

[2] Hays *v.* Commonwealth, 82 Pa. St. 518 (1876). Where, by statute, two-thirds of the stockholders are authorized to do an act, this is construed to mean two-thirds of the stock — at least long acquiescence therein has that effect. Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50 (1885).

[3] *Re* Rochester, etc. Co., 40 Hun, 172 (1886), construing a statute which is applicable to all New York corporations.

[4] Weinburgh *v.* Union, etc. Co., 37 Atl. Rep. 1026 (N. J., 1897).

[5] Jones *v.* Concord, etc. R. R., 38 Atl. Rep. 120 (N. H., 1892).

[6] *Re* Moore, etc. Co., 14 Q. B. Rep. (Can.) 365 (1856).

secure more than its equitable proportion of the representation. The larger the number of directors the smaller would be the minority which would be able to elect one member of the board; and the larger the minority the greater the representation possible to be secured.[1] Constitutional or statutory provisions which are designed to secure such a minority representation are found in California, Pennsylvania, Illinois, West Virginia, Missouri, Nebraska, Michigan, Kansas, Idaho, Kentucky, Mississippi, Montana, North Dakota, and South Dakota.[2] These provisions, if designed to be retroactive, have been held unconstitutional and void. They can only apply to corporations chartered after their enactment. So far as they concern corporations chartered before the adoption of such a constitutional provision they impair the obligation of the contract between

[1] Cumulative voting given by the constitution is an absolute right, and does not require notice of the intent to so vote, nor any by-laws, to give it efficacy. By this provision, "if there are six directors to be elected, the single shareholder has six votes; and, contrary to the old rule, he may cast these six votes for a single one of the candidates, or he may distribute them to two or more of such candidates, as he may think proper. He may cast two ballots for each of three of the proposed directors — three for two, or two for one, and one each for four others; or finally, he may cast one vote for each of the six candidates." Pierce *v.* Commonwealth, 104 Pa. St. 150 (1883).

[2] See Part VII, *infra*. A statutory provision to the same effect prevails in Michigan. The California provision is construed in Wright *v.* Central Cal. etc. Co., 67 Cal. 532 (1885), holding that this constitutional right as to voting could not be changed by a resolution of the directors. The Pennsylvania provision is construed in Wright *v.* Commonwealth, 109 Pa. St. 560 (1885), holding that part of the directors so elected by a plurality and declared elected may act, although the remaining directors are not elected by reason of the vote as to them being a tie. See also Commonwealth *v.* Lintsman, 6 Pittsb. L. J. (N. S.) 122 (1875). The Ohio statute prescribing that "each share shall entitle the owner to as many votes as there are directors to be elected" does not authorize cumulative voting. State *v.* Stockley, 45 Ohio St. 304 (1887). Where cumulative voting prevails, and the statutes require three directors to be residents, and all the votes are cumulated on non-residents excepting thirty-two which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v.* Wilder, 48 Kan. 222 (1892). In Wright *v.* Central Cal. etc. Co., 67 Cal. 532 (1885), the court said that this provision conferred "upon the individual stockholder, entitled to vote at an election, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so, . . . or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit."

the corporation, the stockholders, and the state, and infringe the vested rights of the stockholders.[1] But, under its reserved power to alter, amend, or repeal a charter the legislature may allow cumulative voting.[2] A statute giving the right to cumu-

[1] State *v.* Greer, 78 Mo. 188 (1883); Hays *v.* Commonwealth, 82 Pa. St. 518 (1876); Baker's Appeal, 109 Pa. St. 461 (1885). See also, on this subject, ch. XXVIII, *supra*. Upon the question of the constitutionality of statutes providing for minority representation or cumulative voting in the election of public officers, a matter germane to the present subject, see People *v.* Kenney, 96 N. Y. 294 (1884); People *v.* Crissey, 91 N. Y. 616 (1883); State *v.* Constantine, 42 Ohio St. 437 (1884). In Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. In Michigan it has been decided that a statute providing for the cumulative plan of voting in public elections is unconstitutional. Maynard *v.* Board, etc., 84 Mich. 228 (1890).

[2] Attorney-General *v.* Looker, 69 N. W. Rep. 929 (Mich., 1897). See § 501, *supra*. In West Virginia it is held that where the legislature has the right to amend or repeal a charter, the statute giving the right to cumulate the votes applies to a corporation already existing as well as later corporations. Cross *v.* West Virginia, etc. R'y, 35 W. Va. 174 (1891).

Mr. Simon Sterne (Cyclopedia of Polit. Sci., Polit. Econ., and U. S. Hist., vol. III, p. 526) says: "The severest blow, however, which could be dealt to corporate mismanagement would be the rigorous introduction of minority representation in boards of direction, which would make secrecy of management as against the interest of shareholders substantially impossible, and would prevent the possibility of the recurrence of some of the worst abuses which characterize their administration. Suppose twenty directors were to be elected; the reform would consist in allowing each section of one-twentieth of the stockholding interest to elect one director by accumulating their votes upon a single name, or by distributing their votes for one or more, as they may see fit. This is the cumulative plan. Another is the preferential or list plan, in allowing each twentieth part of the constituency to elect one director by preferences indicated on a ballot in the order of the names as printed. When the first name has a quota sufficient to elect him — *i. e.*, one-twentieth of the votes cast — the ballot is counted for the second name, and so forth. The result of this system of minority representation would be to make of the board of directors a reduced photograph of the whole constituent body, and make it impossible to capture an organization like a railway from the actual owners thereof. Any one of the numerous plans suggested for securing minority representation, if applied to corporate management, would successfully accomplish that result. The objection which has been urged to minority representation in public representative bodies has no validity to corporate elections, as in corporations neither localities nor persons are supposed to be represented, but pecuniary interests only. It would better secure fair representation than does the English system of diminished value of votes in proportion to stockholders' interest — *i. e.*, one vote for every share up to ten, an additional vote for every five others beyond the first ten, and one vote for

late votes does not apply to corporations then existing, even though such corporations accept the benefits of subsequent statutes, such statutes not imposing any conditions.[1] It is to be borne in mind that tricks and traps may be devised under this plan of voting.[2] And where, in cumulating votes, the voter spreads his votes over so many persons that none of those particular persons are elected, he cannot have the election set aside on the ground that by cumulating on a less number of persons he can certainly elect them, nor on the ground that there was an oral contract as to who should be elected.[3] Where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote.[4] Even though the stockholders are entitled to vote on the cumulative plan, yet they are not obliged to do so.[5]

§ 610. *Proxies.*— At common law a stockholder has no right to cast his vote by proxy.[6] This rule was evolved from the analogous rule governing municipal corporations, which re-

every ten beyond one hundred shares; or the classification plan, by which only a few directors of the whole retire each year. Minority representation would give permanency in management, and prevent the swamping of the interest of the smaller shareholders."

[1] Smith *v.* Atchison, etc. R. R., 64 Fed. Rep. 272 (1894); Commonwealth *v.* Butterworth, 160 Pa. St. 55 (1894).

[2] Thus, suppose there are 1,000 shares, and ten directors to be elected, and one person holds 600 shares. Clearly he should be able to elect a majority of the ten directors. Suppose he votes his 600 votes for six of his friends (A, B, C, D, E, and F) and for four of the minority (G, H, I, and J); and suppose at the same time the 400 shares of the minority are cumulated on three other parties (K, L, and M), with ten votes for the four directors mentioned above (G, H, I, and J). The result will then be as follows:

A, B, C, D, E, and F have	600	votes	each
G, H, I, and J.....	" 610	"	"
K, L, and M.....	" 1,320	"	"

In other words, the majority of votes do not elect. Again, suppose the holder of the 600 shares does not vote for any minority candidate at all, but casts 600 votes for each of his six candidates, A, B, C, D, E, and F. Even then he may lose the election. The minority 400 may cumulate their 4,000 votes on six candidates, and give each of the six 666⅔ votes. Under the cumulative system the majority, in order to be safe, must not only abandon the idea of electing the whole board, but must cumulate their votes on such a proportion of the board as their stock bears to the whole stock, and must not cast complimentary votes for representatives of the minority.

[3] Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894).

[4] Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

[5] Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897).

[6] Taylor *v.* Griswold, 14 N. J. L. 223 (1834); Philips *v.* Wickham, 1 Paige, 590 (1829); Brown *v.* Commonwealth, 3 Grant (Pa.), 209 (1856), where the

quires all votes to be given in person. The right to vote by proxy is often given by the charter itself. Even if not so given the right may be created by by-law.[1] Where the statutes give the right to vote by proxy, the by-laws of the corporation cannot restrict that right by providing that only stockholders shall act as proxies.[2]

The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself in general or special terms gives the proxy the power to vote on such questions.[3] A proxy authorized to vote at a cor-

charter allowed only those *present* to vote; Craig *v.* First Presbyterian Church, 88 Pa. St. 42 (1878); Commonwealth *v.* Bringhurst, 103 Pa. St. 134 (1883); People *v.* Twaddell, 18 Hun, 427, 430 (1879); *Re* Dean and Chapter of Fernes, Davies, 116, 129 (1608); Attorney-General *v.* Scott, 1 Vesey, 413 (1749); Harben *v.* Phillips, L. R. 23 Ch. D. 14, 22, 36 (1882). Where the statute allows citizens to vote by proxy, an alien is not within its terms, and cannot do so. *Re* Barker, 6 Wend. 509 (1830).

[1] Quoted and approved in Market Street R'y *v.* Hellman, 109 Cal. 571 (1895); People *v.* Crossley, 69 Ill. 195 (1873); Philips *v.* Wickham, 1 Paige, 590, 598 (1829); State *v.* Tudor, 5 Day (Conn.), 329 (1812); 2 Kent, Comm., 294, 295. A contrary rule is laid down in New Jersey. Taylor *v.* Griswold, 14 N. J. L. 222 (1834). Where the charter authorizes voting by proxy at elections for directors, and also empowers directors to make by-laws not inconsistent with the laws of the commonwealth, a by-law adopted by the board of directors allowing voting by proxy at all stock elections was held valid. Wilson *v.* Academy of Music, 43 Leg. Int. 86 (1886). A by-law may allow voting by proxy. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A corporation as a stockholder may of course give a proxy where proxies are allowed. *Re* Indiana, etc. Co., L. R. 26 Ch. D. 70 (1884).

[2] People's, etc. Bank *v.* San Francisco Super. Ct., 104 Cal. 649 (1894). Where the statute gives a right to vote by proxy, a by-law to the effect that only a stockholder can act as proxy is illegal and void. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888).

[3] Abbott *v.* American Hard Rubber Co., 33 Barb. 578, 584 (1861); Cumberland Coal Co. *v.* Sherman, 30 Barb. 553, 577 (1859); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866), where the proxy, being authorized to vote for increasing the stock, voted also to issue the new stock in exchange for the stock of another company. Marie *v.* Garrison, 13 Abb. N. Cas. 210, 235 (1883). Where directors are authorized by charter to vote by proxy, the proxy cannot authorize a borrowing of money — an *ultra vires* and void act in England. Brown *v.* Byers, 16 M. & W. 252 (1847). A proxy to vote is not a proxy to demand a poll. *Re* Haven, etc. Co., L. R. 20 Ch. D. 151 (1881); Regina *v.* Government, etc. Co., L. R. 3 Q. B. D. 442 (1878). See also Decatur Bldg. etc. Co. *v.* Neal, 97 Ala. 717 (1893). A proxy for an election does not extend to an election four months later, the first elec-

porate meeting is not authorized to vote to discharge a mortgage which secures the stockholder, who gave the proxy, as a creditor of the corporation.[1] A proxy authorizing the holder to vote "in the same manner as I should do were I there personally present" estops the stockholder giving the proxy from questioning the call of the meeting or the regularity of an increase of stock voted for at such meeting.[2] A written proxy authorizing the proxy to vote as fully as a stockholder could were he personally present gives the proxy the right to vote on the question of adjournment and of opening the ballots.[3] A proxy has a right to vote on a *viva voce* vote or show of hands.[4] Where a vote is taken by show of hands each person is entitled to only one vote, even though as a proxy he represents several persons, and a person who is a proxy only may vote.[5] A proxy cannot vote when the owner of the stock is present and votes.[6] In England proxies deposited abroad have been allowed a vote by telegraph.[7] The sale of proxies is forbidden by statute in New York.[8]

Directors may be enjoined from using the funds of the company to obtain proxies for themselves or their nominees.[9]

Where a will directs that of three executors two shall give proxies to the third on stock owned by the estate, a court of equity will compel the two to give the proxies, although the third intends to use the proxy to continue himself as president, and the management of the company is alleged to be improvident and ruinous.[10] Where there are several executors, and only one of them is present at the election, he may cast the vote,

tion not having been held, the proxy being by a director, the directors being authorized to vote as directors by proxy. Howard *v.* Hull, 5 R'y & Corp. L. J. 255 (Eng., 1888).

[1] Moore *v.* Ensley, 20 S. Rep. 744 (Ala., 1896).

[2] Columbia Nat. Bank *v.* Matthews, 85 Fed. Rep. 934 (1898).

[3] Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

[4] *Re* Bidwell, [1893] 1 Ch. 603.

[5] Ernest *v.* Loma, etc. Mines, 75 L. T. Rep. 317 (1896).

[6] Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893).

[7] In *Re* English, etc. Bank, [1893] 3 Ch. 385, the court allowed foreign creditors to vote abroad by proxy deposited abroad, and to telegraph such vote to the home meeting on a scheme of reorganization, holding also that a proxy need not state the day of meeting.

[8] See Part VII, *infra*. It is illegal for a stockholder to sell his right to vote. Hafer *v.* New York, etc. R. R., 14 Week. L. Bul. 68 (1885).

[9] Studdert *v.* Grosvenor, L. R. 33 Ch. D. 528 (1886).

[10] This case was affirmed on an even division of the court. Lafferty's Es-

even though a proxy has been given by another of the executors.[1]

A proxy should be in writing, but it need not be in any particular form; it need not be acknowledged or proved, but it must be in such a shape as reasonably to satisfy the inspectors of election of its genuineness and validity.[2] And to this end the corporate officers may insist upon reasonable evidence of the regularity and genuineness of the proxy before allowing it to be voted.[3] The proxy should be dated.

Where certificates of proxies are destroyed after use, parol evidence is admissible to prove their former existence and sufficiency.[4]

A stockholder who signs a form of proxy in blank, and hands it over to another to be used in the ordinary way, impliedly authorizes that other to fill up the blank with his own name.[5]

tate, 154 Pa. St. 430 (1893); Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892).

[1] Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897).

[2] *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884). No particular form of words is necessary to constitute a proxy. Smith *v.* San Francisco, etc. R'y, 47 Pac. Rep. 582 (Cal., 1897). See the form of proxy in Marie *v.* Garrison, 13 Abb. N. Cas. 210, 234 (1883). Proxies need not be acknowledged, proved, or witnessed. *Re* Cecil, 36 How. Pr. 477 (1869). A proxy need not state the day upon which the election is to be held. *Re* Townsend, 18 N. Y. Supp. 905 (1892). A proxy is good although the date when it is given is left blank and has not been filled in. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Where one gave a proxy to vote at an annual election, it was held *prima facie* evidence that he was a stockholder just before such election. Harger *v.* McCullough, 2 Denio, 119, 122 (1846). A proxy which had been exercised and voted upon for many years without renewal was sustained in Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867). Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

[3] *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). But the inspectors have no right to refuse a vote by proxy or to assume a judicial power to try its genuineness, if it is apparently executed by the stockholder and is regular in form. *Re* Cecil, 36 How. Pr. 477 (1869). Neither the stockholder nor his proxy can be compelled by a by-law to take an oath that the former is the owner of the stock. People *v.* Tibbits, 4 Cow. 358 (1825); People *v.* Kip, 4 Cow. 382 (1822). The by-laws may require the proxies to be witnessed. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1882).

[4] Haywood & Pittsborough P. R. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858).

[5] *Ex parte* Duce, L. R. 13 Ch. D. 429 (1879); *Ex parte* Lancaster, L. R. 5 Ch. D. 911 (1877). As to whether a blank proxy may be filled in by the

Although a proxy contains blanks as to the day and hour of the meeting, yet these may be filled in by the party using the proxy.[1]

A proxy is always revocable. Even when by its terms it is made "irrevocable," the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders and thus control the corporation by giving irrevocable proxies to specified persons. But the law allows the stockholder to revoke the proxy at any time.[2]

§ 611. *The transfer book as evidence of a right to vote.*— The question who is entitled to vote upon a particular share of stock is, as a general rule, answered by a reference to the corporate transfer book. He who is there registered as the owner of the stock is entitled to vote upon it.[3] It is not necessary

agent, see *quære* in *Re* White *v.* New York, etc. Soc., 45 Hun, 580 (1887), citing cases.

[1] Ernest *v.* Loma, etc. Mines, 75 L. T. Rep. 317 (1896).

[2] Schmidt *v.* Mitchell, 41 S. W. Rep. 939 (Ky., 1897); Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887). In this case the stock certificates were turned over to trustees to transfer to themselves, with power to vote, hold, or sell the same. "Trust" certificates were issued. The court held that at any time previous to an actual sale by the trustees a certificate-holder might revoke his interest in the "trust" and demand back his part of the stock. To same effect and on very similar facts, see Griffith *v.* Jewett, 15 Week. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 2 R'y & Corp. L. J. 409 (Pa., 1887). Such irrevocable proxies are not necessarily void as against public policy. Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420. They simply are revocable. A proxy given for a valuable consideration may nevertheless be revoked if it is about to be used for a fraudulent purpose. Reed *v.* Bank of Newburgh, 6 Paige, 337 (1837). An agreement not to revoke a power which from its nature or by law is revocable is not binding. People *v.* Nash, 111 N. Y. 310, 315 (1888). A written contract not to vote by proxy, entered into by certain shareholders mutually for the purpose of preventing the board of directors from consummating a proposed sale of the franchises of the corporation, has been held a pernicious and unlawful compact. Fisher *v.* Bush, 35 Hun, 641 (1885). An irrevocable proxy is prohibited by statute in New York. It may be revoked even though coupled with an interest, in this case being to a pledgee. *Re* Germicide Co., 65 Hun, 606 (1892). A proxy for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter person a court of equity will enjoin voting thereunder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891).

[3] "The general rule is that, as between the corporation and the person offering to vote, the right follows

that the owner of stock produce his certificate, or even have a certificate, in order to vote.[1] Neither will indebtedness for the subscription price prevent the stockholder from voting.[2] So, also, it is immaterial that the person in whose name the stock is registered is merely the nominal holder, and that another

the legal title, of which the certificates and stock books are the *prima facie* evidence. By-laws may establish a different rule, and there may be special circumstances to change the equities as to individuals or even as to the corporation." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893). *Ex parte* Willcocks, 7 Cow. 402 (1827), stating, however, that in certain cases, like that of stock held for the corporation itself, a different rule prevails; State *v.* Ferris, 42 Conn. 560, 568 (1875), sustaining a vote by a bankrupt, the court saying: "The party who appears to be the owner by the books of the corporation has the right to be treated as a stockholder and to vote on whatever stock stands in his name;" Hoppin *v.* Buffum, 9 R. I. 513 (1870), the court saying: "In a case of a dispute as to a right to vote, the books of the corporation are the *prima facie* evidence; at any rate, the corporation cannot be required to decide a disputed right. . . . Upon any other rule it could never be known who were entitled to vote until the courts had decided the dispute." Allen *v.* Hill, 16 Cal. 113 (1860); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). The president has no power to decide what stock should be allowed to vote. The transfer book governs as to that. State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897). See also next section for various cases on the conclusiveness of the transfer book.

[1] Beckett *v.* Houston, 32 Ind. 393 (1869).

[2] Birmingham, etc. R'y *v.* Locke, 1 Q. B. 256 (1841); Savage *v.* Ball, 17 N. J. Eq. 142 (1864); American, etc. Co. *v.* State Board, 29 Atl. Rep. 160 (N. J., 1894); People *v.* Albany, etc. R. R., 55 Barb. 344, 386 (1869); Downing *v.* Potts, 23 N. J. L. 66 (1851). So held in this case, even though the subscriber had paid nothing on his stock. In General Electric Co. *v.* Wightman, 3 N. Y. App. Div. 118 (1896), it is stated that under the New York statutes subscribers for stock are not entitled to any voice in the management until the stock has been paid up. It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. R'y *v.* Hambleton, 77 Md. 341 (1893). Where a mortgage must be authorized by a vote of two-thirds in value of the stockholders this means a stock vote, irrespective of the fact that some of the stock is only partly paid up. Purdom *v.* Ontario, etc. Deb. Co., 22 Ont. Rep. (Can.) 597 (1892).

person really owns the stock.[1] A subscriber upon a condition not yet performed may vote upon the question whether that condition shall or shall not be performed.[2] And stock issued for construction, the work not having been performed, may nevertheless be voted.[3]

Persons who are not registered stockholders on the day an election is held cannot vote, though they were stockholders on the day the election should have been held.[4] The corporation may be compelled to register transfers made merely for the purpose of increasing the voting power of the stock, there being a limit to the number of votes one stockholder may cast.[5] The holders of stock issued by a stock dividend are entitled to vote.[6]

Where the corporation keeps a stock-certificate book but no transfer book, a transfer on the back of a certificate, which is then canceled and pasted back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute the transferee a stockholder.[7] Although votes are chal-

[1] State *v.* Leete, 16 Nev. 242 (1881), where a man put stock in the name of his son in order to qualify him to serve as a director. Where the statute prescribes that only *bona fide* stockholders shall vote, a stockholder of record who is really a dummy for the real owner in order to enable the latter to avoid the statutory liability cannot vote. Smith *v.* San Francisco, etc. R'y. 47 Pac. Rep. 582 (Cal., 1897). See also § 612, *infra*.

[2] Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118, 135 (1851).

[3] Savage *v.* Ball, 17 N. J. Eq. 142 (1864). Where a sale of bonds having a voting power is made subject to the ratification of another party, the vendor has the right to vote such bonds until the sale is so ratified. State *v.* McDaniel, 22 Ohio St. 354 (1872). Stock issued to a contractor for money to be paid may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. Price *v.* Holcomb, 89 Iowa, 123 (1893).

[4] Johnston *v.* Jones, 23 N. J. Eq. 216, 228 (1872).

[5] *Re* Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). See also § 618, *infra*. But where valuable privileges other than voting attach to stock, a nominal transfer to obtain these privileges will not be sustained as regards them. Academy of Music's Appeal, 108 Pa. St. 510 (1885), where free admission to a theatre was given to stockholders.

[6] Bailey *v.* Railroad Co., 22 Wall. 604, 637 (1874), holding also that the rule is otherwise as regards the holders of a scrip dividend, where the scrip was redeemable by the company in cash or convertible into stock.

[7] He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891). See also § 382, *supra*.

lenged, and the inspectors call for the stock books, and such books cannot be obtained, yet this does not invalidate the election.[1] If the stock book is lost, the directors may substitute a new one, filled out as accurately as is possible.[2] Where the corporation has kept no regular stock books, and the secretary, by order of the directors, prepares a stock book, getting the information from various sources, this book governs.[3] Where the transfer book differs from the stock ledger the former governs.[4] A by-law authorizing the administration of an oath to examine the stockholders as to their title is illegal and void where the charter regulates the right to vote.[5]

There are some exceptions, however, to the rule that the transfer book is conclusive on the question of who is entitled to vote. Thus, the inspectors of election may inquire whether the stock which is about to be voted belongs to the corporation, and if it does they may reject the vote.[6] So, also, they may allow an administrator to vote, although the stock stands in the name of the deceased person.[7]

In some courts this rule is carried still further, and it is held that the inspectors of election may allow the pledgor to vote, although the stock stands in the name of the pledgee on the books of the company;[8] and it has also been held that the purchaser of certificates of stock may vote thereon, although the stock stands on the books of the company in the name of the vendor.[9] It has been held in Georgia that where a stockholder

[1] *Re* Argus Co., 138 N. Y. 557 (1893).

[2] *Re* Schoharie, etc. R. R., 12 Abb. Pr. (N. S.) 394 (1872).

[3] *Re* Election, etc. Grove Cem. Co., 39 Atl. Rep. 1024 (N. J., 1898).

[4] Downing *v.* Potts, 23 N. J. L. 66 (1851).

[5] People *v.* Kip, 4 Cow. 382, note (1822).

[6] See § 613, *infra*.

[7] See § 612, *infra*.

[8] See § 612, *infra*.

[9] In the case of Allen *v.* Hill, 16 Cal. 113 (1860), the court said: "It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meetings of the corporation, and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In Illinois it is held that the corporation must allow the real owner of the stock to vote, whether he be the registered owner or not, where the corporation has no by-law requiring a registry of transfers, and the vendee produces his certificate of stock duly transferred on the back. People *v.* Devin, 17 Ill. 84 (1855). In a stockholder's vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake,

has sold his stock and delivered the certificates, he has no right to give a proxy on the stock to some other person, even though the stock still stands in his name, and the giving of such proxy may constitute a tort for which the purchaser of the stock may sue for damages.[1] The vendor and vendee of stock may agree between themselves as to who shall vote the stock. Where the vendor expressly parts with the right to vote the stock, he cannot, under the statutes of Pennsylvania, vote it, even though he appears as a stockholder on the corporate books.[2]

In New York, by statute, the corporate transfer book is made conclusive upon the question who may vote.[3] There are various other statutory provisions in New York regulating voting, and provision is made for reviewing elections.[4]

etc. Co., 81 Cal. 303 (1889). Where, however, the unregistered transferee did not challenge the right of his transferrer to vote and did not claim the right to vote, but attacked the election afterwards by *quo warranto*, his suit failed. People *v.* Robinson, 64 Cal. 373 (1883). State *v.* Smith, 15 Oreg. 98, 118 (1887), contains a dictum that the purchaser of a certificate of stock cannot vote on the stock until it has been transferred into his name. Where both the legal and equitable owners of stock agree as to how stock shall be voted, other stockholders cannot complain that the vote was not cast in accordance with law. State *v.* Ferris, 42 Conn. 560 (1875), where a bankrupt voted stock still standing in his name. State *v.* Pettineli, 10 Nev. 141 (1875). In this last case the registered holder had transferred the certificate, but obtained it again and exhibited it at the meeting. If a vote is not challenged, an objection to it afterwards may not meet with much favor. *Re* Long Island R. R., 19 Wend. 37, 44 (1837). See also § 620, *infra*. The vendor of stock may give the vendee a proxy to vote on the stock which still stands in the name of the vendor on the books. Stephenson *v.* Vokes, 27 Ont. Rep. (Can.) 691 (1896).

[1] Witham *v.* Cohen, 28 S. E. Rep. 505 (Ga., 1897).

[2] Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893). Under the Pennsylvania statute of 1889, allowing any stockholder in writing under oath to challenge a vote, the mere challenge that a person does not now own stock which stands in his name on the books is not sufficient to exclude his vote. Some proof must be given. Commonwealth *v.* Dalzell, 1 Pa. Dist. 657 (1892). The registered stockholder may vote even though he has transferred his certificates to another. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[3] Vandenburgh *v.* Broadway R'y, 29 Hun, 348, 355 (1883); *Re* Long Island R. R., 19 Wend. 37 (1837); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). Under former statutes, the registered stockholder was entitled to vote although he had assigned his certificate of stock. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

[4] See § 619, *infra*. Strong *v.* Smith, 15 Hun, 222 (1878), holding that the transfer book is conclusive upon the inspectors, but that the court has power to go back of the entries therein and inquire whether, as for instance in this case, a transfer of shares was an absolute sale or a

§ 612. *The right of trustees, pledgees, administrators, etc., to vote.*— It is the general rule that a person holding stock as trustee is entitled to vote upon the stock, not only where he is duly registered as a holder of stock in trust, but also where he is registered absolutely as a stockholder upon the books of the corporation.[1] If the trustees disagree as to how the stock shall

pledge, and thus whether the transferrer or transferee has the right to vote them; citing *Ex parte* Holmes, 5 Cow. 426 (1826); *Re* Long Island R. R., 19 Wend. 37 (1837); and see N. Y. L. J., June 29, 1889. Although only stockholders who still own their stock are allowed to vote, a person who has given an option on his stock is nevertheless entitled to vote on it. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). In New York, when for any reason the corporation fails to hold an election at the stated time as provided in the charter or by-laws, and the election is held subsequently, only those stockholders are entitled to vote who were qualified electors at the time when the election ought to have been held. Vandenburgh *v.* Broadway R. R., 29 Hun, 348 (1883); People *v.* Tibbets, 4 Cow. 358 (1825). Where the statute limits the votes to stock that for ten days has been entered on the stock book, a stockholder cannot vote who mailed a certificate for transfer the day before the ten days began, if the corporation did not receive the same until six days thereafter. The object of the statute is to enable persons to ascertain during the ten days who are entitled to vote. Under the New York statute a person who has sold his certificate of stock cannot vote. *Re* Glen Salt Co., 17 N. Y. App. Div. 234 (1897). See also § 538, *supra*, as to closing the books. Where a statute forbids the voting of stock which has been transferred within twenty days prior to an election, and in a corporation having sixty shares of stock thirty-two shares are voted, four of which were transferred on the day of election, the court will declare the election void. *Re* Vernon, 40 Atl. Rep. 60 (Del., 1898).

[1] Conant *v.* Millaudon, 5 La. Ann. 542 (1850); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Hoppin *v.* Buffum, 9 R. I. 513 (1870), the court saying: "If the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, he is the proper person to represent and vote upon it. And the corporation cannot be required to examine into the nature of the trust with a view to decide as to the right to vote;" *Re* Barker, 6 Wend. 509 (1831); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding also that the administrator of the trustee may vote the stock; Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877). In Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892), it was held that a trust company has no power to hold as trustee and vote the majority of the stock of a great railroad system, especially where it is also the trustee in a trust deed of the company, the court saying: "There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. And where the pledgor or mortgagor is disqualified to vote the stock, the disqualification extends as well to the pledgee or trustee." In this case,

be voted, the courts have power to direct them.[1] A trustee of stock has the right to vote thereon even for a consolidation, and even though he holds it for another corporation.[2] A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price.[3] Where a mortgage covers shares of stock and the trustee has the voting power, its discretion cannot be controlled by the majority of the bondholders.[4] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[5]

In California the real owner of stock may vote on it, although it stands on the books of the company in the name of a "dummy" as "trustee."[6]

A pledgor of stock is entitled to vote upon it in all cases where the stock continues to stand on the books of the company in the name of such pledgor.[7] And even where the

however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Even though a statute requires that certificates running to trustees shall state who is the *cestui que trust*, yet an election may be legal though stock is voted by trustees and such stock does not state who is the real owner. State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897).

[1] Wanneker *v.* Hitchcock, 38 Fed. Rep. 383 (1889).

[2] Market Street R'y *v.* Hellman, 109 Cal. 571 (1895).

[3] Elias *v.* Schweyer, 13 N. Y. App. Rep. 336 (1897); S. C. 27 *id.* 69.

[4] Toler *v.* East Tennessee, etc. R'y, 67 Fed. Rep. 168 (1894).

[5] Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

[6] Under the California statute, stock placed by the secretary in the name of a "dummy," as trustee, cannot be voted by such dummy, the real owners of the stock not having assented thereto, even though for business reasons they did not wish to have the stock issued to themselves. Stewart *v.* Mahoney Min. Co., 54 Cal. 149 (1880); Smith *v.* San Francisco, etc. R'y, 47 Pac. Rep. 582 (Cal., 1897). See also *Ex parte* Holmes, 5 Cow. 426 (1826); American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891), holding that the beneficial owners are entitled to say how the vote shall be cast. In the last case the stock had been surrendered and new certificates issued, but no transfer book was kept.

[7] *Re* Barker, 6 Wend. 509 (1831); *Ex parte* Willcocks, 7 Cow. 402 (1827); *Re* Cecil, 36 How. Pr. 477 (1869); Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); *Re* St. Lawrence

pledgee has caused the stock to be transferred into his own name, as by law he is allowed to do,[1] it has been held that the pledgor may demand the right to vote at elections, and that upon proof of the facts the inspectors of election must allow the pledgor to vote the stock.[2]

It must be conceded, however, that the established rule is to the contrary.[3] Nevertheless the pledgor may control the vote on his stock if he desires so to do. In many of the states there are statutes which give to the pledgor the right to vote the stock.[4] And even where there is no statute to protect the pledgor's right to vote, the courts will intervene.[5] By a bill in

Steamboat Co., 44 N. J. L. 529, 540 (1882), a dictum. Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet in the absence of fraud the pledgee is bound. Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

[1] See § 466, *supra.*

[2] In Oregon it is held that at common law the real owner of stock is entitled to vote it, even though it stands on the corporate books in the name of his pledgee. It is denied that the transfer book is binding upon the inspectors of election, and the decisions to that effect in New York are stated to be based on the New York statutory law. State *v.* Smith, 15 Oreg. 98 (1887). See also Allen *v.* Hill, 16 Cal. 119 (1860), to substantially the same effect. It has been held that the pledgee of stock is not even entitled to notice of meetings. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850).

[3] The pledgor and pledgee of stock may agree between themselves as to who should vote the stock. If there is no agreement, the right to vote should follow the legal title; in other words, the title as it appears on the corporate books. Even under a statute authorizing inspectors of election, upon a challenge, to determine whether the party who appears to be the owner is really the owner, the pledgee is entitled to vote the stock standing in his name where there is no agreement to the contrary. Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). A pledgee into whose name the stock has been transferred may vote it. He is a "*bona fide*" stockholder as required by the statute. The pledgor cannot appear at the meeting and vote the stock. *Re* Argus Printing Co., 1 N. D. 434 (1891). It is not a conversion for one who holds stock as pledgee to attend corporate meetings and vote upon the stock. Heath *v.* Silverthorn Lead Min. etc. Co., 39 Wis. 146 (1875).

[4] See Part VII, *infra.* Also Strong *v.* Smith, 15 Hun, 222 (1878). Concerning a similar statute in Rhode Island, see Sayles *v.* Brown, 40 Fed. Rep. 8 (1889). Under the Colorado statutes an owner who has pledged his stock may represent the stock at all meetings of the stockholders and vote accordingly. Miller *v.* Murray, 17 Colo. 408 (1892).

[5] Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); State *v.* Smith, 15 Oreg. 98 (1887), where the pledgor obtained an injunction against the pledgee voting the stock, and the pledgor was allowed by the inspectors to vote.

equity the pledgor may compel the pledgee to give him a proxy to vote the stock.[1] But in order to invoke the extraordinary powers of a court of equity in this respect, the pledgor must show that the interests of the company have been or will be prejudiced, or that the value of the stock has been or will be impaired, and that the intervention of the court is necessary to protect the pledgor's rights.[2] A pledgor may enjoin a pledgee from transferring stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording of such pledge without a transfer of the stock itself.[3] The pledgee of a majority of the corporate stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[4]

An administrator or executor may vote on the stock of the deceased stockholder, even though such stock has not been transferred to the executor or administrator on the books of the company.[5] Stock held jointly by three executors cannot

[1] Vowell *v.* Thompson, 3 Cranch, C. C. 428 (1829). See also Hoppin *v.* Buffum, 9 R. I. 513 (1870), holding that although the pledgor may by a bill in equity compel the pledgee, in whose name the stock stands, to make a retransfer or to give a proxy to the pledgor, yet where the pledgor for many years allows the pledgee to vote the stock and claims the right at an election only after the ballots are cast and are being counted, the court will not set the election aside.

[2] McHenry *v.* Jewett, 90 N. Y. 58 (1882). Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite*. Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl., 1889). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. Hinckley *v.* Pfister, 83 Wis. 64 (1892).

[3] Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896).

[4] Higgins *v.* Lansingh, 154 Ill. 301 (1895). See also § 468, *supra*.

[5] Quoted and approved in Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897); Market Street R'y *v.* Hellman, 109 Cal. 571 (1895). A foreign executor may vote stock belonging to the estate, even though the stock stands in the name of the deceased stockholder. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J., 1888); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding that an administrator may vote upon stock standing in the name of the deceased person, even though the latter held the stock as

be voted unless they all agree upon the vote.[1] Where a will gives to one of three executors the power to vote the stock, and directs the other two executors to give him a proxy to that purpose, the court will order the proxy to be given, even though he intends to vote himself into office, and he may not be a good manager.[2] A partner may vote upon stock belonging to the firm and registered in the partnership name.[3] Where stock is entered in the corporate books in the name of a person as an officer of another corporation, the successor in office of that person may vote the stock without a transfer on the corporate books.[4] Where a corporation is authorized to hold stock in another corporation it is entitled to vote such stock.[5] A corporation as a stockholder may vote its stock by an agent.[6] When a municipal corporation is a stockholder in a private corporation, it is entitled to vote upon its stock in the same way as any other stockholder.[7] The fact that the government or a single person owns all the stock of a company does not put an end to the corporate existence.[8] Where joint owners of stock disagree as to its vote, the vote is to be rejected.[9]

trustee. In a proceeding to dissolve a corporation the administrator is the proper representative of stock owned by the estate. Wolfe v. Underwood, 97 Ala. 375 (1893). The administrator and not the heirs at law have the right to vote. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

[1] Tunis v. Hestonville, etc. R. R., 149 Pa. St. 70 (1892). Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re* Belton, 47 La. Ann. 1614 (1895).

[2] Lafferty's Estate, 154 Pa. St. 430 (1893).

[3] Kenton Furnace R. R. etc. Co. v. McAlpin, 5 Fed. Rep. 737 (1880). In California he may vote such stock where the stock belongs to the firm, but is registered in the name of the other partner, who is dead. Allen v. Hill, 16 Cal. 113 (1860).

[4] Farmers', etc. Co. v. Chicago, etc. R'y, 27 Fed. Rep. 146, 156 (1886); Mousseaux v. Urquhart, 19 La. Ann. 482 (1867). *Contra*, *Re* Mohawk, etc. R. R., 19 Wend. 135, 146 (1838), holding that the word "cashier" attached to a stockholder's name does not authorize a succeeding cashier to vote the stock.

[5] Davis v. U. S. etc. Co., 77 Md. 35 (1893). *Cf.* § 615, *infra*.

[6] State v. Rohlffs, 19 Atl. Rep. 1099 (N. J., 1890).

[7] See § 99, *supra*. Where stock in a railroad is owned by a part of a county, that part becomes a municipality for the purpose of owning and voting the stock. Hancock v. Louisville, etc. R. R., 145 U. S. 409 (1892).

[8] The United States government, though the owner of all the stock of

[9] *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865); Tunis v. Hestonville, etc. R'y, 1 Pa. Dist. 207 (1892). *Cf.* S. C., 149 Pa. St. 70.

A receiver who is in possession of shares of stock generally votes such stock without his right to do so being questioned. Sometimes the court, upon appointing a receiver of stock, expressly authorizes him to vote the stock, and sometimes directs him how to vote it.[1]

It seems that a stockholder may lease his stock. He may, for a certain sum, assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that time.[2]

§ 613. *The corporation cannot vote upon shares of its own stock.*— Shares of stock owned by the corporation itself cannot be voted either directly by the corporate officers or indirectly by a trustee of the corporation. This is the established rule, whether the stock is registered in the name of the corporation or not.[3]

a canal company, may continue as a stockholder and keep up the corporate existence by allowing the directors to retain one share each as a qualification share. U. S. v. Louisville, etc. Canal Co., 4 Dill. 601 (1878); S. C., 26 Fed. Cas. 1002. See also § 700, *infra*.

[1] A court may appoint a receiver to hold an election, etc., where the entire interests in the corporation, including the stock, belong to parties who have been defrauded. King v. Barnes, 51 Hun, 550 (1889); aff'd, 113 N. Y. 655. See also dictum in Wanneker v. Hitchcock, 38 Fed. Rep. 383 (1889), where the trustees of stock disagreed as to voting; People v. Albany, etc. R. R., 55 Barb. 344, 371 (1869), where a receiver's vote was set aside, fraud being involved and the appointment being invalid; American Inv. Co. v. Yost, 25 Abb. N. Cas. 274 (1890), where a receiver of stock was instructed how to vote, the action being to enforce an agreement to place stock in the hands of trustees until the debts of the company and chief stockholder were paid.

[2] Zachry v. Nolan, 66 Fed. Rep. 467 (1895).

[3] *Ex parte* Holmes, 5 Cow. 426 (1826); McNeely v. Woodruff, 13 N. J. L. 252 (1833); American Ry Frog Co. v. Haven, 101 Mass. 398 (1869); Commonwealth v. Boston, etc. R. R., 142 Mass. 146 (1886); State v. Smith, 48 Vt. 266 (1876); Monsseaux v. Urquhart, 19 La. Ann. 482 (1867); U. S. v. Columbian Ins. Co., 2 Cranch, C. C. 266 (1821); New England, etc. Ins. Co. v. Phillips, 141 Mass. 535 (1886), where income bonds entitled to vote were held to have lost that right when they were paid; Brewster v. Hartley, 37 Cal. 15 (1869), where the company had pledged its stock. If all the stockholders consent, the stock owned by the corporation may be voted. Farwell v. Houghton, etc. Works, 3 Fed. Rep. 66 (1881). Where a mortgage can be given only upon the vote of the stockholders, stock owned by the corporation cannot be voted, but the pledgee of such stock from the corporation was allowed to vote. Vail v. Hamilton, 85 N. Y. 453 (1881). Directors elected by votes upon stock owned by the corporation are illegally elected. *Ex parte* Desobry, 1 Wend. 98 (1828). Where the statute requires the vote of the holders of a

Where the directors, just before the election, issue or sell stock owned by the corporation, the purpose of such issue or sale being to control the election, the courts will interfere at the instance of other stockholders where an actual fraud is involved.[1]

§ 614. *Issuing stock in order to carry an election.*— Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the sale aside as fraudulent.[2] In a proper case the court will enjoin the issue of the new stock.[3]

But an election is valid although it is carried by treasury stock of the corporation, which is sold by the directors just before the election in order to carry the election, so long as the sale is not attacked and set aside for fraud.[4] Where the stock

certain amount of the stock, only the outstanding stock is considered. The unissued stock and treasury stock are not counted. Market Street R'y *v.* Hellman, 109 Cal. 571 (1895).

[1] See § 614, *infra*, on this subject.

[2] Hilles *v.* Parish, 14 N. J. Eq. 380 (1862). Where the stock of a cemetery company of the par value of $50 is worth but $5, the directors may issue it for land which is liable to come into competition with the company, even though one motive of the directors is thereby to control an election. Wildes *v.* Rural, etc. Co., 53 N. J. Eq. 425 (1896), rev'g 32 Atl. Rep. 676. A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquire control of the company. Morris *v.* Stevens, 36 Atl. Rep. 151 (Pa., 1897). Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. Morris *v.* Stevens, 36 Atl. Rep. 151 (Pa., 1897). See also *post*, p. 1167, note 1.

[3] The court will enjoin the board of directors from issuing new stock on the verge of an election and for the sole purpose of carrying that election, where the directors really represent a minority of the stock, and where the power to issue the new stock is very doubtful. Such an injunction was granted even though the charge was made that the complainant was interested in rival companies and was exercising control in their behalf. Fraser *v.* Whalley, 2 Hem. & M. 10 (1864).

[4] State *v.* Smith, 48 Vt. 266 (1876). In the case of Taylor *v.* Miami Exporting Co., 6 Ohio, 176, 223 (1833), a bill by a stockholder to compel a person to take back from the corpora-

is not treasury stock, but is new increased capital stock, all the existing stockholders have a right to subscribe for their proportion of the new stock, and may protect that right by injunction.[1] A court of equity may set aside an election of directors carried by a trick, whereby an irresponsible person was allowed to subscribe for a large amount of stock, which he then voted, nothing being paid on the stock. Such a suit may be brought by some of the stockholders in behalf of all.[2] It is of course legal to purchase stock from stockholders in order to control an election.[3]

§ 615. *Where one corporation owns a majority of the stock of a rival company, may it vote the stock and control the latter company?* — It has been decided in several cases that where one corporation owns a majority of the stock of a rival company, the temptation to manage the latter company for the benefit of the former company will be so great that a minority stockholder of the latter company may enjoin the former company from voting the stock.[4]

tion certain stock which he had purchased of it just before the election, and had voted at the election and then immediately sold again to the corporation, failed. The vote on these shares, however, did not affect the result. But see §§ 65, 70, 286 (notes), *supra*, and § 653, *infra*. Where the stockholders are present and no one objects to the issue of unissued stock to a director whereby he acquires control, such issue is legal. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

[1] § 286, *supra*.

[2] Davidson *v.* Grange, 4 Grant's Ch. Rep. (Can.) 377 (1854).

[3] Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

[4] Where one railroad company acquires a majority of the stock of another having so substantially similar a field of operations that there is a necessary conflict of interests between the two, the former may be enjoined from voting its stock on the question of annulling a lease from one to the other, even though both companies are in the hands of a receiver. George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894). In Memphis, etc. R. R. *v.* Woods, 88 Ala. 630 (1889), it was held that where one railroad company has acquired a majority of the stock of another railroad company, and has elected the board of directors, and oppressed and defrauded such latter company by buying unnecessary rolling stock, making unnecessary repairs at exorbitant charges, unduly apportioning the earnings as between the two roads, and in other ways increasing its own profits at the expense of the latter company, a minority stockholder in such latter company may enjoin the former company from voting such stock at an election. A request to the company to bring the action was first made by the stockholder who brought the suit. A transportation company owning a majority of the stock of an ice company may be enjoined from voting the stock, if the

A somewhat similar conclusion was reached by a lower court in New York,[1] but a later decision is to the effect that a court of equity has no power to restrain a railroad corporation, which has legally purchased a majority of the stock of another railroad corporation, "from voting on the stock so purchased, upon the allegation or proof that it intends to cause a board of directors to be elected, who, by their action or non-action, may injure or prejudice the interests of the minority stockholders of the corporation whose stock has been so purchased."[2] Such also is the law in New Jersey.[3] It has been held in Ohio that

former company intends to purchase ice from the latter company, but otherwise no such injunction will issue. American, etc. Co. *v.* Linn, 93 Ala. 610 (1890). A stockholder in one mining and manufacturing company may enjoin another rival company from voting the majority of stock in the former company, such majority being owned by the latter company. Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where an electric-light company purchases a majority of the stock of a competing electric-light company in the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company; but the proof of such intent must be clear. The fact that the directors so elected are stockholders in the controlling company is not sufficient. Davis *v.* U. S. etc. Co., 77 Md. 35 (1893). It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Buckeye, etc. Co. *v.* Harvey, 20 S. W. Rep. 427 (Tenn., 1892). See also Alexander *v.* Searcy, 81 Ga. 536 (1889). A stockholder's suit to restrain another corporation from voting stock in his corporation does not lie where such other corporation is not made a party defendant. Hollifield *v.* Wrightsville, etc. R. R., 27 S. E. Rep. 715 (Ga., 1896).

[1] In Milbank *v.* New York, etc. R. R., 64 How. Pr. 20 (1882), the court, at the instance of a minority stockholder, enjoined another railroad company from voting a majority of the stock in his company, although fraud and partiality in the management for the benefit of the majority stockholder was a fear of the future instead of a fact in the past. The court said: "It is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock."

[2] Oelbermann *v.* New York, etc. R. R., 77 Hun, 332 (1894).

[3] A stockholder will not be enjoined from voting on the ground that he is not a *bona fide* stockholder, but that his stock was paid for by rival companies, and that he intends to control the company for the advantage of those companies. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883).

one railroad corporation has no power to acquire the bonds of another railroad corporation in order to control the elections of the latter, such bonds having a voting power.[1] Where a railroad company acquires control of the bonds and stock of a competing company, and allows a foreclosure to take place, the minority stockholders may defend against such foreclosure on the ground that the earnings had been kept down and also diverted.[2]

The reasonable rule would seem to be that where one company, having no power to purchase the stock of a rival company,[3] illegally purchases a controlling interest in such stock, or where one company, having legally purchased the majority of the stock of a rival company, has managed the latter company fraudulently in its own interest, a court of equity will enjoin it from voting the stock at the next election. But if the purchase of the stock was legal and there has as yet been no fraud in the management, such an injunction will not be granted.[4] An individual may of course own a controlling interest in two corporations, although they compete in business.[5]

§ 616. *Illegal or fraudulent elections — The remedy of injunction against elections and against voting particular stock.* A court of equity has power to enjoin the holding of an election by a corporation during the pendency of a suit.[6]

A federal court has held that where a corporation is organized to own and vote the stock of two competing railroads, the courts will enjoin the voting of the stock, the combination itself being forbidden by law. Clarke *v.* Central R. R. etc., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894).

[1] State *v.* McDaniel, 22 Ohio St. 354, 368 (1872). Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held contrary to the statutes and constitution of the state by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce, and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and gives it a right to own such stock. South Carolina *v.* Port Royal, etc. R'y, 56 Fed. Rep. 333 (1893).

[2] Farmers' L. & T. Co. *v.* New York, etc. R'y, 150 N. Y. 410 (1896).

[3] See §§ 315–317, *supra*.

[4] On this subject see also § 6, *supra*.

[5] See § 621*b*, *infra*.

[6] In Walker *v.* Devereaux, 4 Paige, 229, 247 (1833), Chancellor Walworth said: "This court unquestionably has the power to prevent their election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election." In Haight *v.* Day, 1 Johns. 18

A court of equity may enjoin the majority stockholders from holding a new election, even though they claim that the former election was invalid.[1]

A court of equity may also enjoin the voting of particular

(1814), Chancellor Kent dissolved the injunction, but did not question the power of the court to grant it. High on Injunctions, § 1230, says: "While the propriety of equitable interference by injunction with the election of officers of private corporations has been frequently criticised, and with no inconsiderable show of injustice, the jurisdiction itself, although sparingly exercised, is too firmly established to be readily shaken without the intervention of legislative authority. The jurisdiction is, however, almost entirely of American growth, the English authorities affording few instances of its exercise." A court of equity has jurisdiction on a bill in equity to enjoin an election, although the statute provides for a summary remedy by application to the court, where the relief asked for by the bill involves also the transfer of stock. Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892).

The court may enjoin the company from receiving any votes at an election unless the votes of the plaintiff are received. Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420. In the latter case Judge Blatchford said: "As to the character of the injunction asked for, it is laid down in Judge Redfield's Treatise on the Law of Railways (vol. 2, sec. 221) that 'it has been common to produce a positive effect through an injunction out of chancery by means of a prohibitory order,' and that a mandatory order is, in courts of equity, seldom denied unless the remedy at law is perfectly adequate." In this case Judge Blatchford enjoined the election inspectors from holding any election until the further order of the court, unless certain persons should first be permitted to vote certain stock; and also enjoined certain persons from voting any stock until after certain other persons had been afforded an opportunity to vote their stock. In Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl., January, 1890), the court did not deny its power to enjoin the election, but said: "The case is not sufficiently clear to warrant a preliminary injunction that would prevent an election on the day named in the charter, and might cause the irreparable injury which such remedies are given to prevent." If the election is held in violation of an injunction, this fact will be considered in *quo warranto* proceedings. People *v.* Albany, etc. R. R., 55 Barb. 344, 384 (1869). The injunction generally runs against the inspectors, president, directors, officers, agents, servants, etc. Campbell *v.* Poultney, 6 Gill & J. (Md.) 44 (1834). It has been held that an injunction permanently forbidding the holding of any election whatever is an interference with the management of corporate affairs, to which the courts will decline to be a party; and such an injunction would, if granted, be void. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869), holding also that while an injunction forbidding inspectors to hold an election at all, or to receive and count the votes thereof, is entirely void, since a court of equity has no power to restrain permanently an officer of a corporation from performing the ordinary duties of his

[1] Chiera *v.* Brevoort, 97 Mich. 638 (1893).

stock. In order to obtain such an injunction, however, the complainant must show that the defendant intends to vote the stock; that he has no equitable right to do so; that the effect of the vote will be to control the election; and that irreparable and permanent injury will come to the corporation or to the stockholders unless the injunction is granted.[1]

Thus, an injunction has been granted where there was a conspiracy to obtain, on the eve of the election, an injunction against the complainants from voting their stock;[2] also where the di-

office, yet they may be enjoined from holding an election until the further order of the court, or from receiving the votes of certain stockholders until the votes of others are deposited. But an injunction may be granted staying an election. Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); S. C., 21 Fed. Cas. 723, where the inspectors denied the right of pledgors to vote. If directors convene a meeting, to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to entrust their votes, the court will grant an injunction to restrain the holding of the meeting, and to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884). For other instances in which a court of equity interfered, see § 593, *supra*, and § 618, *infra*.

[1] Reed *v.* Jones, 6 Wis. 680 (1858), holding that a preliminary injunction against a stockholder voting his stock cannot be granted on the ground that he had no title to the land which he conveyed in payment of the stock. The stock had not been canceled by the company, and no action was pending to cancel it. McHenry *v.* Jewett, 90 N. Y. 58 (1882), where the preliminary injunction was denied, inasmuch as the complaint showed no equitable cause of action. Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite*. Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl., 1889). An injunction against a stockholder's voting certain stock is not an injunction to "suspend the general and ordinary business of a corporation." Reed *v.* Jones, 6 Wis. 680 (1858). An election is not such business. Reed *v.* Jones, 6 Wis. 680 (1858).

[2] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420, in which the allegation was that the defendants contemplated, through improper means, to obtain an injunction preventing plaintiffs, who were large stockholders in a corporation, from voting at an approaching election, and that defendants were improperly obtaining proxies from other stockholders in order to control the election for their private purposes. The complainant alleged that defendants intended to obtain control for the benefit of rival companies, and intended fraudulently to prevent the complainants

rectors propose to postpone the election in order to prolong their term of office;[1] also where a stockholder has transferred part of his stock in order to increase the voting power of the stock, the charter limiting the number of votes one stockholder may cast;[2] also where a majority of stock is owned by a competing company which has acquired control for the purpose of diverting business to itself;[3] also where "trustees," who are mere agents, refuse to transfer the stock to their principals or to give proxies.[4]

Where the owner of a majority of the stock sells it, the purchase price being only paid in part, and retains the stock in his name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments, even though the vendee has proceeded to improve the property.[5]

Equity has jurisdiction to compel the transfer of stock as between parties. Hence where stock is issued in payment for property, and the party to whom the certificate is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division and may enjoin any election of the corporation until such division is made.[6]

The general rule is that one stockholder has nothing to do with the motive of another stockholder. The injunction must be based on damage reasonably certain to ensue.[7] Accordingly,

from voting. The court enjoined defendants from participating in any election unless plaintiffs' votes were received thereat, and from restraining plaintiffs in their right to vote.

[1] A stockholder may enjoin directors from postponing an annual election which comes in February, but which the directors by by-law have changed to October, thereby endeavoring to extend their term. Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 467 (1883). See also Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 274 (1883).

[2] Webb *v.* Ridgely, 38 Md. 364 (1873), where stock had been colorably transferred without consideration for the purpose of controlling an election, there being a provision in the charter prohibiting a single stockholder from voting on more than twenty shares. See also § 621, *infra.*

[3] See § 615, *infra.*

[4] See § 622, *infra.*

[5] Stockton *v.* Russell, 54 Fed. Rep. 224 (1892).

[6] Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892).

[7] Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), where a subscriber failed in his defense against a subscription by attacking the policy of the majority in control.

an injunction will not be granted upon the ground that the stockholders against whom the injunction is sought are likely to obtain control of the affairs of the company, and that then they will probably misuse their power.[1] The form of the injunction order varies, of course, with the circumstances of the case. The federal courts have sanctioned a form which, while drastic in its terms, is effective in reaching the desired result, and is none too severe when the difficulties are considered.[2]

Where a party is enjoined from voting, the court will enjoin his proxy from voting.[3]

The proxy may be enjoined although his principal is not made a party and is not served.[4] But stockholders who are not made parties will not be enjoined.[5] The injunction against certain persons voting certain stock does not prevent the election from taking place. On the contrary, the election goes on and is valid, even though it happen that what would have been a minority of the votes, had not the injunction issued, becomes, by reason thereof, a majority, and elects.[6] Where the injunction is applied for at a time so near the election that the opposition will have no reasonable opportunity to be heard, the court may refuse the application on that ground.[7] The practice of serving an injunction after the meeting has assembled is not looked

[1] Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). *Cf.* Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420.

[2] See the form of injunction granted in Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420. Approved in People *v.* Albany, etc. R. R., 55 Barb. 344, 383 (1869). An injunction against a corporation recognizing a transfer of stock was held not to prevent the transferee's voting, in Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895).

[3] Clarke *v.* Central R. R. etc. Co., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894).

[4] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420.

[5] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420.

[6] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420.

[7] Where a bill was filed to restrain certain shareholders from selling or assigning their stock, or from voting upon it at an ensuing election, which was to be held within three days from the date of the filing of the bill, the court held that inasmuch as the probable effect of the injunction would be to change the result of the election, and the consequent control of the affairs of the company, without allowing the shareholders sought to be restrained to be heard in their own defense, the injunction ought to be denied. Hilles *v.* Parish, 14 N. J. Eq. 380 (1862). It appears, however,

upon with favor by the courts.[1] Where an injunction has been obtained on false affidavits and bill to control an election, and the proceedings in court are discontinued immediately after the election, the court will summarily vacate and set aside the election by reason of the abuse of the process of the court and the fraud on the rights of the stockholders.[2] An appeal from an injunction against voting certain stock will be dismissed where the parties may, under a statute, apply to the court to review the election on affidavits.[3]

§ 617. *Illegal or fraudulent elections — The remedies of quo warranto and mandamus.*— There are various ways in which an illegal or fraudulent election of directors or managers of an incorporated company can be investigated and remedied. The natural and proper remedy in all cases is the old remedy of *quo warranto* to test the title to office. In England *quo warranto* does not lie to test the legality of the election of officers of a private corporation, but in this country a contrary rule prevails.[4] An information in the nature of a *quo warranto* is

that counsel stipulated for a new election in case the complainant succeeded, and the court so ordered.

[1] "The practice of procuring an injunction and serving it after the meeting had assembled is not to be commended, and should only be tolerated in cases where the right thereto is clearly established." *Re* Rochester, etc. Co., 40 Hun, 172 (1886).

[2] Putnam *v.* Sweet, 1 Chand. (Wis.) 286, 334 (1849).

[3] Where an injunction against postponing an election is granted, and the election is held, and the next day an appeal is taken from the injunction order, the appeal will be dismissed, inasmuch as the parties have the remedy under the statute of applying to the court to review the election. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). Where an injunction against voting particular stock has been refused, and the election held, an appeal will be dismissed. Foster *v.* Smith, 47 Pac. Rep. 591 (Cal., 1897).

[4] Commonwealth *v.* Arrison, 15 Serg. & R. (Pa.) 127 (1827), a case of church trustees; Commonwealth *v.* Graham, 64 Pa. St. 339 (1870), the same; People *v.* Tibbits, 4 Cow. 358 (1825), an insurance company; State *v.* Ferris, 45 Mo. 183 (1869), college trustees; Creek *v.* State, 77 Ind. 180 (1881), church trustees; State *v.* Kupersforte, 44 Mo. 154 (1869), an insurance company; State *v.* McDaniel, 22 Ohio St. 354 (1872), directors of a railroad; Commonwealth *v.* Smith, 45 Pa. St. 59 (1863); High, Extraord. Remedies, § 653, etc.; Shortt, Informations, 129 (Eng., 1887); Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837), giving the pleadings herein; People *v.* Albany, etc. R. R., 55 Barb. 344, 354 (1869). *Quo warranto* is a proper remedy to determine the right of a relator claiming to have been elected as a director of a corporation. Attorney-General *v.* Looker, 69 N. W. Rep. 929 (Mich., 1897). For a clear statement of the nature of an information in the nature of a *quo warranto* filed

not allowed of course, but is a subject for the exercise of a sound discretion.[1] Mandamus, instead of *quo warranto*, lies when the title *de jure* has been adjudicated.[2] In West Virginia mandamus is held to be the proper remedy to place a *de jure* director in the place of the *de facto* director, and service on the latter may be by publication;[3] and mandamus lies at the instance of a corporation to compel illegally-elected directors to turn over the books to the legally-elected directors.[4] Under the Nevada statute mandamus lies at the instance of a superintendent to oust a person who is illegally holding that office.[5] The courts of one state will consider the board of directors as legally elected until the courts of the state wherein the company was organized decide to the contrary.[6]

§ 618. *Illegal or fraudulent elections — The remedy by injunction against directors acting, and the remedy of a suit in equity where the validity of the election arises incidentally.*— A court of equity may, prior to the holding of an election, enjoin such election.[7] But a different rule prevails after the election has actually taken place. A court of equity has no inherent power or jurisdiction to entertain a bill for the purpose of reviewing a corporate election and ousting the parties who claim to have been elected.[8]

by a claimant for an office in the name of the attorney-general, see Gibbs *v.* Somers Point, 49 N. J. L. 515 (1887). A stockholder may institute *quo warranto* proceedings. Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895). See also § 713, *infra*, concerning *de facto* officers.

[1] State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). The court in its discretion may, in Minnesota, decline to allow a private person to file an information in the nature of *quo warranto* to test the title to office of directors. Whitcomb *v.* Lockerby, 59 N. W. Rep. 495 (Minn., 1894). *Quo warranto* does not lie against a superintendent who may be removed at any time by the directors. State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897).

[2] Leeds *v.* Atlantic City, 52 N. J. L. 332 (1890).

[3] Cross *v.* West Va. etc. R'y, 35 W. Va. 174 (1891). Compare S. C., 34 W. Va. 742, and People *v.* New York, etc. Asylum, 122 N. Y. 190 (1890).

[4] American R'y Frog Co. *v.* Haven, 101 Mass. 398 (1869).

[5] State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897).

[6] State *v.* Cronan, 49 Pac. Rep. 41 (Nev., 1897).

[7] See § 616, *supra*.

[8] The title of *de facto* officers to their office cannot be tested by an injunction or bill in equity. *Quo warranto* or a proceeding under the statute is necessary. People *v.* Albany, etc. R. R., 57 N. Y. 161, 171 (1874). A court of equity has no jurisdiction to decide which board of directors was elected. Kean *v.* Union Water Co., 52 N. J. Eq. 813 (1895), rev'g Union Water Co. *v.* Kean, 52

But where there has been a palpable fraud practiced in the election, and usurpers are about to take possession of the prop-

N. J. Eq. 111. An *ex parte* injunction against a director continuing his duties as a director is void in New York as being contrary to the statute. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). Where there are two rival boards of directors, each claiming to have been legally elected, the remedy of one against the other is not an injunction, but a *quo warranto* proceeding. Carmel, etc. Co. *v.* Small, 47 N. E. Rep. 11 (Ind., 1897). No injunction lies against officers acting as such, on the ground of illegal election. *Quo warranto* lies. Hartt *v.* Harvey, 32 Barb. 55 (1860). Equity has no power, except as incidental to other relief, to review an election. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891); Hullman *v.* Honcomp, 5 Ohio St. 237 (1855); New England, etc. Co. *v.* Phillips, 141 Mass. 535 (1886), where an injunction was sought to restrain persons from acting as directors who had been illegally elected. Allen, J.: "This course is open to the objection that suits to remove or to institute corporation officers do not belong to the original jurisdiction of chancery; and that the right to be such officer cannot, in general, and in the absence of special legislation allowing this remedy, be tested by means of an injunction." 1 Pomeroy, Eq., § 171; 3 Pomeroy, Eq., § 1345. See also, to same effect, Owen *v.* Whitaker, 20 N. J. Eq. 122 (1869), where the legality of the first election was the only thing involved; Hughes *v.* Parker, 20 N. H. 58 (1849); Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); Mechanics' Nat. Bank *v.* Burnet Mfg. Co., 32 N. J. Eq. 236 (1880), where a third person suing the corporation sought to have its answer stricken out because the officers were not duly elected; Fadness *v.* Braunborg, 73 Wis. 257 (1889), a religious corporation case; Wandsworth, etc. Co. *v.* Wright, 18 W. R. 728 (1870), where fraud was charged on the part of the inspectors; Davidson *v.* Grange, 4 Grant, Ch. (U. C.) 377 (1854), where the court refused an injunction, but said in a dictum that the election might be set aside on account of fraudulent voting of shares subscribed for by "dummies" to get control of the election on the promise that the subscriptions would afterwards be canceled. Where by reason of an injunction against voting certain stock the meeting is not held at the time specified in the notice, but later in the day a minority meet and adjourn to the next day and conceal such adjournment from the majority and elect directors, the court will oust them from office. State *v.* Bonnell, 35 Ohio St. 10 (1878). Self-constituted directors without a regular organized meeting have not a good title to their office; and where subsequently the incorporators elected other directors, the latter may cause to be stayed an action brought in the name of the company by the self-constituted directors. John Morley Bldg. Co. *v.* Barras, [1891] 2 Ch. 386. The Pennsylvania statute giving the court power to control and supervise elections where fraud, violence, or unlawful conduct prevents a fair and honest election does not sustain an injunction obtained by majority stockholders — who withdrew from the annual meeting and held a separate election because a stock vote was not allowed on the election of chairman — against the board elected by the minority. *Quo warranto* is the only remedy. Jenkins *v.* Baxter, 160 Pa. St. 199 (1894).

erty in violation of all justice, a court of equity will enjoin them from doing so.[1]

The *de facto* directors may enjoin the claimants to office from attempting to take forcible possession or exercising the duties of the office.[2] If the validity of a corporate election

[1] Where the owners of the whole stock sell it, and part of them resign and place the representatives of the vendee in possession, and those who remain in the board do so at his request, but transfer to him their certificates of stock, and then subsequently, when the time for the annual meeting has gone by, they publish a notice of a meeting and conceal the notice from him, and elect a board, and attempt to take possession, a court of equity will enjoin them. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). Equity is not obliged "to leave the corporation and its lawful directors to the remedy at law, always taking at least months, and in the meantime suffer the road to be operated and perhaps ruined by the depredators, because they claim to be directors *de facto* or *de jure*." Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). In Clarke *v.* Central, etc. Co., 54 Fed. Rep. 556 (1893), it appeared that, the board of directors having been illegally elected, "the voting power of the stock was enjoined, a new election ordered, and the court appointed receivers, not for the purpose of subjecting the properties to the claims of creditors, but to protect and to preserve them until they could be turned over to a legally-elected board of directors, as proper trustees, who would have the right under the law to take and operate the railroad in the interest of all concerned. The court further directed that, when this new election should have taken place, said new board of directors might apply to the court to have the property returned to the control of the properly constituted officers of the corporation." In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where a corporation has an authorized capital of $5,000, but only $2,500 are directed by the stockholders to be issued, it is illegal and fraudulent to issue the remaining authorized capital without giving the existing stockholders a prior right to subscribe to such increased capital *pro rata*. Directors elected by reason of such illegal issue will be enjoined from acting, where they are about to change the whole policy of the company. Humboldt, etc. Assoc. *v.* Stevens, 34 Neb. 528 (1892). A suit in Kentucky between rival claimants to office to have an adjudication as to the same and to have a receiver does not prevent one of the parties from foreclosing a mortgage on the corporate property in another state and having a receiver thereof appointed. Kelly *v.* Mitchell, 98 Ky. 218 (1895). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. R'y, 45 S. C. 470 (1895). For other instances in which a court of equity interfered, see §§ 593 and 616, *supra*.

[2] Reis *v.* Rohde, 34 Hun, 161 (1884). Although there is a controversy as to the legality of an election, yet the newly-elected president, who takes peaceable possession of the property,

arises incidentally in connection with a suit in equity, the court will pass upon the election. This may occur where a bill is filed to enjoin a forfeiture of stock[1] or a consolidation of corporations,[2] but not in a suit to enjoin the sale of stock,[3] nor in a suit to compel the directors to turn over the property.[4]

A court of equity may appoint a master to hold an election of a corporation when by reason of fraud, violence, or unlawful conduct on the part of some stockholder a fair election cannot otherwise be held.[5] Where a claimant to the office of the director has with violence illegally taken possession of the corporate property, the court may appoint a custodian of the property, and direct the custodian to deliver to the proper officers.[6]

§ 619. *Illegal or fraudulent elections — Statutory remedy by petition to a court of equity.*— In consequence of the delays and difficulties attending the remedy of *quo warranto*, statutes have been enacted in many of the states which give courts of equity the power to review corporate elections at the instance of the

can enjoin the old president, who claims to hold over and who has forcibly taken possession. Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

[1] In an injunction suit, brought by a stockholder to prevent the corporate officers from forfeiting stock, the court will pass upon the legality of an election of directors, but of course will not and cannot remove them. Moses *v.* Tompkins, 84 Ala. 613 (1888); Garden, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875).

[2] Where the directors are about to make an illegal consolidation, and a stockholder files a bill to enjoin it, the court will pass also upon the legality of the election of the *de facto* directors. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

[3] In an action to enjoin the sale of stock by a corporation under a lien which the corporation has upon the stock, a court of equity will not inquire into the regularity of the election of the directors. Elliott *v.* Sibley, 101 Ala. 344 (1893).

[4] The legality of the election of directors cannot be tested by a suit in equity, even though the suit is ostensibly brought to compel the directors to turn over the property. Bedford Springs Co. *v.* McMeen, 161 Pa. St. 639 (1894). Where newly-elected directors bring suit in the name of the company for the corporate books, the legality of the election cannot be questioned by way of defense. The question of such legality can be raised only by a direct proceeding for that purpose. Austin, etc. Co. *v.* Gemmell, 10 Ont. Rep. (Can.) 696 (1886).

[5] Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892). A decree to the effect that stockholders entitled to vote were forcibly prevented from voting, and to the effect that a commissioner should conduct another election and report to the court the vote and the objections, is not a final decree. National, etc. Co. *v.* United, etc. Co., 36 Atl. Rep. 724 (Pa., 1897). See also § 612, *supra*.

[6] Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892).

parties aggrieved.[1] Such a statute is found in New York, New Jersey, California, and other states.[2] By these statutes the court, sitting as a court of chancery, is empowered to review corporate elections, and to grant such relief as the particular circumstances and justice of the case seem to require.[3]

Such a statute has proven to be one of the wisest and best that a legislature ever enacted in regard to corporations. It furnishes a speedy, simple, just, and effective remedy for all complaints, and is free from useless technicalities and expense. Various decisions under these statutes are given in the notes below.[4] Although by the award of arbitrators stock is trans-

[1] See Part VII, *infra*.

[2] See Part VII, *infra*.

[3] Brewster *v.* Hartley, 37 Cal. 15 (1869); Wright *v.* Central California, etc. Water Co., 67 Cal. 532 (1885); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), a case where proxies were illegally rejected. For various cases in New York, showing the wide powers exercised by the court under this statute, see *Ex parte* Holmes, 5 Cow. 426 (1826); Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872); *Ex parte* Desdoity, 1 Wend. 98 (1828); Vandenburgh *v.* Broadway, etc. R. R., 29 Hun, 348 (1883); Strong *v.* Smith, 15 Hun, 222 (1878); *Ex parte* Willcocks, 7 Cow. 402 (1827); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); *Re* Long Island R. R., 19 Wend. 37 (1837). In this case an election was set aside because the directors had illegally declared certain shares forfeited for non-payment of instalments, and refused to record an assignment thereof so as to entitle the assignee to vote. Under these statutes an election may be declared void by reason of the conspiracy, frauds, or trickery of a part of the stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869).

[4] As to a proceeding under the New York statute the strict rules as to the reception of evidence in civil actions do not apply. *Re* Argus Co., 138 N. Y. 557 (1893), holding also that the application will be heard by the court under the New York statute, although another party is joined as petitioner without authority. Where the stockholders disagree, and two elections are held in adjoining rooms at the same time, the court may consider the ballots cast at both meetings, in order to arrive at the proper result of the election. *Re* Election, etc. Grove Cem. Co., 39 Atl. Rep. 1024 (N. J., 1898). The statute authorizing a court of chancery to review elections and order new ones does not authorize the courts to issue a mandamus to the inspectors of election in regard to counting votes by proxy and amending the return. People *v.* Simonson, 61 Hun, 338 (1891). "Surprise and fraud upon part of the electors is ground for avoiding an election." People *v.* Albany, etc. R. R., 55 Barb. 344, 363 (1869). In this case the place of an election was filled by one party with roughs as proxies brought there for purposes of intimidation, and for voting on *viva voce* votes, and for crowding out the regular voters. People *v.* Albany, etc. R. R., 55 Barb. 379 (1869). In this case also, under the New York statute, in an equitable suit brought by the state, the court appointed a receiver and issued an injunction pending the suit, and finally declared

ferred to a certain party, and such party votes the stock at the next election, and thereafter the award is set aside and the stock retransferred, yet the party so deprived of the stock during the election cannot have the election set aside.[1]

§ 620. *Who may complain of an illegal election — A new election is not granted if the result will be the same.*— Only a shareholder whose rights have been infringed and who is equitably entitled to complain may institute the proceedings. Accordingly, a transferee of one of the shareholders who participated in the fraud will not be heard to impeach the result of that

elected persons who would have received the most votes of all votes that had been legally cast, although there had been two elections held at the same time by the two parties at different places in the same town. Under the New York statute making the transfer book conclusively binding upon the inspectors of election, the inspectors cannot exclude the vote of the registered stockholder although he holds the stock merely as pledgee; but under the New York statute allowing the courts to summarily review the election, the court has power to go back of the transfer book and set the election aside, where the statute gave the pledgor the right to vote. Strong *v.* Smith, 15 Hun, 222 (1878). "Where no allegation of fraud or deceit is made, the court cannot interfere under the power vested in it by the Revised Statutes to nullify or set aside the will of the shareholders as expressed by their votes." *Re* Wellman, etc. *v.* Ciancimino, etc. Co., N. Y. L. J., May 13, 1890. Although officers in possession of the corporate property and management may, in proceedings to have defendant's election declared illegal, obtain an injunction against the defendant's interfering with the management of property, yet where the plaintiff obtained the property and management by violence on the day of the commencement of the suit, notwithstanding an injunction against such violence, his injunction will be dissolved. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). The statutory power of the court to inquire into the legality of corporate elections does not apply to the "appointment" of a director by the board to fill a vacancy due to a resignation. Wickersham *v.* Brittan, 93 Cal. 34 (1892). Nor does such a statute enable the director so "appointed" to settle the question of the legality of the election by applying to the court. Wickersham *v.* Murphy, 93 Cal. 41 (1892). Nor does it apply to the legality of an election of the president by the directors. *Re* Caguey, N. Y. L. J., Sept. 15, 1891. Where two groups of stockholders are contesting for control, the expenses of the litigation should not be borne by the company. Wickersham *v.* Crittenden, 106 Cal. 329 (1895). Although the inspectors admitted votes on insufficient evidence, yet if additional and sufficient evidence is presented to the court the election will stand. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). The corporation itself may apply under the statute for an order to the effect that the persons declared elected were legally elected. *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865). In attacking the validity of a vote the burden of proof is on him who attacks it. *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884).

[1] *Re* Leslie, 58 N. J. L. 609 (1896).

fraud.[1] And in general the plaintiff, a relator seeking to set aside a corporate election, is barred of relief if he himself was guilty of misconduct or neglect, or if it appears that he has subsequently acquiesced with knowledge of the facts.[2] It is a principle of law, also, that the legality of an election will not be inquired into upon the ground that illegal votes were cast, unless those votes were challenged at the election at the time when they were cast.[3]

Where a candidate at a corporate election receives a majority of the votes cast, the receipt of illegal votes in his favor does not defeat his election.[4] An election will not be set aside if it be shown that after throwing out the invalid votes the officers declared elected would still have, according to the return, a valid majority of the votes cast;[5] and a new election will not be ordered if after rejecting all the illegal votes, and after ad-

[1] *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883).

[2] Wiltz *v.* Peters, 4 La. Ann. 339 (1849), where a commissioner of election attacked the legality of votes which he himself had admitted as commissioner.

[3] *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839), wherein the court said: "It is quite clear, generally speaking, that an illegal vote not challenged will not invalidate an election, nor will even be inquired into." See also Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872). A stockholder who attends the election and votes, and does not object to others voting, although he knows they are doing so in violation of a by-law, cannot himself afterwards object to the legality of the election. State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). See also People *v.* Robinson, 64 Cal. 373 (1883); *Re* Long Island, etc. R. R., 19 Wend. 37, 44 (1837), and §§ 599, 594, *supra*. The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done. McFadden *v.* Leeka, 48 Ohio St. 513 (1891).

[4] *Re* Argus Co., 138 N. Y. 557 (1893).

[5] People *v.* Tuthill, 31 N. Y. 550 (1864); *Ex parte* Murphy, 7 Cow. 153 (1827); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839); State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); First Parish *v.* Stearns, 38 Mass. 148 (1838); School District *v.* Gibbs, 56 Mass. 39 (1848); Christ Church *v.* Pope, 74 Mass. 140 (1857). The court will not consider the legality or illegality of votes, where those votes will not change the result whatever the decision might be. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). Where the officers declared elected received a majority of the original stock as well as a majority of the alleged illegal increased stock, they will not be ousted. Byers *v.* Rollins, 13 Colo. 22 (1889). Where, after rejecting all votes illegally cast by proxy, there is still a majority for the persons who were declared elected, the court will not disturb the election. Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878).

mitting the opposition legal votes which were rejected, it still appears that the directors returned as elected had a majority of the votes.[1]

The court may, in the exercise of its equity powers, declare a candidate elected who received only a minority of the votes actually cast, when such candidate plainly received a majority of all the legal votes cast.[2] Where *quo warranto* proceedings

[1] McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); *Ex parte* Desdoity, 1 Wend. 98 (1828).

[2] Where the whole number of votes is five hundred and ninety-three, and there were present five hundred and thirty-seven, and the candidates declared not elected received three hundred votes, one hundred and fifty of which were illegally rejected by the inspectors, the court, under the New Jersey statute, declared those candidates elected and did not order a new election. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867); *Ex parte* Desdoity. 1 Wend. 98 (1828); Vandenburgh *v.* Broadway R'y, 29 Hun, 348 (1883); Downing *v.* Potts, 23 N. J. L. 66, 84 (1851), where an election was set aside and a new one ordered because votes were illegally rejected on one side and illegally accepted on the other, which changed the result, but two directors who were on both tickets and received all the votes cast were held elected. The court said that unless the legal votes rejected and the illegal votes received were sufficient to change the result of the election, the election would not be set aside. Hence where of two thousand three hundred and ninety-two votes for certain candidates seven hundred and ninety-nine were illegal, and there were illegally rejected one thousand eight hundred and ninety-four votes for the defeated candidate, who received forty-six votes, the court ordered a new election. In *Re* Long Island R. R., 19 Wend. 37 (1837), where the votes illegally rejected would have elected other persons, the court set the election aside, and did not declare elected those who would have been elected if the rejected votes had been counted, there being one thousand seven hundred votes not represented, and eleven thousand that were disqualified under the statute. The court may declare part of the directors illegally elected, and order a new election as to them, without affecting the title of the others to their offices. People *v.* Fleming, 59 Hun, 518 (1891). In Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867), the court ousted a director and declared elected another person in his stead. Where the presiding officer illegally rejects certain votes, declares certain persons elected, and adjourns the meeting, and the dissatisfied party continue the meeting and hold another election, the court will consider merely the question as to who received a majority of the votes which were legally offered to be cast. State *v.* Smith, 15 Oreg. 98 (1887). A court will not force upon the company directors who are technically entitled to be declared elected, certain proxies being irregularly executed, but will order a new election. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1882). A statute repealing the statutory remedy in chancery to review elections operates retrospectively as well as prospectively. *Re* New York, etc. Co., 23 Hun, 615 (1881). In New Jersey it has been held that,

are pursued, the court can only oust the party who is in office. It cannot declare another person elected.[1]

§ 621. *Restrictions on the right to vote.*— It is legal for a corporation, upon issuing preferred stock or increased capital stock, to impose a condition that such stock shall not have any right to vote.[2] It is legal also for the corporation, with the assent of all stockholders, to give to bonds a voting power,[3] although a contrary rule has been reached in Illinois under a statute to the effect that elections shall be by the stockholders and not otherwise.[4] There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power. If the agreement is made by unanimous consent it is legal. Such restrictions, however, generally are, and always should be, printed on the certificates of stock, so that a purchaser shall take with full notice. Thus, a by-law passed at the time of the organization of the company may limit the number of votes which a single stockholder may cast.[5] Under the partnership

if the illegally-rejected votes would have given the defeated candidate a majority of all the stock, the court will declare him elected, and will oust the one that was declared elected. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J., 1888).

[1] State *v.* McDaniel, 22 Ohio St. 354 (1872), where a number of legal votes were rejected which would have sufficed to elect certain directors who without such votes had only a minority of the votes cast. The court held that persons cannot be declared elected and inducted into office upon *quo warranto* information; People *v.* Phillips, 1 Denio, 388 (1845), making the same ruling as to a church corporation.

[2] It is legal, upon the issue of preferred stock, to provide that it shall not vote at corporate elections. Such a provision will be upheld. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). See also ch. XVI, § 269, *supra*.

[3] In State *v.* McDaniel, 22 Ohio St. 354 (1872), the bondholders on a reorganization were given by contract the power to vote, and the court upheld such contract right. In Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), the court passed upon a statutory scheme in which the creditors of a railroad company, by the terms of a mortgage, chose two-thirds of the directors and the stockholders chose one-third until the debt was reduced to a certain figure.

[4] A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner. Durkee *v.* People, 155 Ill. 354 (1895).

[5] A by-law may provide that stockholders shall have one vote for each share held by them up to ten shares, and may fix the proportion which their votes shall bear to their shares above that number. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A

association statute of Pennsylvania, a by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[1] All this is a mere matter of private contract. But a by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as attempting to limit the voting power of a stockholder.[2] Where the charter limits the number of votes which one stockholder may cast, the provision cannot be evaded by transfers to various persons. The courts will enjoin the voting of the stock.[3]

by-law restricting the right of members of a church to vote as authorized by statute is void. People *v.* Phillips, 1 Denio, 388 (1845). A by-law restricting the right of electors in a town to vote is not good. Rex *v.* Spencer, 3 Burr. 1827 (1766); Rex *v.* Head, 4 Burr. 2515, 2521 (1770). See also § 4*a*, *supra;* People *v.* Kip, 4 Cow. 382, note (1822), holding that a corporation has no power, by a by-law, to demand an oath of a stockholder in order to test his qualifications as a voter. Where the charter authorizes the depositors and stockholders to elect new members, the directors cannot by by-law exclude the former from elections and give a vote to stockholders only. Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837).

[1] Carter *v.* Producers' Oil Co., 38 Atl. Rep. 571 (Pa., 1897).

[2] McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897).

[3] Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where stock has been transferred in order to give it a vote, the transferrer having already all the stock that the charter allows one stockholder to vote, the transfer being merely nominal and for voting purposes only, an injunction will issue against its being voted. Campbell *v.* Poultney, 6 G. & J. 94 (1834); Webb *v.* Ridgely, 38 Md. 364 (1873). Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same and the court will enforce this agreement. Scott *v.* Scott, 38 Atl. Rep. 567 (N. H., 1894). Although the charter limits each person to one hundred votes, yet a person voting a hundred votes in his own name may vote another hundred as proxy for his wife, if it is *bona fide* her property. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). In England a contrary rule prevails. It is not illegal to transfer or procure shares before a meeting so as to multiply votes at it; nor can votes so obtained be disregarded. They may be cast. Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877); Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Cannon *v.* Trask, L. R. 20 Eq. 669 (1875); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878); and see Northwest Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887). A statute which confines the right to vote to stockholders who are citizens of the state by which the corporation is chartered cannot be evaded by colorable transfers of shares to residents of the state merely for the purpose of having them voted upon. State *v.*

A statute prohibiting a stockholder from voting "whose liability is past due and unpaid" refers to a subscription liability and not to a commercial liability.[1] The right to vote is sometimes restricted by the charter to those who are registered stockholders.[2] In some states the right to vote is limited to those who have been stockholders of record for a certain number of days before the election.[3]

§ 621*a*. *Restrictions on right to sell stock, and contracts against selling.*—A stockholder has a right to sell his stock at any time unless he has specifically agreed otherwise,[4] and this right of a stockholder to sell and transfer his stock cannot be restrained by a by-law of the corporation.[5] An agreement or contract,

Hunton, 28 Vt. 594 (1856). Such a statute would now, however, probably be held to be unconstitutional. See § 813, *infra*, relative to statutes prohibiting citizens of other states from being trustees.

[1] U. S. *v.* Berry, 36 Fed. Rep. 246 (1888).

[2] See § 611, *supra*.

[3] See § 611, *supra*.

[4] "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of negotiations then pending." . . . "We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers' L. & T. Co. *v.* Chicago, etc. R'y, 163 U. S. 31 (1896).

[5] Morgan *v.* Struthers, 131 U. S. 246, 252 (1889); Feckheimer *v.* National Exch. Bank, 79 Va. 80 (1884), where a by-law prohibiting transfers except with the consent of the directors was declared void; Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Orr *v.* Bigelow, 14 N. Y. 556 (1856); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Moore *v.* Bank of Commerce, 52 Mo. 377 (1873). A by-law to the effect that a transfer of stock shall be allowed only upon consent of all the other stockholders is void as in restraint of trade. *Re* Klaus, 67 Wis. 401 (1886). As regards corporate liens herein, see ch. XXXI, *supra*. See also, as to the general policy of the law to discountenance restrictions on right to sell, Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). In this case the directors were compelled to allow a transfer although the purpose of the transfer was to multiply votes. As already stated, a by-law that no stockholder shall transfer his stock except by the consent of all stockholders is void. A secretary cannot refuse to register a transfer on account of the motive of the transferrer. *Re* Klaus, 67 Wis. 401 (1886). A by-law providing that, if any stockholder shall desire to dispose of his stock, he shall give written notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, is an invalid restraint on alienation. Victor, etc. Co. *v.* Bloede, 84 Md. 129 (1896). A by-law that no stockholder shall sell his stock or have a transfer of it unless he shall first have offered it for sale to the directors is illegal and void. Brinkerhoff-Farris, etc.

however, between the members, or a part of them, not to sell except on certain conditions, is valid, unless it amounts to an unreasonable restraint of trade. Thus, an agreement of several holders of stock to deposit their stock in a trust company for a term of six months and not to sell the same during that time, is legal, there being no provision depriving any party of his right to vote on the stock. Where compensation in damages for a breach would be difficult or impossible, a court of equity may grant specific performance of such a contract by enjoining a breach thereof. Such a contract is not void as suspend-

Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). A by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as attempting to limit the voting power of a stockholder. McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Laurie, 164 Ill. 42 (1896). The foreclosure and sale of a pledge of stock in the Western Associated Press has been refused where it was shown that the stock merely entitled the holder to receive news; that no transfer was allowed except by consent of the association, and such consent had never been given, and the association was not made a party to the suit. Metropolitan Nat. Bank *v.* St. Louis Despatch Co., 36 Fed. Rep. 729 (1888). In this case it is to be noticed that no profits or dividends could arise from the stock. Where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void. In such case the records of a directors' meeting showing that, by vote of the directors present, a stockholder's shares were appraised at a certain price and taken for the use of the company, sufficiently show an appraisal, although no notice of hearing was given the stockholder. Where a stockholder agrees to transfer his shares to the company at an appraisal to be made by the directors, the decision of the directors cannot be impeached by showing that they committed errors of judgment in the appraisal. A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors, to be disposed of by them as they may see fit, where the evidence shows that none of the stock of said corporation has ever been sold on the market or otherwise than by transfer to the directors, and no fraud in the appraisal is charged, the remedy by an action for damages being inadequate. New England Trust Co. *v.* Abbott, 162 Mass. 148 (1894).

ing the power of alienation, nor is it against public policy as being a restraint upon trade, the purpose of the contract being to prevent a sacrifice of the stock.[1] An agreement between the stockholders of a corporation that no one of them will sell, assign, or dispose of his stock, without having first given the other parties to the agreement an opportunity to purchase, does not disable a party from transferring a legal title to his stock without the consent of the other parties and in violation of the agreement, and this although the transferee was cognizant of the agreement at the time of the transfer.[2]

[1] Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416, and 74 Hun, 427. See also § 622, *infra*.

[2] The enforcement of specific performance of such an agreement by a court of equity rests in the discretion of the court; it may not be demanded as a right. The fact that the transferee holds the stock subject to the enforcement of the equitable remedy does not in any way interfere with his legal title, nor does it preclude the corporation from treating him as, and according to him all the rights of, a stockholder, including the right to vote upon the stock at a stockholders' meeting. *Re* Argus Co., 138 N. Y. 557 (1893). An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). As to "pools" of stock and contracts tying up stock, see §§ 621*b*, 622, *infra*. A contract of a stockholder not to transfer or sell his stock does not bind a *bona fide* purchaser. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). In the case of Jones *v.* Brown, 50 N. E. Rep. 648 (Mass., 1898), in a close corporation, the stockholders made a contract, the essential parts of which are set forth in the opinion of the court, providing for the purchase of the stock of a certain stockholder in case of his death, and for the purchase of the stock of any other stockholder who ceased to be connected with the corporation. The former stockholder having died, the court granted specific performance of the contract and compelled his estate to deliver the stock upon payment of the specified price.

The following is a form of contract on this subject which the author drew, and has used on several occasions:

Whereas, ———, party of the first part, is the owner of —— shares of the capital stock of the ——— Company, and ———, party of the second part, is the owner of —— shares of said capital stock; and

Whereas, said party of the first part has agreed that in case he hereafter sells any or all of the said stock owned by him, he will at the same time make it a part of such contract of sale that the party purchasing shall extend to said party of the second part the option to sell his said —— shares of stock, or any part thereof, to said purchaser at the same price and on the same terms:

Now, therefore, it is hereby agreed between said parties for a valuable consideration, receipt of which is hereby acknowledged by said party of the first part, that in case said party of the first part sells or causes to be sold his said shares of stock or any part thereof, he will at the same time make it a part of such contract of sale that the party purchasing shall purchase from said party of the second part at the same price and on the same terms such part of said shares of stock belonging to said party of the second

The right of transfer is sometimes limited by statute, as in New York, where stock in railroad or manufacturing corporations cannot be transferred until all calls thereon shall have been fully paid.[1] Where the charter or a statute forbids transfers before the full capital stock is paid in, any transfer before such payment has been held to be void.[2] A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence the corporation cannot refuse to transfer the stock.[3]

In England sometimes express authority is given to the directors, by the articles of association, to refuse to permit a transfer unless the same is satisfactory to them.[4] They have this power, however, only by express authority, and it is not extended by implication.[5] The power must be reasonably ex-

part as the party of the second part may care to sell at that time at that price and on those terms. In case said party of the first part fails to make such provision in any sale or transfer made by said party of the first part, said party of the second part may tender to the party of the first part the certificates for any or all of said —— shares of stock owned by the party of the second part, and thereupon may demand and collect therefor from the party of the first part, by suit, a sum per share, for the stock so tendered, equal to the highest price per share at which said party of the first part may have prior thereto sold the shares of stock, or any part thereof, belonging to the party of the first part. This agreement shall bind the heirs, representatives, agents, and assigns of the party of the first part, and shall continue in force for the period of —— years from the date hereof.

Dated, New York, ——— —, 1898.

[1] See Part VII, *infra*.

[2] Merrill *v.* Call, 15 Me. 428 (1839). The case of Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813), holds that, nevertheless, such a transfer vests in the transferee all the transferrer's interest in the stock. *Cf.* Kahn *v.* Bank of St. Joseph, 70 Mo. 262 (1879). The statutes of a state cannot restrict or interfere with the transferability of certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892).

[3] Ireland *v.* Globe, etc. Co., 38 Atl. Rep. 116 (R. I., 1897). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 49 N. E. Rep. 640 (Mass., 1898).

[4] Shortridge *v.* Bosanquet, 16 Beav. 84 (1852); Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855); *Re* Joint-stock Discount Co., Shepherd's Case, L. R. 2 Eq. 564 (1866).

[5] Weston's Case, L. R. 4 Ch. App. 20 (1868); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Chappell's Case, L. R. 6 Ch. App. 902 (1871); *Re* Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878); Slee *v.* International Bank, 17 L. T. Rep. 425 (1867). Judge Dillon, in Johnson *v.* Laflin, 5 Dill. 65, 78; S. C., 13 Fed. Cas. 758, 763; aff'd, 103 U. S. 800 (1880), said: "Such a power

ercised, and its exercise must be free from fraud, caprice, and arbitrary power.[1] The corporation cannot refuse to allow a registry on the ground that there was no consideration for the transfer;[2] nor because a claimant of the stock notified it not to make the registry.[3] In this country no such power is given to the directors. A person who purchases stock is entitled to a transfer on the books. A resolution of the stockholders that the company should not allow any further transfers of stock until the company is out of financial difficulties does not bind a stockholder who did not take part in the meeting.[4]

Where two stockholders make a contract by which the stock is placed in the name of one of them to be held in trust and voted by him as they agree, and in case of disagreement an ar-

is so capable of abuse, and so foreign to all received notions, and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist." See also Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878), the court holding that a by-law that transfers of stock shall not be valid unless approved by the board of directors cannot restrain transfers. "Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate."

[1] They cannot refuse to allow any transfers. Robinson *v.* Chartered Bank, L. R. 1 Eq. 32 (1865). And an objection, not to the transferee, but to the purpose of the transferrer in respect to voting, is not sufficient. Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). But the board may refuse to give its reasons for refusing to allow the transfer, and in that case it will be presumed to have had sufficient reason for the refusal. *Ex parte* Penney, L. R. 8 Ch. App. 446 (1872). Where the by-laws limit the right of transfer of stock, and give the directors the power to pass upon the same, the court will presume that their action in refusing a transfer was based on good reasons, even though no reason was given. *Re* Coalport China Co., [1895] 2 Ch. 404. If misrepresentations are made in inducing the directors to allow transfer, they, having discretion, may avoid the same. Payne's Case, L. R. 9 Eq. 223 (1869); Master's Case, L. R. 7 Ch. 292 (1872); Bishop's Case, L. R. 7 Ch. 296 (1869). Although a transfer is rejected by the directors, the transferee is nevertheless entitled to dividends and the title to the stock. Poole *v.* Middleton, 29 Beav. 646 (1861). Where the company may accept or reject a transferee, and rejects him, the transferee cannot recover back from the transferrer the consideration of the transfer. London Founders' Assoc. *v.* Clarke, 59 L. T. Rep. 93 (1888).

[2] Helm *v.* Swiggert, 12 Ind. 194 (1859).

[3] *Ex parte* Sargent, L. R. 17 Eq. 273 (1874). *Cf.* § 387, *supra*.

[4] Smith *v.* Bank, etc. Scotia, 8 S. C. Rep. (Can.) 558 (1883).

bitrator is to decide, and the stock is not to be sold until they agree to sell, the one so placing stock in the name of the other as trustee cannot sue the latter for refusal to deliver to the former his part of the stock.[1] Where stock is transferred to a trustee to sell with the stock of other persons, the trustee's power of sale is not revoked by the death of the transferrer.[2] An agreement to hold stock and sell together is valid.[3]

§ 621*b*. "*Pools*," "*corners*," *and combinations in stock*.—The courts will not aid either party in carrying out an agreement for advancing the price of stock by means of fictitious dealings designed to deceive others concerning the real value of such stock.[4] Where both the vendor and vendee of stock know that the purpose of the vendee is to control the corporation and illegally issue corporate paper, the sale is illegal and void.[5] An agreement to make a "corner" in stock, by buying it up so as to control the market and then purchasing for future deliveries, is illegal.[6] It is not necessarily unlawful to form a "pool" for

[1] Louisville Trust Co. *v.* Stockton, 75 Fed. Rep. 62 (1896). A transfer of the controlling interest of stock of a railroad company to trustees to hold until the road is completed and then to return the same to the transferrers, the object being to secure the co-operation of municipalities in obtaining an extension of the charter and the granting of municipal aid, is legal, the transaction being a fair one, and being known to the public, and insisted upon by the public before aid would be given. Greene *v.* Nash, 85 Me. 148 (1892). The contract of an agent to sell stock does not give the principal a right to damages for failure to sell, where the principal delivered trustee's receipts instead of the stock itself, the stock having been "pooled." Simmons *v.* Brooks, 159 Mass. 219 (1893). See § 622, *infra*.

[2] Hiller *v.* Ladd, 80 Fed. Rep. 794 (1897).

[3] Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506 (1878); S. C., 45 N. Y. Super. Ct. 464; aff'd, 86 N. Y. 618; Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886)—an important case. But an agreement not to sell except by concurrent consent of all signers to the agreement is void as in restraint of trade and against public policy. Fisher *v.* Bush, 35 Hun, 641 (1885). See also § 320, *supra*. For a full discussion of this subject, see § 622, *infra*. For an interesting statement of the *modus operandi* of a "corner," see "An Investor's Notes on American Railroads," by Swann, ch. XII (1886). See § 615, *supra*, relative to purchases for the purpose of affecting corporate elections.

[4] Livermore *v.* Bushnell, 5 Hun, 285 (1875). See also, in general, § 445, note, *supra*, and § 622, *infra*.

[5] Newark *v.* Elliott, 5 Ohio St. 113 (1855).

[6] Sampson *v.* Shaw, 101 Mass. 145 (1869); Raymond *v.* Leavitt, 46 Mich. 447 (1881); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871); Arnot *v.* Pittston, etc. Coal Co., 68 N. Y. 558 (1877); Keene *v.* Kent, N. Y. D. Reg., March 15, 1887. *Cf.* Petrie *v.* Hannay, 3 T. R. 418 (1789). No suit

the purpose of dealing in a particular stock,[1] and the person who does the buying and selling must account to the others.[2]

A contract by which a shareholder in a corporation agrees to secure to the purchaser of his stock a corporate office at a stated salary, and in case of his removal to repurchase the stock, is void as against public policy and as a fraud on other stockholders, unless it is proved that the transaction is not for the private benefit of the vendor, or that it was consented to by the other stockholders.[3] But a contract to convey a majority of the stock of a corporation, and to procure the resignation of the corporate directors, thereby enabling the vendee to elect directors satisfactory to himself, is a valid and legal agreement.[4] One railroad company cannot purchase a controlling

lies against a broker for fraud in carrying out a pool or combination to "corner" and advance the price of lard. Leonard *v.* Poole, 114 N. Y. 371 (1889). See also § 445, *supra*. A person making a "corner" in wheat is not subject to a criminal prosecution therefor. Raymond *v.* Leavitt, 46 Mich. 447 (1881). It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscription and purchased the greater part of it himself. Salaman *v.* Warner, 64 L. T. Rep. 598 (1891). *Cf* Barry *v.* Croskey, 2 Jones & H. 1 (1861), holding that the victim of the "corner" may file a bill in equity to recover back the money lost.

[1] Quincey *v.* White, 63 N. Y. 370, 383 (1875), modifying Quincey *v.* Young, 5 Daly, 327 (1873).

[2] Where several parties buy a certificate of stock in fixed proportions and the certificate is taken by one for the benefit of all, he is a bailee for the others and not a vendor. Coquard *v.* Wernse, 100 Mo. 137 (1890). See also § 320, *supra*. The general rule that an action affecting a joint enterprise for the purchase, upon speculation, of certain mining stocks must join all the parties who enter the "pool" does not necessitate the joinder of one who is out of the jurisdiction. Angell *v.* Lawton, 76 N. Y. 540 (1879). The representative of a syndicate after selling the stock cannot modify the contract. He is liable to the others if he does so. Kountz *v.* Gates, 78 Wis. 415 (1891). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. Johnson *v.* Brooks, 46 N. Y. Super. 13 (1880); Thornton *v.* St. Paul, etc. R'y, 45 How. Pr. 416 (1873); S. C., dismissed, 6 N. Y. Week. Dig. 309 (1878). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). See also § 320, *supra*.

[3] See § 622, *infra*.

[4] See § 622, *infra*.

interest in another railroad company for the purpose of managing or absorbing the latter; but this rule grows out of the fact that such purchases are beyond the powers of the corporation. It is immaterial that a vendee already controls one railroad company, and that the stock contracted to be sold will give him the control of another. He is entitled to the stock.[2] An agreement to contribute stock towards a common undertaking for the benefit of the corporation itself is enforceable, the consideration being the mutual obligation.[3] But the common undertaking must be a legal one.[4]

§ 622. *Contracts as to directors, elections, voting, and control — Combinations of stockholders — Voting trusts and pooling agreements.*— Stockholders owning a majority of the stock have a right to combine and control the election of the board of directors.[5] It is legal for persons to contract to form a cor

[1] See § 315, *supra*.

[2] Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506 (1878). *Cf.* § 315, n., *supra*.

[3] See § 76, *supra*.

[4] If the purpose is to rob a railroad and bribe a judge, the court will aid no one. Tobey *v.* Robinson, 99 Ill. 222 (1881). *Cf.* § 39, *supra*.

[5] Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506, 513 (1878); affirmed, 86 N. Y. 618 (1881); Faulds *v.* Yates, 57 Ill. 416 (1870), where it was held that persons holding the majority of stock in a corporation could lawfully agree among themselves to vote as a unit to control an election; and that their agreement that their votes should be cast as should be decided by the majority of their own votes was not void as being against public policy. "There is, if I may say so, no obligation on a shareholder of a company to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest." Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877). A stockholder who signs an agreement with others to vote their stock as a unit cannot afterwards complain of acts of the board of directors, which acts were in accordance with the policy of the pooling agreement. Zeigler *v.* Lake St. El. R. R., 69 Fed. Rep. 176 (1895), giving portions of the agreement. "It is not *per se* unlawful for a number of persons, by previous agreement, to buy shares of the stock of a corporation for the purpose of controlling its policy, electing its officers, etc." Beitman *v.* Steiner, 98 Ala. 241 (1893). Where two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

poration and to provide for its future management and control.[1] But a contract in regard to elections in private corporations is not legal if it provides that a lucrative corporate position shall be given to one or more of the parties to the contract. Thus, an agreement of a large stockholder holding a majority of the stock that upon the purchase and absorption of plaintiff's business by the corporation the plaintiff should be engaged for a term of years as vice-president and general manager of the corporation at a specified salary is contrary to public policy and is void.[2] An agreement of persons as a condition of their

[1] King *v.* Barnes, 109 N. Y. 267 (1888).

[2] West *v.* Camden, 135 U. S. 507 (1890). A contract made by a stockholder for a consideration to vote for a particular person for manager of the company, and in the event of his election to vote for an increase of the salary attaching to that position, is illegal and cannot be enforced. Woodruff *v.* Wentworth, 133 Mass. 309 (1882). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). A proxy for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter person a court of equity will enjoin voting thereunder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891). Where a stockholder in a railroad company is induced to take part in the formation of a land company, and is to receive a certain sum of money when a depot is located on such land, he cannot enforce the agreement. It is practically a sale of his vote. Fuller *v.* Dame, 35 Mass. 472 (1836). A contract of the vendor of bank stock that he would make the vendee the cashier is illegal and void. Noel *v.* Drake, 28 Kan. 265 (1882). An agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment. Elliott *v.* Richardson, L. R. 5 C. P. 744 (1870). See also Moffatt *v.* Farquharson, 2 Bro. C. C. 338 (1788); Card *v.* Hope, 2 B. & Cr. 661 (1824). Compare Bolton *v.* Madden, L. R. 9 Q. B. 55 (1873), where an agreement between two subscribers to a charity to vote for each other's nominees was held not to be illegal. Although a contract of certain stockholders to vote together is legal, yet a conspiracy to obtain an illegal injunction against others voting will not be countenanced by the court. People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869). A contract by which a shareholder in a corporation agrees to secure to the purchaser of his stock a corporate office at a stated salary, and in case of his removal to repurchase the stock, is void as against public policy and as a fraud on other stockholders, unless it is proved that the transaction is not for the private benefit of the vendor, or that it was consented to by the other stockholders. Guernsey *v.* Cook, 120 Mass. 501 (1876); Noyes *v.* Marsh, 123 Mass. 286

election that the bank should extend to a certain party credit for loans at a specified rate of interest is illegal.[1] A sale of his vote by a stockholder is illegal.[2] A contract, however, by which the directors who own a majority of the stock sell such stock and agree to substitute the vendees as directors of the company is legal.[3] Where part of the consideration in the sale of stock

(1877). A contract to preserve the control and *status quo* was involved in Harris *v.* Scott, 32 Atl. Rep. 770 (N. H., 1893). The contract provided for voting on all subjects, for salaries, and for sales of stock before and after death. The court refused to grant specific performance for sale after death. Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them, and two persons to be named by the others, and that one of them, who had received a salary of $2,500, should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time the seller to have a salary and one-half of the directors, is illegal, and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement. Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). A contract of sale of stock whereby the vendee is to be voted a certain salary and an equal representation in the board, and in case either party wishes to sell stock it is first to be offered to the other party at a fixed price, is void as an attempt to barter away the offices. Fennessy *v.* Ross, 90 Hun, 298 (1895). Where a part of the consideration of a contract in regard to voting stock in a certain way is that one of the parties shall be given an official position in the corporation at a salary, the contract is void and unenforceable. Gage *v.* Fisher, 5 N. D. 297 (1895). In the case of Witham *v.* Cohen, 28 S. E. Rep. 505 (Ga., 1897), a stockholder who had obtained proxies from most of the other stockholders, on an agreement by which he was to become president on a certain salary, was held to have a right of damages against a stockholder whose stock he had purchased, but who, nevertheless, had given a proxy to some other person. A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company; and that thereby the vendee was induced to make the contract of purchase at an unconscionable price. Delano *v.* Rice, 23 N. Y. App. Div. 327 (1897). Where the agreement was to keep the vendor in a professorship, the court will not aid the parties. The agreement is against public policy. Jones *v.* Scudder, 2 Cin. Super. Ct. 178 (1872).

[1] Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896).

[2] Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1886). See also Yale Law Journal, vol. 1, p. 7.

[3] A contract to sell one's stock in a corporation, and to resign a directorship and the presidency, and, having done so, to endeavor to induce other directors to resign, in order that the purchasers of the stock may come in and take their places and so control

is that the vendor resign an office in the company, and the vendee be elected in his place, and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position or does something towards restoring the vendor to his former position.[1] An agreement by a stockholder to give a person part of his stock if such person would become a director of the corporation is not necessarily against public policy.[2] The vendor of stock may of course agree to vote as the vendee wishes.[3]

Closely connected with this principle of law is the question whether a director or stockholder may vote his stock in favor of a sale of corporate property to, or a purchase of property for the corporation from, another corporation in which such director or stockholder is interested as a stockholder. The general rule is that a contract between two corporations having certain stockholders or directors in common will be sustained by the courts if the contract is fair towards the minority stockholders. If it is so unfair as to amount to a fraud, the courts will set it aside upon the complaint of the minority stockholders.[4]

Restrictions on the right to vote stock, like restrictions on

the management of the company, there being no evidence of fraud, has been held a contract not void as against public policy. Barnes *v.* Brown, 80 N. Y. 527 (1880). Specific performance will not be granted of an agreement of the vendors of stock that they will resign as directors and substitute the vendee's representatives instead. Fremont *v.* Stone, 42 Barb. 169 (1864), the court stating that such a contract is unfair towards the minority stockholders. See also, *contra*, Jacobs *v.* Miller, 15 Alb. L. J. 188 (1877). Directors have no power to contract with an outsider that he shall, upon purchasing certain stock, be made a director in the company. Seymour *v.* Detroit Copper, etc. Mills, 56 Mich. 117 (1885). But a sale of stock with an agreement that the vendee should be elected superintendent may be rescinded if the latter part of the agreement is not carried out. Seymour *v.* Detroit Copper, etc. Mills, 56 Mich. 117 (1885). An agreement to turn over the control of a co-operative insurance company is illegal, and money received therefor cannot be recovered by the company. McClure *v.* Law, 20 N. Y. App. Div. 459 (1897).

[1] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[2] Almy *v.* Orne, 165 Mass. 126 (1896).

[3] An agreement by a vendor of stock, which is to be delivered after an election, that he will vote as the vendee desires, is legal. Mobley *v.* Morgan, 6 Atl. Rep. 694 (Pa., 1886). One corporation issuing its stock as security to another may agree that the latter shall hold and vote the stock of and in the former. Tonawanda, etc. R. R. *v.* New York, etc. R. R., 42 Hun, 496 (1886).

[4] See ch. XXXIX, § 662, *infra*.

the right to sell stock, are not favored by the courts. These two classes of restrictions are closely allied, and have partially been considered elsewhere.[1] They both are due generally to a desire to so tie up the stock or the voting power that the control will be permanently obtained and retained thereby. It is an old problem in corporation law how to compel parties to live up to their agreement in regard to holding their stock and voting with other parties to the contract, in order to keep the control of the corporation. Various devices have been tried, the object being to place the stock in such a position that no one of the parties can break his agreement to act with the others. "Irrevocable" proxies to vote upon the stock have been given by all the parties to a designated person, who acted as their agent. But the courts decided that these proxies were not irrevocable, but might be revoked at any time.[2]

Another plan was to place the stock of the various parties in the hands of trustees with power to transfer the stock to themselves, and to hold and vote the same. Trustees' certificates were then issued by the trustees to the various parties, specifying the amount of stock so deposited by them and their interest in the pool. But this plan failed. The courts held that any holder of a trustee's certificate might at any time demand back his part of the stock.[3]

[1] See §§ 621, 621*a*, *supra*.

[2] See § 610, *supra*.

[3] Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887); Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1885). See Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 2 R'y & Corp. L. J. 409 (Pa., 1887); Starbuck *v.* Mercantile Trust Co., 60 Conn. 553 (1891). See also an excellent article and careful review of the cases by Professor Baldwin in 1 Yale L. J. 1 (1891). A trust of stock for the benefit of both the bondholders and the stockholders cannot be broken up by one of the stockholders only. Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl., Jan., 1890). Although many stockholders transfer their stock to a trustee to hold and vote it for three years, and agree not to sell until they have offered to sell to each other, yet any one may sell to an outsider, and the latter may demand back his stock from the trustee. Moses *v.* Scott, 84 Ala. 608 (1888). An agreement whereby $83,000 of stock is pooled in a trustee's hands, the latter issuing trustee's certificates therefor, and electing such directors as the certificate-holders may direct, according to the trust agreement, may be annulled and set aside at the instance of purchasers of the remaining $17,000 of stock and of a majority of the trustee's certificates. White *v.* Thomas, etc. Co., 52 N. J. Eq. 178 (1893). An agreement between stockholders holding a majority of the shares to pool their stock by transferring it to trustees, and authorizing them to vote all such

Voting trusts of this kind are resorted to in forming "trusts," the combinations in trade. All the stock of various competing corporations are placed in the hands of trustees, who issue trustee certificates therefor. Such voting trusts as these are declared illegal because the monopolistic combination that is sought is illegal. Hence the decisions concerning the "trusts" are not applicable to the questions now under consideration, inasmuch as the question of monopoly is not here involved.[1]

Another device was tried. The parties contracted together not to sell their stock for a specified time, and agreed that if

stock at corporate meetings, and to pledge it as collateral for loans, is void, as against public policy. Hence the holder of one of the trustee's certificates may demand his stock and may enjoin the trustee from voting his stock or disposing of it. Harvey *v.* Linville Imp. Co., 118 N. C. 693 (1896). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). The trustees are not purchasers and owners of the stock. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). An outside stockholder cannot object to other stockholders uniting their interests in a "trust," and thereby obtaining control of the corporation. Zimmermann *v.* Jewett, 19 Abb. N. Cas. 459 (1886). But he can object when the purpose of the "trust" is to work out some scheme which is illegal in itself. Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1886). A "trust" of stock was involved in Farmers' Loan, etc. Co. *v.* Chicago, etc. R'y, 27 Fed. Rep. 146 (1886), where Hugh J. Jewett, president of the Erie Railway, held as trustee the stock of the Chicago & Atlantic Railroad, the western connection of the former company. The court did not pass on the permanency of the trust. An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). A contract to combine to control the majority of the stock of a railroad company may be violated by a party to it, although by its terms it is irrevocable. Clarke *v.* Central R. R. etc., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustee's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890).

[1] See ch. XXIX, *supra*, concerning "Trusts."

they did they would sell together or to a purchaser who would be agreeable to the old stockholders. But this plan also did not succeed. If it prohibited any sale whatsoever, and did not limit the time during which the agreement was to last, it was void as an illegal restraint of trade.[1] Moreover, it constituted no check on the parties. At any time any one of the parties might sell his stock. The only remedy of the other parties against him then was a doubtful, difficult, protracted, and expensive suit for damages.[2] Again, although three stockholders, by an instrument similar to a bill of sale, sell their stock to a fourth stockholder "for and during the period of six months, . . . in trust for the use and benefit of the grantors," with power to sell the same on certain terms, yet this instrument is not a sale or trust agreement, but is merely a power of attorney. It does not prevent the fourth stockholder from selling his own stock on such terms as he chooses, even though he does not sell the stock of the others, it not appearing that the sale

[1] Fisher *v.* Bush, 35 Hun, 641 (1885). See also § 621*a*, *supra*.

[2] An agreement between the stockholders of a corporation that no one of them will sell, assign, or dispose of his stock without having first given the other parties to the agreement an opportunity to purchase does not disable a party from transferring a legal title to his stock without the consent of the other parties and in violation of the agreement, and this although the transferee was cognizant of the agreement at the time of the transfer. The enforcement of specific performance of such an agreement by a court of equity rests in the discretion of the court; it may not be demanded as a right. The fact that the transferee holds the stock subject to the enforcement of the equitable remedy in no way interferes with his legal title, nor does it preclude the corporation from treating him as, and according to him all the rights of, a stockholder, including the right to vote upon the stock at a stockholders' meeting. *Re* Argus Co., 138 N. Y. 557 (1893). A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence the corporation cannot refuse to transfer the stock. Ireland *v.* Globe, etc. Co., 38 Atl. Rep. 116 (R. I., 1897). See also § 621*a*, *supra*. In Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506 (1878); aff'd, 86 N. Y. 618, it was held that an agreement of several stockholders not to sell their own stock except in connection with that of the other parties to the contract was not in restraint of trade and was not contrary to public policy, as restricting the right of alienation, but the measure of damages for breach of such a contract is only the actual loss suffered by a decline in the value of the stock by reason of the breach.

of his stock prevented his selling the stock of the others. The instrument conveyed merely at most "only a dry legal title for the mere purpose of sale, and with the power of sale carefully circumscribed."[1]

Another plan was to restrict by a by-law of the corporation the right to transfer stock. But such by-laws are illegal.[2]

Still another plan was tried. An unincorporated joint-stock association was formed to carry on the business. A provision was inserted in the articles of association of the company restricting the right of a shareholder to sell his stock. This provision was upheld by the courts. The purchaser of a certificate of stock, who sold in violation of the agreement, received no right to vote or participate in the company. He merely was entitled to the dividends on his stock.[3] But this device is not open to corporations. Their charters are generally obtained by filing a certificate in accordance with a general law. A special provision inserted in the certificate, limiting the right to transfer stock, would be ineffectual and void. All these various devices have proved to be impracticable.

Where, however, two stockholders make a contract by which the stock is placed in the name of one of them to be held in trust and voted by him as they agree, and in case of disagreement an arbitrator is to decide, and the stock is not to be sold until they agree to sell, the one so placing stock in the name of the other, as trustee, cannot sue the latter for refusal to deliver to the former his part of the stock.[4] Where two patentees agree to own their patents in common, and then contract with

[1] Levi *v.* Evans, 57 Fed. Rep. 677 (1893).

[2] See § 621*a*, *supra*.

[3] Harper *v.* Raymond, 3 Bosw. (N. Y.) 29 (1858). See Kingman *v.* Spurr, 24 Mass. 234 (1828). See also Taft *v.* Harrison, 10 Hare, 489 (1853), as to liability after an offer to sell to the company.

[4] Louisville Trust Co. *v.* Stockton, 75 Fed. Rep. 62 (1896). An agreement of several holders of stock to deposit such stock in a trust company for a term of six months, and not to sell the same during that time, is legal, there being no provision depriving any party of his right to vote on the stock. Where compensation in damages for a breach would be difficult or impossible, a court of equity may grant specific performance of such a contract by enjoining a breach thereof. Such a contract is not void as suspending the power of alienation, nor is it against public policy as being a restraint upon trade, the purpose of the contract being to prevent a sacrifice of the stock. Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416, and 74 Hun, 427.

a corporation to convey the patents to it for stock to be issued to them jointly, each to have one-half, and each to have one-half the dividends thereof, the certificates not to be changed, sold, or pledged for ten years, except upon their joint consent, the instrument may also provide that one of them shall vote the stock as proxy for the ten years, unless both agree otherwise. The court held that such a contract is legal, being practically a contract to become partners in the ownership of stock for ten years.[1] A transfer of a controlling interest of stock of a railroad company to trustees to hold until the road is completed, and then to return the same to the transferrers, the object being to secure the co-operation of municipalities in obtaining an extension of the charter and the granting of municipal aid, is legal, the transaction being a fair one, and being known to the public, and insisted upon by the public before aid would be given.[2] Several parties in purchasing stock may agree that each one's share shall be transferred to him, but that all the stock shall be voted for five years in one way, that way to be determined by a majority of the stock so included in the agreement. Such an agreement is legal, even though it provides that during that time the parties retain the power to vote such stock.[3] It is legal for stockholders to agree to place their stock in the hands of a trustee to be held by such trustee until certain debts of the company have been fully paid.[4] Such an agreement has to be supported, however, by something more than the mere agreement of the parties.[5] It is legal for parties

[1] Hey *v.* Dolphin, 92 Hun, 230 (1895).

[2] Greene *v.* Nash, 85 Me. 148 (1892).

[3] The court consequently held that a member of the syndicate who refused to vote in accordance with a decision of the majority had no right to vote (by reason of the California statute prescribing that only *bona fide* holders of stock should vote), the court holding that the original purchase of the block of stock bound that stock in its vote. Smith *v.* San Francisco, etc. R'y, 47 Pac. Rep. 582 (Cal., 1897).

[4] Mobile, etc. Co. *v.* Nicholas, 98 Ala. 92 (1893). An agreement by which various owners of stock place their stock in the hands of one person as trustee or agent to hold for a certain period of time, the parties agreeing not to sell their stock without having first offered to sell it to the rest of their associates at a price not above the then current market value, and, in case of their declining to take it, without next offering it to the trustee, but any one of the parties to be at liberty to withdraw at any time on those terms, is not "contrary to public policy, or any wise open to objection." Brown *v.* Pacific Mail S. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420.

[5] Fisher *v.* Bush, 35 Hun, 641 (1885).

to agree that certain persons shall be directors for a certain length of time.[1] An agreement that a certain person shall be president for two years will not be specifically enforced by the courts.[2]

It is legal for the stockholders to deposit their stock with a depositary, to be transferred to such depositary and voted by him as directed by a committee of the stockholders, such committee being named, the object of the deposit being to effect

"There is no consideration whatever between the trustees and the subscribers; none is claimed or mentioned in the agreement itself, and as between the subscribers there is also none. The mere fact that several or a majority have signed does not furnish a supporting consideration. No one subscriber acquired under the agreement any interest in any other one stock, or any undivided interest in the whole of the stock represented by the subscribers. No real and special consideration is claimed, and without this the agreement cannot be supported." Vanderbilt *v.* Bennett, 2 R'y & Corp. L. J. 409 (Pa., 1887).

[1] But a receiver will not be appointed on account of a breach of the contract. Baumgarten *v.* Nichols, N. Y. L. J., May 19, 1891. An agreement to elect a certain person president is waived if he participates in electing others. American, etc. T. Co. *v.* Toledo, etc. R'y, 47 Fed. Rep. 343 (1890). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors it was illegal. Kountze *v.* Flannagan, 19 N. Y. Supp. 33 (1892). An agreement that certain persons should have control of the corporation until certain debts were paid must be clearly proved before it will be sustained by the courts. Proctor, etc. Co. *v.* Finley, 33 S. W. Rep. 188 (Ky., 1895). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contract, and pay dividends on its stock) is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

[2] Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894), holding also that an election in which the party is not even elected a director will not be set aside, even under the statutory power of the courts to set aside elections on equitable grounds. A court of equity will not grant specific performance of a contract to vote stock as the complainant stockholder wishes, with a view to controlling the corporation. Hence where the promisee of such a contract knows the promisor will not fulfill his contract, and consequently the promisee buys the promisor's stock at a high price, he, the promisee, cannot rescind such purchase, but must pay the stipulated price. Gage *v.* Fisher, 5 N. D. 297 (1895). See also Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

an adjustment of differences between the common and preferred stockholders.[1]

Where, in order to prevent the foreclosure and sale of a railroad, a reorganization agreement is entered into by the creditors and stockholders, whereby the claims of the creditors and the voting power of the stockholders are vested in trustees, the voting power to be exercised by the trustees until certain debts were paid, the stockholders cannot withdraw from the agreement and claim the right to vote upon their stock.[2]

The most effective way in which a majority or all the stock of a company may be pooled or tied up seems to be by selling and transferring it to another corporation formed for that purpose. Such corporations may be organized under the laws of many of the states. The objection to this plan is that it enables the directors of the second corporation to sell the stock at any time, and it involves not merely a temporary pooling of the stock, but a permanent parting with the title and interest in it.

A contract by which stock is contributed for the purpose of developing the business of the company is legal.[3]

§ 623. *Who may be a director or corporate officer — Qualification shares.*— If the charter or statutes require a director to be a stockholder, one who holds stock transferred to him in trust for the express purpose of qualifying him for the position

[1] The agreement did not prevent any stockholder from demanding back his stock whenever he saw fit. The court held that this was not a "voting trust," and that it was merely "a convenient method by which distant and widely-separated shareholders became enabled, indirectly, to participate in the control and management of the company, and from which each could recede at any time and demand return of his stock without violating any term of the agreement. The depositary is a proxy required to vote the stock as directed by the committee." The contract of deposit is given in the report. The suit arose on *quo warranto* proceedings to oust the board of directors who were elected by the vote of the depositary, but whose title to office was denied by the company. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892); State *v.* O. & M. R'y, 6 Ohio Circ. Ct. 415 (1892).

[2] Mobile, etc. R. R. *v.* Nicholas, 98 Ala. 92 (1893). Not even the subsequent change in the agreement so as to issue first-mortgage bonds to take up some of the debt will enable the stockholders to claim the right to vote upon their stock before the debts specified above have been paid. Mobile, etc. Co. *v.* Nicholas, 98 Ala. 92 (1893). See also Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl., 1890).

[3] See §§ 76, 334, *supra*.

may serve.[1] And where a person has the right to vote on stock as a stockholder, he is eligible to any corporate office to which any stockholder is eligible, and accordingly may be elected a director, even though an assignee in bankruptcy has been appointed of his estate.[2] He may obtain stock in any way and become thereby qualified.[3] Although the charter requires the directors to be stockholders, it has been held that the transferee and holder of a certificate of stock is qualified, even though the stock itself stands on the books of the company in the name of his transferrer.[4] In general, any one who

[1] Budd *v.* Munroe, 18 Hun, 316 (1879). *Contra*, Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852). Where an agent of a corporation purchases with corporate funds, without authority, stock in another company, and sells one of the shares to a person in order to enable the latter to qualify as a director in such company, the person receiving the one share is protected in his title, and the first-named corporation cannot compel him to give it up, even though the agent had no power to sell, the purchaser having purchased in good faith. Hence, his acts as a director are valid. Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893). Although the statute requires a director to be a stockholder, it is no objection that a qualification share was put in a director's name merely for the purpose of qualifying him. *Re* Leslie, 58 N. J. L. 609 (1896). In a stockholder's suit to enjoin the corporation from entering into a consolidation, he cannot question the right of the directors to hold office on the ground that the qualification shares did not really belong to them. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

[2] State *v.* Ferris, 42 Conn. 560 (1875).

[3] A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. He is qualified unless the "title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). A person is qualified who buys stock in his own name with his wife's money and transfers the certificate to her, but afterwards, and before registry, keeps the stock for himself. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). If the director has sufficient stock registered in his name, it is immaterial that he does not own it. Pulbrook *v.* Richmond, etc. Co., L. R. 9 Ch. D. 610 (1878); Bainbridge *v.* Smith, 60 L. T. Rep. 879 (1889).

[4] State *v.* Smith, 15 Oreg. 98 (1887). The corporate books are not conclusive as to the qualification of a person to act as a director. If he owns stock he is qualified, even though he does not appear as a stockholder on the corporate books, and *vice versa*. The inspectors cannot reject votes on the ground that the candidate is not qualified. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Under the statutes of North Dakota an unregistered holder of stock is not qualified to be elected a director. *Re* Argus Printing Co., 1 N. D. 434 (1891).

may be an agent may be elected a director of a private corporation; and at common law it is not necessary that a director be a stockholder.[1] A director need not be a citizen of the state by which the corporation is created.[2] The constitutionality of a statute which prohibits the citizens of other states from being directors in a corporation may well be doubted.[3]

An alien may be a stockholder and director in a corporation if the statutes do not prohibit it.[4] A married woman is not at common law qualified to act as an incorporator nor as treasurer,[5] but under the usual statutes conferring rights upon her, she is qualified to act as a director or officer.[6] An executor may be a director.[7]

Votes cast for a person not eligible to the office cannot elect

[1] State *v.* McDaniel, 22 Ohio St. 354, 367 (1872); McDowall *v.* Sheehan, 129 N. Y. 210 (1891); Wight *v.* Springfield, etc. R. R., 117 Mass. 226 (1875); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Hoyt *v.* Bridgewater, etc. Co., 6 N. J. Eq. 253, 274 (1847); *Ex parte* Stock, 33 L. J. (Ch.) 731 (1864); Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852); People *v.* Northern R. R., 42 N. Y. 217 (1870); Cammeyer *v.* United, etc. Churches, 2 Sandf. Ch. 186, 249 (1844); Hurrell & Hyde on Directors and Officers, 2; State *v.* Swearingen, 12 Ga. 23 (1852) — a municipal corporation case. The charter or by-laws may, however, provide otherwise. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). It is not necessary that the directors should be either subscribers to the stock or corporators. Densmore Oil Co. *v.* Densmore, 54 Pa. St. 43 (1877); *Re* British Provident, etc. Assoc., L. R. 5 Ch. D. 306 (1877). It has been doubted whether the by-laws of a company may require directors to be stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869). *Cf.* Cross *v.* West Virginia, etc. R'y, 37 W. Va. 342 (1892).

[2] Kerchner *v.* Gettys, 18 S. C. 521 (1882). A citizen of one state may be a stockholder and director in a corporation incorporated in another state. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). Directors of a national bank "are not required to reside at the bank's place of business." Robinson *v.* Hall, 59 Fed. Rep. 648 (1894). The directors of a corporation need not be residents of the state unless the statutes expressly require it. North, etc. Rolling-stock Co. *v.* People, 147 Ill. 234 (1893).

[3] See § 813, *infra*, to the effect that such a statute as regards trustees in a mortgage deed of trust is unconstitutional and void. A constitutional provision requiring directors to be stockholders does not apply to a consolidated railroad company existing as one corporation in two states. Ohio, etc. R'y *v.* People, 123 Ill. 467 (1888).

[4] Commonwealth *v.* Hemmingway, 131 Pa. St. 614 (1890).

[5] 9 R'y & Corp. L. J. 197.

[6] People *v.* Webster, 10 Wend. 554 (1833).

[7] *Re* Santa Eulalia S. Min. Co., 4 N. Y. Supp. 174 (1889). An executor may be a director even though the stock does not stand in his name. Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897); *Re* Santa Clara, etc. Co., N. Y. Daily Reg., June 19, 1888.

him. He is not even a *de facto* director, and he may be ousted by legal proceedings.[1] Such votes, however, are not to be ignored so as to elect a candidate who receives a minority of all the votes cast.[2] The election is good as to those who were

[1] The election of a person not qualified does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891); Hamley's Case, L. R. 5 Ch. D. 705 (1877); Jenner's Case, L. R. 7 Ch. D. 132 (1877). Where cumulative voting prevails, and the statutes require three directors to be residents, and all votes cast are cumulated on non-residents excepting thirty-two which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v.* Wilder, 48 Kan. 222 (1892). Where directors must be stockholders qualified to vote, a stockholder not qualified to vote by reason of not owning his stock for thirty days before the election is not qualified to be a director. His election does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). Where an election is "conceived in fraud and conducted contrary to law," the call being insufficient, the notice concealed, the instigators having sold and transferred their certificates of stock, the purpose of the election being to steal the control from one who really owned all the stock, and two of the alleged new directors not being stockholders as required by law, there are no directors *de facto*, even though they take possession and drive away the contractor who is building the road. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). In Barber's Case, L. R. 5 Ch. D. 963 (1877), arising under similar facts, the court said: "Mr. Barber was not qualified to be elected a director, and his election was absolutely null and void. . . . If he had acted as a director, there might have been an estoppel." The board of directors cannot, even under a by-law authorizing them to fill vacancies, oust a director on the ground that he was ineligible when elected, and then proceed to fill his place. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A director who is not a stockholder cannot sign a statutory notice of a meeting to increase the capital stock. *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). It formerly was held in England that the election of one not a shareholder as a director in a corporation in which it is required that the directors be owners of a certain amount of stock is valid; and such a person, upon acceptance of the directorship, is bound to take and pay for the required number of shares. But the later decisions have established the rule that by accepting the directorship he does not thereby become liable as a subscriber for stock to the amount of qualification shares. See § 52, *supra*. The election of a disqualified person as director is voidable, not void. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869).

[2] Where the person declared elected received a minority of the votes, he will be ousted even though the other candidate was not qualified to act as a director. "Votes cast for a candidate who is disqualified for the office will not be thrown away so as to make the election fall on a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was, for that reason, disabled by law from holding

eligible.[1] Although the statutes require a director to be a stockholder, yet a person not a stockholder may be elected, and may then acquire one or more shares of stock before acting as director. This satisfies the law.[2] A statute requiring directors to be stockholders does not apply to directors named in the certificate of incorporation for the first year.[3]

Where a person not eligible to the office is declared elected, and no stockholder objects or takes legal proceedings to test the right to the office, and such person is allowed to perform the duties of his office, he becomes an officer *de facto*. As such his acts cannot be objected to on the ground that he was not a legally-elected director. Neither corporate creditors, nor the corporation, nor the stockholders, nor the director himself, are allowed to raise this objection in that manner. The remedy is to oust him by *quo warranto* or to enjoin him as a usurper. But after he is allowed to become a *de facto* director, his title to office cannot be attacked collaterally, nor can his acts be repudiated on that ground.[4]

Where the charter requires the director to be a stockholder, he must continue to hold stock during his term of office. If he sells all his stock in the company, he thereby becomes disqualified and ceases, *ipso facto*, to be a director.[5] Where the charter

the office." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), citing cases. See also People *v.* Clute, 50 N. Y. 451 (1872). Unless the stockholders know that they are voting for an ineligible candidate, a candidate who receives a minority of the stock cannot be declared elected; in other words, the votes cast for the ineligible person are not to be ignored, but a new election must be held. Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897).

[1] Schmidt *v.* Mitchell, 41 S. W. Rep. 929 (Ky., 1897).

[2] Greenough *v.* Alabama, etc. R. R., 64 Fed. Rep. 23 (1894). Where directors must be stockholders, a person elected director without his knowledge and owning no stock, and who never acted as a director for ten years, is not a director, even though a share of stock was given to him shortly after his election and he took the same. Hence he may purchase corporation property at a judicial sale. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114 (1896).

[3] Camden, etc. Co. *v.* Burlington, etc. Co., 33 Atl. Rep. 479 (N. J., 1895); McDowall *v.* Sheehan, 129 N. Y. 200 (1891); Portal *v.* Emmens, L. R. 1 C. P. D. 664, 667 (1876).

[4] See § 713, *infra*.

[5] Where the statutes require the director to be a stockholder, it follows "that as soon as a director parts with all beneficial interest in, and control over, the stock which he is required to hold, and causes the officers of the corporation to have knowledge of such fact by a request that a proper transfer be made on the books of the company, he no

requires directors to be stockholders, and three of the seven are clerks, to each of whom one share of stock is transferred, and the certificate therefor is at once retransferred to the real parties in interest, this is good ground for a forfeiture of the charter.[1] A director may, however, remain as a *de facto* director and bind the company by his acts, if allowed to continue in his position.[2] The director does not become disqualified by reason of his pledging his stock.[3] The secretary, treasurer, or other officer of a corporation need not be a resident or citizen unless the statute requires it.[4]

longer possesses the qualifications which the statute declares to be essential," and hence he ceases *ipso facto* to be a director, and is no longer liable on a director's statutory liability. "The statute executing itself operated to divest him of title to the office." Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250 (1892). Under the New York statutes a director ceases to be such when he sells his shares, and certainly after the transfer is recorded on the corporate books. Hence he is not liable as a director on the statutory liability for not filing a report subsequent to the time when he sold his stock. Sinclair *v.* Dwight, 9 N. Y. App. Div. 297 (1896). *Contra*, Nathan *v.* Tompkins, 82 Ala. 437 (1887), holding that he may be removed, but does not cease to be a director by the mere act of selling his stock. To same effect, Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); S. C., 2 Fed. Cas. 186. Although the statute requires three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), rev'g Wright *v.* First Nat. Bank, 52 N. J. Eq. 392. Where a trustee sells and delivers all his stock, he ceases to be an officer *de jure*, the statute requiring him to be a stockholder; and where the whole board of directors have sold their stock, their acts as a board of directors are not binding on the corporation. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). "Can a director part with his qualification shares?" See on this subject, 8 R'y & Corp. L. J. 99. A person may purchase stock although such stock constitute the qualification shares of the vendor as a director. Kern *v.* Day, 45 La. Ann. 71 (1893). A motion declaring the office vacant and electing another person before the director has really sold his stock is void. Craw *v.* Easterly, 54 N. Y. 679 (1873).

[1] Lorillard *v.* Clyde, 142 N. Y. 456 (1894).

[2] A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is a director *de facto*. Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

[3] Cummings *v.* Prescott, 2 Y. & C. Exch. 488 (1837). This was held in a case where the qualification shares were to be held by the directors in their own right. Pulbrook *v.* Richmond, etc. Min. Co., L. R. 9 Ch. D. 610 (1878). The court, in *Ex parte* Littledale, 24 L. J. (Bankr.) N. S. 9 (1855), assumed that a director became disqualified where he had pledged his stock, even though the transfer was not recorded.

[4] Kerchner *v.* Gettys, 18 S. C. 521 (1882); McCall *v.* Byram Mfg. Co., 6

A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director.[1]

§ 624. *Acceptance and resignation of office and failure to elect officers — Removal of directors.*— An acceptance of the office by one who is elected director is necessary to constitute him a director. Some direct and positive act of acceptance is necessary.[2]

A director may resign, and no formal acceptance or entry thereof on the minute-book of the corporation is necessary to effect the resignation.[3]

Conn. 428 (1827). But in Matthews *v.* Trustees, 2 Brewst. (Pa.) 541 (1868), the court enjoined the company from compelling its resident treasurer to turn over funds to a newly-elected non-resident treasurer.

[1] Cross *v.* West Virginia, etc. R'y, 37 W. Va. 342 (1892).

[2] Osborne, etc. Co. *v.* Croome, 14 Hun, 164 (1878); aff'd, 77 N. Y. 629; Cameron *v.* Seaman, 69 N. Y. 396 (1877); Rozecrans, etc. Co. *v.* Morey, 111 Cal. 114 (1896). An "honorary director," who sits with the board, makes up a quorum, and accepts pay, is subject to the disabilities and liabilities of a director as to being interested in contracts with the company. There is no such thing in law as an "honorary director." *Ex parte* Stears, Johns. V.-C. 480 (1859). It is a question for the jury whether a person accepted a directorship. The mere fact that as an adviser he met with the directors and made motions is not conclusive if he declined to accept. Blake *v.* Bayley, 82 Mass. 531 (1860). Acceptance is presumed. Lockwood *v.* Mechanics', etc. Bank, 9 R. I. 308 (1869). But may be disproved, even though the person attended directors' meetings. Blake *v.* Bayley, 82 Mass. 531 (1860). The fact that a director does not attend meetings or signify his acceptance of the office does not justify the board in declaring his office vacant. Acceptance is presumed. Halpin *v.* Mutual, etc. Co., 20 N. Y. App. Div. 583 (1897). Notice of a directors' meeting need not be given to a director who has never accepted the office. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897).

[3] Movius *v.* Lee, 30 Fed. Rep. 298 (1887); Smith *v.* Danzig, 64 How. Pr. 320 (1883); Chandler *v.* Hoag, 2 Hun, 613 (1874); aff'd, 63 N. Y. 624; Blake *v.* Wheeler, 18 Hun, 496 (1879); aff'd, 80 N. Y. 128. A resignation to take effect on the termination of the term for which a director is elected is effectual, and he does not hold over though no successor is elected. Van Amburgh *v.* Baker, 81 N. Y. 46 (1880). A resignation releases a director if laid before the board of directors, and it is effective, though not accepted, where it has been duly presented. Maitland's Case, 4 De G., M. & G. 769 (1853). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. Sturgis *v.* Crescent, etc. Co., 10 N. Y. Supp. 470 (1890). A director may resign after the company and officers have been enjoined from interfering with the corporate assets, and may then pursue his remedies as a corporate creditor. Mexican, etc. Co. *v.* Mexican, etc. Co., 47 Fed. Rep. 351 (1891). A resignation takes effect upon its delivery, even though not accepted. International Bank *v.* Faber, 86 Fed. Rep. 443 (1898). A resignation

A director may resign by an oral statement to that effect, and his resignation may be accepted in the same manner by the president.[1] But a mere statement of a director that he will have nothing more to do with the office is not a sufficient resignation.[2]

A resignation may be effectual even though it is not accepted, but it has been doubted whether all the directors can resign, thereby leaving the corporation helpless.[3]

A director whose resignation has been accepted cannot afterwards vote at a meeting as a director.[4] The fact of the resignation need not be published or made known to corporate creditors.[5]

In England it has been held that the resignation of a director must be presented to a meeting of the stockholders in order to be effective, unless the by-laws allow the directors to accept it. It is not sufficient to present the resignation to a meeting of the board of directors. Hence, although a resignation is sent in in the middle of the year, and is not accepted until the stockholders' meeting later in the year, the director continues to be such until such acceptance.[6]

may be effective without acceptance. Noble *v.* Euler, 20 N. Y. App. Div. 548 (1897). Where a treasurer and general manager tenders his resignation to take effect upon acceptance, his salary ceases upon the date of acceptance. Savannah C. Mills *v.* Cunningham, 28 S. E. Rep. 435 (Ga., 1897).

[1] Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). A director of a corporation may resign at any time. His resignation may be oral or in writing. The fact that a statute says directors shall continue until their successors are appointed does not prevent a director resigning at any time. Fearing *v.* Glenn, 73 Fed. Rep. 116 (1896). Service upon the president is good although he testifies that he had resigned, there being proof to the contrary and that he afterwards acted as president. Mott Iron Works *v.* West Coast, etc. Co., 113 Cal. 341 (1896).

[2] A mere statement by one director to another that he would have no more to do with the office is not a resignation. Kindberg *v.* Mudgett, 24 N. Y. Week. Dig. 229 (1886). A statement by a director to the secretary and treasurer at the time of transferring all his shares that he severed all connection with the company is not a resignation, so far as corporate creditors' rights are concerned. Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 285 (1890); Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 288 (1890); reversed on other grounds, 132 N. Y. 250. Application to sue may be made to the president though he claims to have resigned. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889).

[3] Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890).

[4] Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

[5] Bruce *v.* Platt, 80 N. Y. 379 (1880).

[6] Municipal, etc. Land Co. *v.* Pol-

The insolvency of a director does not vacate his office.[1] A director does not lose his seat by absence.[2] But the by-laws may provide otherwise.[3]

A director, unless he has resigned, continues to be such until his successor is elected, even though he never attends meetings and is never consulted.[4]

A reduction in the number of trustees may be valid although the statutory certificate is not filed, so far as corporate creditors are concerned.[5] The failure to have the number of directors required by statute does not invalidate their acts.[6]

The stockholders have no power to remove directors before the expiration of their term of office unless the charter or by-laws expressly give that power.[7] Nor can they remove the president.[8] The president is elected by the directors,[9] and after election the directors cannot remove him.[10]

A failure to elect officers at the stated time does not work a dissolution of the corporation. The old directors continue in

lington, 63 L. T. Rep. 238 (1890). Where the by-laws give the directors power to fill vacancies in the board, they may fill vacancies due to the original directors refusing to serve. La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.

[1] Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); S. C., 2 Fed. Cas. 186.

[2] Phelps *v.* Lyle, 10 Ad. & E. 113 (1839).

[3] Wilson *v.* Wilson, 6 Scott, 540 (1838), holding that an absconding director becomes "unable to act" within the meaning of the by-laws. Sturges *v.* Vanderbilt, 73 N. Y. 384 (1878); S. C., below, *sub nom.* Sturgis *v.* Drew, 11 Hun, 136.

[4] First Nat. Bank *v.* Lamon, 130 N. Y. 366 (1891).

[5] Wallace *v.* Walsh, 125 N. Y. 26 (1890).

[6] See § 713*a*, *infra*.

[7] See § 711, *infra*. Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. Stephenson *v.* Vokes, 27 Ont. (Can.) 691 (1896). A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892).

[8] Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892). A contract between a company and a person that he shall be the managing director for ten years does not prevent the corporation from dismissing him. Bainbridge *v.* Smith, 60 L. T. Rep. 879 (1889).

[9] The stockholders have no power to elect the president. Their action is a nullity. Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144 (1894).

[10] Where three out of five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. Hatch *v.* Johnson L. & T. Co., 79 Fed. Rep. 828 (1895).

office until their successors are duly elected.[1] But in England it is held that where the by-laws provide that the directors shall be elected annually, and shall hold office for one year, they cannot hold over. They cease to be directors at the end of the year, and insurance assessments levied by them after the year are invalid.[2] Even though the failure to elect has extended over a period of several years, and there are by reason thereof no directors in office, the old directors having wholly abandoned their trust, the stockholders may at any time, in a lawful manner, proceed to the election of a new board of directors.[3] But if the majority fail or refuse to hold an election, and the corporate property is thereby endangered, a court of equity may appoint a receiver to take charge of it,[4] and will in a proper case authorize a winding up.[5]

A director is an "officer" of the corporation in the usual meaning of that term. A director is entitled at all times to examine the books and papers of the company.[6]

Questions relative to the meetings of directors are considered elsewhere.[7]

§ 625. *Stockholders can act only at corporate meetings.*— Stockholders can hold elections and transact the other busi-

[1] State *v.* Bonnell, 35 Ohio St. 10, 17 (1878), in which an election of directors being held invalid, those previously in office were restored to office as being entitled to hold until their successors were qualified. Huguenot Nat. Bank *v.* Studwell, 6 Daly, 13 (1875), reversed on other grounds, 74 N. Y. 621 (1878); and see § 631, *infra*. Holding over may also arise from acting as a director. Sanborn *v.* Lefferts, 58 N. Y. 179 (1874). Hold-over directors may hold meetings, fill vacancies in the board, and vote to sell property, the same as though regular elections had been held. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Directors who hold over are liable on the statutory liability of directors. Jenet *v.* Nims, 7 Colo. App. 88 (1895). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co. *v.* Abraham, 26 Oreg. 282 (1894).

[2] Tyne, etc. Assoc. *v.* Brown, 74 L. T. Rep. 283 (1896).

[3] People *v.* Twaddell, 18 Hun, 427 (1879). In Reilly *v.* Oglebay, 25 W. Va. 36, 43 (1884), it is held that where there is no board of directors the shareholders themselves may, pending a regular election, lawfully assume and perform the duties which ordinarily belong to a board of directors. But see § 709, *infra*.

[4] Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829).

[5] Brown *v.* Union Ins. Co., 3 La. Ann. 177, 182 (1848), in which the neglect for nearly ten years to appoint officers being to the injury of creditors, the court appointed a manager to wind up the affairs of the company.

[6] See § 511, *supra*.

[7] See § 713*a*, *infra*.

ness which they as a body are qualified to transact only at a corporate meeting duly called and convened. Consequently, all votes taken elsewhere than at such a meeting, and all separate consents, either oral or in writing, whereby the stockholders assume to bind the company, are invalid and void.[1]

§§ 626, 627. *Stockholders cannot carry on the business or enter into contracts for the corporation.*— This subject is fully considered elsewhere.[2]

[1] Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Finley Shoe, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876); Peirce *v.* New Orleans Building Co., 9 La. 397, 404 (1836); Livingston *v.* Lynch, 4 Johns. Ch. 573, 597 (1820); Torrey *v.* Baker, 83 Mass. 120 (1861); *Ex parte* Johnson, 31 Eng. L. & Eq. 430 (1854); Short *v.* Unangst, 3 Watts & S. (Pa.) 45 (1841). *Cf.* Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Granger *v.* Grubb, 7 Phila. 350 (1870). For the rule relative to directors' meetings, see § 713*a*, *infra*. A lease authorized upon a two-thirds vote of the stockholders cannot be effected by two-thirds consenting thereto in writing without a meeting. Reiff *v.* Western, etc. Tel. Co., 49 N. Y. Super. Ct. 441 (1883). The separate assent of stockholders to an act is not valid. Their acts must be in meeting assembled. Duke *v.* Markham, 105 N. C. 131 (1890). An actual meeting of the stockholders is not necessary if all consent, even though the statutes require a meeting. A subsequent creditor cannot complain. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). In *Re* George Newman & Co., [1895] 1 Ch. 674, the court said: "Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but, for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting."

[2] See § 709, etc., *infra*.

CHAPTER XXXVIII.

DISSOLUTION, FORFEITURE, AND IRREGULAR INCORPORATION.

§ 628. Methods of dissolution.
629, 630. Dissolution by the stockholders — A court of equity has no power to dissolve a corporation — Receiver, and distribution of assets by court of equity — Statutory dissolution.
631. Acts which do not constitute dissolution.
632. Only the attorney-general can institute a suit to forfeit a charter.
633. Forfeiture for misuser.
634. Forfeiture for non-user — Forfeiture for failure to complete a railroad or enterprise.
§ 635. Forfeiture for *ultra vires* acts and for usurpation of franchises — *Quo warranto* and injunction at the instance of the state.
636. State may waive forfeiture.
637. Who may set up forfeiture, dissolution, or non-legal incorporation — *De facto* corporations.
638. Lapse of charter by failure to comply with conditions.
639, 640. Repeals of charters — Right of stockholders to object.
641. The assets upon dissolution — Distribution.
642. The liabilities upon dissolution, consolidation, or sale.

§ 628. *Methods of dissolution.*— The dissolution of a corporation may be brought about by reason of (1) the forfeiture of its franchises by the adjudication of a court;[1] (2) the loss of its charter by a charter provision to that effect, in case the corporation fails to do certain things within a certain time;[2] (3) the repeal of its charter under the reserved power of the state;[3] (4) the voluntary surrender of the franchises by the stockholders; or (5) the expiration of the time limited for its existence in the charter.[4] Upon dissolution by any one of these methods the stockholders have certain rights in the corporate assets.

[1] See §§ 632–637, *infra*.

[2] See § 638, *infra*.

[3] This subject is considered in § 639, *infra*.

[4] "The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means." Swan, etc. Co. *v.* Frank, 148 U. S. 603, 611 (1893). In Michigan all charters except those of railroads, canals, and turnpikes are limited by the constitution to thirty years. "The evident intent of this section was to prevent the perpetuation of corporate power and corporate wealth so

§ 629. *Dissolution by the stockholders — A court of equity has no power to dissolve a corporation — Receiver, and distribution of assets by court of equity — Statutory dissolution.*— It is an unquestioned rule that all the stockholders, by unanimous consent, may effect a dissolution of the corporation by the surrender of the corporate franchises.[1]

Greater difficulty is found in determining whether a majority of the stockholders may dissolve a corporation. It has been held that the majority in interest of the stockholders of a corporation may dissolve it by a voluntary surrender of its franchises, even though a minority of the stockholders are opposed to the dissolution.[2]

Such, undoubtedly, is the case where the corporation is insolvent or is doing a failing business, and is manifestly unable to accomplish the purposes of its organization.[3] But where such

as to place it practically beyond the reach of the people or the legislature." It does not apply to a county-fair corporation. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Where a special charter is granted, and nothing is prescribed as to the duration of the corporation, the charter is perpetual. State *v.* Ladies of Sacred Heart, 99 Mo. 533 (1889). A corporation without limit of time in its charter as to duration is perpetual. Snell *v.* Chicago, 133 Ill. 413 (1890).

[1] Mobile, etc. R. R. *v.* State, 29 Ala. 573, 586 (1857); Savage *v.* Walshe, 26 Ala. 619 (1855); Attorney-General *v.* Clergy Society, 10 Rich. Eq. (S. C.) 604 (1859); Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 121 (1832); McIntyre Poor School *v.* Zanesville Canal, etc. Co., 9 Ohio, 203 (1839); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Slee *v.* Bloom, 19 Johns. 456 (1822); Webster *v.* Turner, 12 Hun, 264 (1877); Houston *v.* Jefferson College, 63 Pa. St. 423 (1869); Denike *v.* New York, etc. Co., 80 N. Y. 599, 606 (1880). Although a stockholder has sued in the federal court to wind up a Connecticut corporation, nevertheless it seems that such corporation may dissolve voluntarily. Kessler *v.* Continental, etc. Co., 42 Fed. Rep. 258 (1890).

[2] Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856); Hancock *v.* Holbrook, 9 Fed. Rep. 353 (1881) (reversed on another point, 112 U. S. 229); Wilson *v.* Central Bridge, 9 R. I. 590 (1870). Compare, however, dictum in Denike *v.* New York, etc. Co., 80 N. Y. 599, 603 (1880), citing cases, and in Mobile, etc. Co. *v.* State, 29 Ala. 573, 586 (1857), citing New Orleans, etc. Co. *v.* Harris, 27 Miss. 577 (1854); Ward *v.* Society, etc., 28 Eng. Ch. (1 Collier), 370 (1844); Angell & Ames, Corp., § 772. See also Berry *v.* Broach, 65 Miss. 450 (1888), where the business was a losing one. That the majority may not dissolve, see Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 168 (1867); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930; Lauman *v.* Lebanon, etc., 30 Pa. St. 42 (1858), and cases in following notes.

[3] The majority have a right to have the business wound up and sold when such business cannot be advantageously carried on. Price *v.* Holcomb,

is not the case, and where the term during which the corporation was to exist has not expired;[1] or where the dissolution is desired in order to obtain a new charter for a different object;[2] or where the dissolution is merely a device to effect a consolidation which otherwise would be *ultra vires*,[3] — it has been held that the majority cannot dissolve the corporation in opposition to the wishes of the minority.[4] Stockholders owning only a minority of the stock cannot, at common law, compel a dissolution before the expiration of the time limited in the charter for the existence of the corporation.[5] The directors of a corporation cannot dissolve it.[6]

A court of equity has, in the absence of statutory power, no

89 Iowa, 123 (1893). See also § 670, *infra*.

[1] Kean *v.* Johnson, 9 N. J. Eq. 401 (1853). See also Van Schmidt *v.* Huntington, 1 Cal. 25 (1850). Dissolution of a solvent corporation before its charter time has elapsed cannot be had except by unanimous consent of the stockholders. Barton *v.* Enterprise, etc. Assoc., 114 Ind. 226 (1888). In Louisiana a majority of the stockholders have the power to wind up the affairs of the corporation even though it is solvent. Pringle *v.* Eltringham, etc. Co., 21 S. Rep. 515 (La., 1897).

[2] Ward *v.* Society of Attornies, 1 Coll. 370 (1844).

[3] Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 403 (1871). See also § 670, *infra*.

[4] Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861); Curien *v.* Santini, 16 La. Ann. 27 (1861). See also dictum in Mobile, etc. R. R. *v.* State, 29 Ala. 573 (1857), and notes *supra*.

[5] Denike *v.* New York, etc. Co., 80 N. Y. 599 (1880) (citing cases); Folger *v.* Columbian Ins. Co., 99 Mass. 267 (1868); Pratt *v.* Jewett, 75 Mass. 34 (1857), where dissolution was denied, although the business was a losing one and the single person holding a majority of the stock was mismanaging the business; Croft *v.* Lumpkin, etc. Min. Co., 61 Ga. 465 (1878), where the corporation was solvent, but made no effort to transact business or proceed; Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867), holding that misconduct of the corporate officers is no cause for dissolution at the suit of the minority. To same effect, Belmont *v.* Erie R'y, 52 Barb. 637 (1869). A stockholder has no right to bring an action for the dissolution of the corporation. Byrne *v.* New York Brick, etc. Co., 16 Week. Dig. 139 (1882). In Tennessee it is held that where a hotel company cannot raise sufficient capital to build, and it has become impracticable and undesirable to proceed, and the enterprise is clearly a failure, a minority stockholder may force a winding up and distribution. O'Connor *v.* Knoxville Hotel Co., 93 Tenn. 708 (1894).

[6] Lake Ontario, etc. Bank *v.* Onondaga Bank, 7 Hun, 549 (1876): Jones *v.* Bank of Leadville, 10 Colo. 464 (1888); Ward *v.* Sea Ins. Co., 7 Paige, 294 (1838); Abbot *v.* American Hard Rubber Co., 33 Barb. 578 (1861). *Cf.* Bank of Switzerland *v.* Bank of Turkey, 5 L. T. (N. S.) 549 (1862), where the directors repaid sums advanced to an abortive company.

jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of their assets among the individual corporators at the suit of one or more of the stockholders.[1] A court of equity has no power to sequestrate the

[1] U. S. Trust Co. *v.* N. Y. etc. R. R., 101 N. Y. 478 (1886); Oldham *v.* Mt. Sterling Imp. Co., 45 S. W. Rep. 779 (Ky., 1898); Verplanck *v.* Mercantile, etc. Co., 1 Edw. Ch. 84 (1831); Hardon *v.* Newton, 14 Blatchf. 376 (1878); S. C., 11 Fed. Cas. 500; Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848); Ferris *v.* Strong, 3 Edw. Ch. 127 (1837). See also Strong *v.* McCagg, 55 Wis. 624 (1882); Latimer *v.* Eddy, 46 Barb. 61 (1864). But see dictum in Benedict *v.* Columbus, etc. Co., 40 N. J. Eq. 23, 36 (1891); Barton *v.* International, etc. Alliance, 36 Atl. Rep. 658 (Md., 1897); Wallace *v.* Pierce-Wallace, etc. Co., 70 N. W. Rep. 216 (Iowa, 1897); People *v.* Weigley, 155 Ill. 491 (1895); State, etc. Ins. Co. *v.* San Francisco Super. Ct., 101 Cal. 135 (1894). A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. Mason *v.* Equitable League, 77 Md. 483 (1893). A stockholder cannot file a bill for the dissolution of an insolvent corporation. Heap *v.* Heap Mfg. Co., 97 Mich. 147 (1893). But the court will appoint a receiver to preserve the corporate assets where the majority do not elect officers. Lawrence *v.* Greenwich Fire Ins. Co., 1 Paige, 587 (1829). Any person may be appointed receiver. See § 864, *infra*. Where, upon voluntary dissolution, the stockholders appoint two of their number to administer the assets, the court will not displace them and appoint a receiver. Follett *v.* Field, 30 La. Ann. 161 (1878). A single stockholder in an insolvent corporation cannot have it dissolved in a court of equity. Merryman *v.* Carroll, etc. Co., 4 R'y & Corp. L. J. 12 (1888). A corporation cannot be dissolved except by judicial sentence or sovereign power. A court of equity has no inherent power to decree dissolution. A member cannot sue for his part of the assets until a dissolution is had. Magee *v.* Geneseo Academy, 17 N. Y. St. Rep. 221 (1888). A stockholder cannot have the corporation wound up in equity. Hinckley *v.* Pfister, 83 Wis. 64 (1892). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental were declared illegal and void. Where the same company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). The appellate court, in Florida Const. Co. *v.* Young, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former. The order appointed a receiver of the former and granted an injunction. "The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought

property of a corporation by means of a receiver.[1] Sequestration is the taking of property from the owner for a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.[2] Sometimes the corporation, after paying its debts, distributes its assets among its stockholders without any dissolution.[3]

In many of the states and in England there are statutes regulating the dissolution of a corporation. These statutes generally specify what parties may bring suit for dissolution, on what grounds dissolution will be decreed, and what proceedings must be taken to obtain the decree. Such a statutory dissolution is hardly a voluntary dissolution, and yet it approaches that kind of dissolution more nearly than any other.[4]

by the attorney-general in the name of the sovereign. The court of chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined, until the power was conferred by statute, to sequestrate corporate property through the medium of a receiver or to dissolve corporate bodies, or to restrain the usurpation of corporate powers." Decker *v.* Gardner, 124 N. Y. 334 (1890). In the absence of statutory authority, a court of equity has no jurisdiction to dissolve a corporation. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892).

[1] *Re* Binghamton Gen. Elect. Co., 143 N. Y. 261 (1894). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made and illegal elections held, even though the illegal officers are running the business; nor will a receiver be appointed, although the purpose of the company is impracticable, the member bringing the suit having been a party thereto. Equity will not interfere, although the company is wholly illegal and unauthorized. The remedy is at law. Crombie *v.* Order of Solon, 157 Pa. St. 588 (1893).

[2] Proctor *v.* Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896).

[3] See §§ 670–672, *infra*, and § 548, *supra*.

[4] Thus, in New York, elaborate provision is made. The majority of the directors may apply for dissolution. See Code Civ. Pro., §§ 2419, etc. As also may a creditor or stockholder. Code Civ. Pro., §§ 1784, etc. Under the New York statute the court will order the dissolution of a corporation where a majority of the directors and stockholders wish it, where the interests are discordant, and a dissolution will be beneficial. *Re* Importers', etc. Exchange, 132 N. Y. 212 (1892). Under the old statute, part of the stockholders might compel a dissolution where there had been a failure to elect officers. Ward *v.* Sea Ins. Co., 7 Paige, 294 (1838). Where a majority of the directors and stockholders apply for dissolution the court will presume that it should be granted. *Re* Niagara Ins. Co., 1 Paige, 258 (1828). In general, see also *Re* Pyrolusite, etc. Co., 29 Hun, 429 (1883); *Re* Boynton, etc. Co., 34 Hun, 369 (1884). In West Virginia one-third in interest of the stockholders may apply to the court for a dissolution. See Hurst *v.* Coe, 30 W. Va. 158 (1887). Corporate creditors cannot, before judgment, apply for a dissolution of the corporation. Cole *v.* Knickerbocker, etc. Ins. Co.,

An American court has no power to dissolve an English corporation and wind up its business. A resolution to that effect by the stockholders may be declared invalid. The American courts will not enjoin a dissolution and winding up of the com-

23 Hun, 255 (1880); aff'd, 91 N. Y. 641. Where the statute provides that two-thirds of the stockholders may cause the corporation to be wound up, their right to do so is absolute and cannot be controlled by the court. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254 (1893). The voluntary dissolution of a company under the statute, but without ten days' notice required by the statute, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). Under statutes in some of the states, an information in the nature of *quo warranto* may be filed at the relation of a shareholder against an illegally-existing corporation to compel a dissolution. Albert *v.* State, 65 Ind. 413 (1879). Under the National Banking Act, see Kennedy *v.* Gibson, 8 Wall. 498 (1869); Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383 (1871); Bank *v.* Kennedy, 17 Wall. 19 (1872); *Re* Platt, 1 Ben. 534 (1867); S. C., 19 Fed. Cas. 815. A resolution of two-thirds of the stockholders in a national bank to go into liquidation does not dissolve the corporation. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552 (1889).

Under the English act it has been held that the majority cannot insist upon dissolution, though the business is a losing one. *Re* Suburban Hotel Co., L. R. 2 Ch. 737 (1867). But the court may grant it under such circumstances even to a few stockholders. *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865). In determining whether to order a winding up the court will not consider possible future profits. *Re* European, etc. Soc., L. R. 9 Eq. 122 (1869). For an application to have a winding up because business had not been commenced within a year, see *Re* Tumacacori, L. R. 17 Eq. 534 (1874). If the corporation has sold its property and ceased business the court will order a distribution of the assets. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). The mere fact that the company is losing money is not sufficient to have a winding up. *Re* Joint-stock Coal Co., L. R. 8 Eq. 146 (1869). The court has a judicial discretion, and will not ordinarily order a winding up at the instance of one stockholder in opposition to all the others. *Re* London Suburban Bank, L. R. 6 Ch. 641 (1871). But if the company is insolvent or is doing a ruinous business with no prospect of a change, the court will order a winding up on the petition of a minority. *Re* Great Northern, etc. Min. Co., 17 W. R. 462 (1869). Where the main purpose of a corporation is the furnishing of lodgings and refreshments at the queen's jubilee, a shareholder has the right to have the company dissolved after the jubilee, even though, under general clauses, the objects of the company are to furnish lodgings and refreshments generally, and even though the directors intend to continue the business. *Re* Amalgamated Syndicates, Ltd., 77 L. T. Rep. 431 (1897). Where a company is organized to work gold mines in a specified place as well as elsewhere, and the company actually works mines elsewhere, but not in the specified

pany in England in accordance with English laws.[1] The courts of one state cannot dissolve a corporation created by another state,[2] but may appoint a receiver of the corporate assets within the jurisdiction.[3]

Where a dissolution is being obtained or has been obtained by fraud and an inequitable overbearing of the rights of an innocent stockholder,[4] a court of equity will, at the instance of the latter, enjoin or set aside the dissolution.[5]

place, the main purpose of the company is not carried out and a dissolution may be had. *Re* Coolgardie, etc. Mines, Ltd., 76 L. T. Rep. 269 (1897). Where a corporation has been enjoined from using its name, this is cause for a dissolution. *Re* Thomas, etc. Sons, Ltd., 76 L. T. Rep. 100 (1897). A court has no jurisdiction to wind up a corporation where a company was never incorporated, one of the requisite incorporators not having signed the articles of incorporation. *Re* National, etc. Corp., [1891] 2 Ch. 505. See also, in general, under this winding-up act, *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865); *Re* Exmouth Docks Co., L. R. 17 Eq. 181 (1873); *Re* Sanderson's Patents Assoc., L. R. 12 Eq. 188 (1871); *Re* Bradford Navigation Co., L. R. 10 Eq. 331 (1870); Princess of Reuss *v.* Bos, L. R. 5 H. L. 176 (1871); *Re* Commercial Bank, L. R. 6 Eq. 517 (1868); *Re* London India Rubber Co., L. R. 1 Ch. 329 (1866); *Re* Pen-y-Van Colliery Co., L. R. 6 Ch. D. 477 (1877); *Re* United Service Co., L. R. 7 Eq. 76 (1868); *Re* German Date Coffee Co., L. R. 20 Ch. D. 169 (1882), holding that where a company was organized and chartered to engage in manufacture and sale of goods under a certain patent, when in fact there was no patent such as was referred to, and an application for such a patent was refused, *held*, that the substratum upon which the company was based or main object for which it was formed not being in existence, the company must be dissolved on petition of a shareholder, notwithstanding it was profitably engaged in the manufacture and sale of the commodity without any patent, and notwithstanding a very large majority of the company desired to have the company continue in business. To same effect, under somewhat similar circumstances, *Re* Haven Gold Min. Co., L. R. 20 Ch. D. 151 (1882). A lender of money to a benefit building society cannot petition to wind it up. *Ex parte* Williamson, L. R. 5 Ch. 309 (1869). Mortgage bondholders cannot institute winding-up proceedings under the English act. *Re* Uruguay, etc. R'y, L. R. 11 Ch. D. 372 (1879). For many cases relative to the question of when a court will order a winding up and when not, under the English statute, see Healey, Companies Law and Practice, pp. 446, etc.

[1] Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893).

[2] Baker *v.* Backus, 32 Ill. 79, 110 (1863).

[3] See § 865, *infra*.

[4] People *v.* Hektograph Co., 10 Abb. N. Cas. 358 (1882).

[5] *Re* Beaujolais Wine Co., L. R. 3 Ch. 15 (1876); *Re* London, etc. Discount Co., L. R. 1 Eq. 277 (1865). In Stupart *v.* Arrowsmith, 3 Sm. & G. 176 (1855), a bill filed by a shareholder on behalf of himself and others to set aside a dissolution, after three years' acquiescence, no fraud or imposition being alleged, was dismissed with costs. *Cf.* Kent *v.* Jackson, 2

§ 630. There has been some doubt whether a voluntary dissolution by all or a majority of the stockholders is completed by a mere vote of the stockholders, or whether a decree of a court is needed and is sufficient; or whether a legislative acceptance and confirmation of the dissolution is essential. The better opinion is that the resolution of the stockholders to dissolve will effect a dissolution only after the legislature has accepted it and ordained it, or a court duly authorized by statute to accept a voluntary dissolution has entered a decree to that effect.[1] Where a charter expires no adjudication of dissolution is necessary.[2]

De G., M. & G. 49 (1852); Bailey's Appeal, 96 Pa. St. 253 (1880), where certain stockholders procured the dissolution of a corporation by fraud. They were held to be trustees *ex maleficio* for the *bona fide* stockholders, and as such liable to account to them for the assets of the company.

[1] Portland Dry Dock, etc. Co. *v.* Trustees of Portland, 12 B. Mon. (Ky). 77 (1851); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267 (1836); Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530 (1847); Currier *v.* Santim, 16 La. Ann. 27 (1861); Norris *v.* Smithville, 1 Swan (Tenn.), 164 (1851); Bradt *v.* Benedict, 17 N. Y. 93, 99 (1858); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839); Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28, 45 (1828); Mumma *v.* Potomac, etc., 8 Pet. 281, 287. An acceptance by the state of a surrender of a charter is necessary in order to complete a dissolution by voluntary surrender. Mylrea *v.* Superior, etc. R'y, 67 N. W. Rep. 1138 (Wis., 1896). A mere resolution of the stockholders is ineffectual. New York, etc. Works *v.* Smith, 4 Duer, 362 (1855); Powell *v.* Oregonian R'y, 38 Fed. Rep. 187 (1889). A notice of the resolution sent to the governor is ineffectual. Merchants' Bank *v.* Heard, 37 Ga. 401 (1867); Revere *v.* Boston, etc. Co., 32 Mass. 351 (1834). By a statute the acceptance may be made by a proclamation Campbell *v.* Mississippi Union Bank, 7 Miss. 625, 681 (1842). The judgment of a court of law in such a case is ineffectual. Chesapeake, etc. Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 107 (1832). In England the surrender at common law was to the king, and had to be accepted by him in order to work a dissolution. Rex *v.* Amery, 2 T. R. 515, 531 (1788); Rex *v.* Gray, 8 Mod. 358 (1825). *Cf.* Bruce *v.* Platt, 80 N. Y. 379 (1880). A voluntary dissolution need not be accepted by the state. Merchants', etc. Line *v.* Waganer, 71 Ala. 581 (1882). The case of Webster *v.* Turner, 12 Hun, 264 (1877), can be upheld only in connection with § 631, *infra*. See also cases in notes *supra*, to effect that a court cannot decree a dissolution at the instance of stockholders. Many states now have statutes expressly giving to courts such authority. The statutes may of course make a voluntary dissolution effectual without legal proceedings.

[2] People *v.* James, 5 N. Y. App. Div. 412 (1896), holding also that where the statute provides for the directors winding up the company the attor-

§ 631. *Acts which do not constitute dissolution.*— There are certain acts and facts which do not in themselves constitute a dissolution. A dissolution is not effected by a failure to elect officers;[1] nor by a sale or assignment of all the corporate property;[2] nor by the fact that one person owns all the shares of stock;[3] nor by a cessation of all corporate business and acts;[4]

ney-general cannot maintain an action for that purpose in behalf of the state.

[1] Rose *v.* Turnpike Co., 3 Watts (Pa.). 46 (1834); Lehigh Bridge Co. *v.* Lehigh Coal, etc. Co., 4 Rawle (Pa.), 8, 23 (1832); Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Hoboken Building, etc. Assoc. *v.* Martin, 13 N. J. Eq. 427 (1861); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850); Nashville Bank *v.* Petway, 3 Humph. (Tenn.) 522 (1842); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Russell *v.* McLellan, 31 Mass. 63 (1833); Cahill *v.* Kalamazoo, etc. Ins. Co., 2 Doug. (Mich.) 124, 140 (1845); Harris *v.* Mississippi Valley, etc. R. R., 51 Mich. 602 (1875); People *v.* Runkle, 9 Johns. 147 (1812); Philips *v.* Wickham, 1 Paige, 590 (1829); Slee *v.* Bloom, 5 Johns. Ch. 366 (1821); S. C., 19 Johns. 456 (1822); St. Louis, etc. Loan Assoc. *v.* Augustin, 2 Mo. App. 123 (1876); Knowlton *v.* Ackley, 62 Mass. 93 (1851); Mendota *v.* Thompson, 20 Ill. 197 (1858); People *v.* Wren, 5 Ill. 269 (1843). Nor will a resignation of all the officers dissolve the corporation. Muscatine Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850). The corporate rights and franchises are, in such a case, merely dormant until other officers are elected. Philips *v.* Wickham, 1 Paige, 590 (1829). *Cf.* Lea *v.* American Atlantic, etc. Canal Co., 3 Abb. Pr. (N. S.) 1 (1867).

[2] Barclay *v.* Talman, 4 Edw. Ch. 123 (1842); De Camp *v.* Aylward, 52 Ind. 468 (1876); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Rollins *v.* Clay, 33 Me. 132 (1851); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279 (1877); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854), where a railroad corporation had leased the entire property to another corporation; State *v.* Merchant, 37 Ohio St. 251 (1881); Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865). To same effect, State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); Bruffett *v.* Great Western R. R., 25 Ill. 353 (1861). The fact that the company sells its property and that one person acquires all the stock does not dissolve the corporation. Parker *v.* Bethel Hotel Co., 96 Tenn. 252 (1896).

[3] See § 709, *infra*.

[4] Attorney-General *v.* Bank of Niagara, Hopk. Ch. 403 (1825); Harrington *v.* Connor, 70 N. W. Rep. 911 (Neb., 1897); Baptist Meeting-house *v.* Webb, 66 Me. 398 (1877); Rollins *v.* Clay, 33 Me. 132 (1851); Harris *v.* Nesbit, 24 Ala. 398 (1854); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279, 288 (1877); Nimmons *v.* Tappan, 2 Sweeney (N. Y.), 652 (1870); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); State *v.* Barron, 58 N. H. 370 (1878); *Re* Jackson M. Ins. Co., 4 Sandf. Ch. 559 (1847); West *v.* Carolina, etc. Co., 31 Ark. 476 (1876); Bache *v.* Horticultural Soc., 10 Lea (Tenn.), 436 (1882); Brandon Iron Co. *v.* Gleason, 24 Vt. 228 (1852); Atlanta *v.* Gate, etc. Co., 71 Ga. 106 (1883). Dissolution may exist by cessation, etc., so far as the reversion of property given to the corporation is concerned. Stone *v.* Framington, 109 Mass. 303 (1872). A cessation of business with the understanding that the company is dissolved, the property having been transferred to

nor by the death of its stockholders;[1] nor by insolvency;[2] nor, in all cases, by a consolidation with another corporation under statutory authority.[3] Nor is it dissolved by the appointment of a receiver,[4] or the foreclosure of a mortgage,[5] nor by failure to file reports.[6] The fact that there are less stockholders than the charter requires does not invalidate the acts of the corporation.[7] For certain purposes, however, such as rendering stockholders liable on their statutory liability,[8] or relieving directors from a penal liability,[9] dissolution is held to arise by some of these acts.

the stockholders, does not work a dissolution. Suits may be instituted against the company. Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890). A foreclosure sale of all the property and franchises of a corporation will close out and foreclose the whole interest of the stockholders therein. Vatable *v.* New York, etc. R. R., 96 N. Y. 49 (1884); Thornton *v.* Wabash R'y, 81 N. Y. 462, 467 (1880). See also Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1876). As to reorganization, see ch. LII, *infra*.

[1] Boston Glass Mfy. *v.* Langdon, 41 Mass. 49, 52 (1841); Russell *v.* McLellan, 31 Mass. 63, 69 (1833).

[2] Moseby *v.* Burrow, 52 Tex. 396 (1880); Valley Bank, etc. Inst. *v.* Sewing Soc., 28 Kan. 423 (1882). Such is the case though a receiver has been appointed. State *v.* Merchant, 37 Ohio St. 251 (1881); National Bank *v.* Insurance Co., 104 U. S. 54 (1881); Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875). The insolvency of a corporation and the appointment of a receiver do not constitute dissolution. Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1 (1896).

[3] See ch. LIII, *infra*.

[4] The appointment of a receiver does not dissolve a corporation. Nothing but the expiration of the charter or the judgment of a court can do that. Hasselman *v.* Japanese, etc. Co., 2 Ind. App. 180 (1891).

[5] Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865); White, etc. R. R. *v.* White, etc. R. R., 50 N. H. 50 (1870). In Pennsylvania it seems to be held that the foreclosure sale of all the assets of the company extinguishes the company itself. Reynolds *v.* Cridge, 1 Pa. Dist. 693 (1892); New Castle Northern R'y *v.* New Castle, etc. R. R., 1 Pa. Dist. 768 (1892). Where a railroad company's property has been foreclosed, and for twenty-six years it has owned no property and kept up no existence, it will be presumed to have been dissolved, and service upon it will be set aside. Combes *v.* Keyes, 89 Wis. 297 (1895). A corporation is not dissolved by the fact that it has lost all its property. Weigand *v.* Alliance Supply Co., 28 S. E. Rep. 803 (W. Va., 1897).

[6] Failure to file a report does not work a forfeiture of the charter. State *v.* Brownstown, etc. Co., 120 Ind. 337 (1889).

[7] Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). The facts that the corporate officers are dead, and the number of stockholders is less than the number required for incorporation, do not dissolve the corporation. *Re* Belton, 47 La. Ann. 1614 (1895).

[8] See Slee *v.* Bloom, 19 Johns. 456 (1822), and § 219, *supra*. *Cf.* Bradt *v.* Benedict, 17 N. Y. 93 (1858).

[9] Losee *v.* Bullard, 79 N. Y. 404 (1880).

§ 632. *Only the attorney-general can institute a suit to forfeit a corporate charter.*— Such unquestionably is the law. It is for the state alone to withdraw the charter which the state has given. A stockholder cannot institute the suit;[1] nor a corporate creditor;[2] nor can the municipal authorities by reason of a change of route by a railroad;[3] nor can a person who is overcharged on a turnpike bring suit to forfeit the company's charter.[4] The secretary of state cannot forfeit a charter, even though the statute prescribes forfeiture for non-payment of taxes.[5] A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder.[6]

§ 633. *Forfeiture for misuser — Acts which constitute a misuser.*— The law is clear that, if a corporation misuses its powers, the state may by a suit withdraw the charter which it has

[1] North *v.* State, 107 Ind. 356 (1886); Baker *v.* Backus, 32 Ill. 79 (1863); Commonwealth *v.* Union Ins. Co., 5 Mass. 230 (1809); State *v.* Paterson, etc. Turnp. Co., 21 N. J. L. 9 (1847); Murphy *v.* Farmers' Bank, 20 Pa. St. 415 (1853); Rice *v.* National Bank, 126 Mass. 300 (1879); Folger *v.* Columbian, etc. Ins. Co., 99 Mass. 267 (1868), where the court refused to recognize a dissolution decreed by a New York court at the instance of a stockholder; Raisbeck *v.* Oesterricher, 4 Abb. N. Cas. 444 (1878), where the plaintiff claimed that the incorporation was irregular.

[2] Gaylord *v.* Fort Wayne, etc. R. R., 6 Biss. 286 (1875); S. C., 10 Fed. Cas. 121. A judgment forfeiting the charter of a private corporation, where the state is not a party to the suit, is a nullity. Pickett *v.* Abney, 84 Tex. 645 (1892).

[3] Moore *v.* Brooklyn, etc. R. R., 108 N. Y. 98 (1888).

[4] Commonwealth *v.* Allegheny Bridge Co., 20 Pa. St. 185 (1852); State *v.* White's, etc. Co., 3 Tenn. Ch. 164 (1876), where the bill purported to be in the attorney-general's name. A shipper of freight cannot by bill in equity compel a canal company to repair and render its canal navigable. Only the state can complain. Buck, etc. Co. *v.* Lehigh, etc. Co., 50 Pa. St. 91 (1865). The statutes of a state, however, sometimes change these rules of law.

[5] A statute of West Virginia stating that charters shall be forfeited if corporate taxes are not paid does not authorize the secretary of state to declare corporate charters forfeited. Forfeiture can be made only in a suit by the state brought for that purpose. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43 (1887).

[6] Coquard *v.* National L. O. Co., 49 N. E. Rep. 563 (Ill., 1898).

given. Great difficulty, however, arises in determining what constitutes a misuser. A clear idea can be obtained only by a study of the cases themselves.[1]

[1] The state will, at the instance of the attorney general, forfeit the charter of the corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations, for the purpose of forming a monopoly in and raising the price of sugar. The "trust" is not a joint-stock association. It is of the character of a trust estate. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The state may forfeit a charter for a failure of the officers to file the annual report and of the stockholders to pay in the capital stock as required by statute. It is immaterial that the state's action was induced by parties who were themselves responsible for the failure to comply with the statute. People *v.* Buffalo, etc. Co., 131 N. Y. 140 (1892). It is cause for forfeiture that some of the directors, all of whom were required to be stockholders, held but one share each, the certificates for which shares were transferred back at once to the real parties in interest, thus leaving the directors disqualified; also that required certificates had not been filed; also that annual elections had not been held; also that the corporation had done business *ultra vires*. But unless public interest so requires, the attorney-general should not bring suit at his own instance. Lorillard *v.* Clyde, 142 N. Y. 456 (1894).

In State *v.* Park, etc. Lumber Co., 58 Minn. 330 (1894), the court forfeited the charter of a company that had been incorporated in Minnesota for the purpose evidently of doing all its business in Wisconsin. The charter was forfeited on the ground that the company had not complied with the statute in having its place of business and keeping its books within the state. The court also approved of a decision in Wisconsin to the effect that at common law a charter may be forfeited where the corporation keeps its principal office, books, and records out of the state to such an extent that it is impossible for the state and its courts to have full jurisdiction and visitorial power over the corporation. For failure to keep a part of its road in repair, or to rebuild a burned bridge, or for abandoning a part of its road, a plank-road company's charter may be forfeited. People *v.* Plainfield, etc. Co., 105 Mich. 9 (1895). The charter of a water-works company may be forfeited when in violation of its charter it does not furnish pure water and does not increase its source of supply. It is no defense that the municipality had elected to take over the property as provided in the original ordinance, or that the municipality had the right to annul the contract between the municipality and the company. Capital City Water Co. *v.* State, 105 Ala. 406 (1894). To a *quo warranto* to forfeit a water-works charter because it failed to supply sufficient water, it is no answer that the company had intended to enlarge, but had not done so because the city had declared its intention to exercise its option to buy the works. State *v.* Capital City Water Co., 102 Ala. 231 (1894). It has been held to be a misuser to file a false certificate that the capital stock has been paid up, Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853); or to establish a branch bank where the charter authorizes only a principal banking place, People *v.*

In Ohio it has been held that a statute giving to a court the power to forfeit the franchises of turnpike roads for being out

Oakland County Bank, 1 Doug. (Mich.) 282 (1843); or to keep its books and place of business out of the state, State *v.* Milwaukee, etc. R'y, 45 Wis. 590 (1878); or for an insurance company to take risks which it cannot pay if required, Ward *v.* Farwell, 97 Ill. 593 (1881); or for taking "graveyard" insurance, State *v.* Central, etc. Assoc., 29 Ohio St. 399 (1876), the person receiving the insurance having no insurable interest in the person insured; or for not keeping tracks in a condition required by the charter, State *v.* Madison Street R'y, 72 Wis. 612 (1888); or for a canal company to allow the canal to become out of repair, State *v.* Pennsylvania, etc. Canal Co., 23 Ohio St. 121 (1872); or for a ferry company to be guilty of the same neglect, State *v.* Council Bluffs, etc. Co., 11 Neb. 354 (1881); or for filing false and fraudulent articles of association, State *v.* Bailey, 16 Ind. 46 (1861), holding also that mere insolvency is no cause for forfeiture; or for accepting subscriptions by persons who are notoriously insolvent, Holman *v.* State, 105 Ind. 569 (1885); Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242 (1878); or for a failure of a river-improvement company to make an improvement as commanded by a statute, People *v.* Improvement Co., 103 Ill. 491 (1882); or for a bank to loan to its directors in violation of a statute, Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 497 (1837); or for a charitable corporation to divide with a lobbyist an appropriation obtained from the legislature, People *v.* Dispensary, etc. Soc., 7 Lans. 304 (1873); or for an insurance company to insure in a manner contrary to statute and to delay payments of losses, State *v.* Standard, etc. Assoc., 38 Ohio St. 281 (1882); for a bank to contract debts beyond the charter limits, and to make dividends before resuming specie payments, State Bank *v.* State, 1 Blackf. (Ind.) 267 (1823); or for persistently taking usurious interest, Commonwealth *v.* Commercial Bank, 28 Pa. St. 383 (1857); State *v.* Commercial Bank, 33 Miss. 474 (1857); or for a mutual relief association to be run for the benefit of its officers only, State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885); or for a bank to suspend specie payments, State *v.* Bank of South Carolina, 1 Spears, L. (S. C.) 433 (1841); Commercial Bank *v.* State, 14 Miss. 599 (1846); but see State *v.* New Orleans, etc. Co., 2 Rob. (La.) 529 (1842); or for a turnpike company to allow its road to be out of repair, Washington, etc. T. Co. *v.* State, 19 Md. 239 (1862); Coon *v.* Plymouth, etc. Co., 32 Mich. 248 (1875); Darnell *v.* State, 48 Ark. 321 (1887); State *v.* Pawtucket, etc. Corp., 8 R. I. 182 (1865), where the company neglected a part of its road which it had sold to a municipality. Not every neglect is fatal. The question is for the jury. People *v.* Royalton, etc. Turnp. Co., 11 Vt. 431 (1839). And it is no defense to forfeiture for neglect that the road has been sold on an execution sale. Commonwealth *v.* Tenth, etc. Turnp. Co., 59 Mass. 509 (1850) Nor is it a defense that the state has authorized a competing line. Turnpike Co. *v.* State, 3 Wall. 210 (1865).

In State *v.* Essex Bank, 8 Vt. 489 (1836), the court refused to decree a forfeiture, since the public were not injured, though the corporation was clearly guilty of misuser. If a gas company is ordered by a municipality under a statutory power to reduce the price of gas, it may defend against forfeiture for non-compliance by asserting that the municipality was fraudulently induced to act. State *v.* Cincinnati, etc. Co., 18 Ohio St. 262

of repair for the preceding six months, without having a jury pass upon the question and without appeal, is unconstitutional.[1]

(1868). If a company has incorporated under a general act, but for a purpose not authorized by it, a suit for forfeiture lies. State *v.* Beck, 81 Ind. 501 (1882), where a turnpike company incorporated to *purchase* turnpikes, a purpose not authorized by the statute. The state may create causes for the forfeiture of insurance companies' charters. Chicago, etc. Ins. Co. *v.* Needles, 113 U. S. 574 (1885). Where the state sues to forfeit the charter of a railroad company which has leased its road, the latter cannot institute a suit to test the validity of that lease. Ogdensburgh, etc. R. R. *v.* Vermont, etc. R. R., 4 Hun, 712 (1875). If *quo warranto* is brought for not making reports, the corporation may offer to make the reports. State *v.* Barron, 57 N. H. 498 (1876). By statute, forfeiture may be decreed where the court decides that a continuance of business by an insurance company will be hazardous to the community. Ward *v.* Farwell, 97 Ill. 593 (1881). The legislature cannot amend a charter by forfeiting the charter if specie payments are not made within a specified time. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30 (1829). It cannot provide that charters shall be forfeited for nonpayment of corporate obligations, so far as corporations existing before the statute are concerned. Aurora, etc. Co. *v.* Holthouse, 7 Ind. 59 (1855). But it may prescribe that the charter be repealed unless within a certain time the company do certain things—here make good its capital. Lothrop *v.* Stedman, 42 Conn. 583 (1875). And may force the dissolution of insolvent insurance corporations, or corporations whose continuance of business will be dangerous to the public. Ward *v.* Farwell, 97 Ill. 593 (1881); Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82 (1881). So also as to banks. The remedy "for a violation of duty may be altered and changed by legislative provisions if the power of accomplishing the same objects by any means is within the legitimate scope of legislative authority." Commonwealth *v.* Farmers', etc. Bank, 38 Mass. 542 (1839). *Quo warranto* does not lie against a corporation for *ultra vires* acts, such as issuing watered stock or purchasing its own stock. "Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture." The courts refuse to define what *ultra vires* acts will and what will not sustain *quo warranto* proceedings. They must be acts which "so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." State *v.* Minnesota, etc. Co., 40 Minn. 213 (1889). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. R'y, 45 S. C. 470 (1895).

The following acts and facts do not constitute a misuser: Where, eight

[1] Salt Creek Val. Turnp. Co. *v.* Parks, 50 Ohio St. 568 (1893). The legislature may authorize county commissioners to institute proceedings to forfeit the charters of plank-road companies which do not keep their plank-roads in repair. Davis *v.* Vernon, etc. Co., 29 S. E. Rep. 475 (Ga., 1898).

A charter will not be forfeited merely because the corporation was incorporated in one state and all its officers and stock-

years after the organization of a water-works company, the attorney-general applies for leave to bring suit to forfeit the charter on account of the issue of watered stock and bonds, and of violations of city ordinances, and for not keeping accurate books of account, the city having the right to buy the works at the end of seven years, the court will not allow the suit to be commenced. The court said: "Unless there is a clear, wilful misuse, abuse, or non use of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain, wilful abuse of power or violation of law, within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises." State *v.* Janesville Water Co., 92 Wis. 496, 501 (1896). Where a company is granted power by a city to build tracks on the streets on condition that the tracks conform to the street grade, and on condition that the company pay for the paving between its tracks, its failure to comply with such conditions is no ground for declaring a forfeiture of the company's charter. State *v.* Omaha, etc. Co., 91 Iowa, 517 (1894). An action by the state against a stock exchange in San Francisco, to annul its charter on the ground that it was a gambling institution, failed in People *v.* San Francisco Public Stock Exchange, 33 Pac. Rep. 785 (Cal., 1893), because the complaint did not clearly allege gambling acts. There is no misuser of franchises by a corporation where the objectionable act was by a cashier in direct violation of orders given to him by the directors. State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218 (1846); or where a railroad or turnpike company has constructed its road over land without obtaining the right of way, State *v.* Kill Buck Turnp. Co., 38 Ind. 71 (1871); People *v.* Hillsdale, etc. Turnp. Co., 2 Johns. 190 (1807); or where the company deviates slightly from its route, fails to file a map of the route, and neglects to elect new directors, Harris *v.* Mississippi, etc. R. R., 51 Miss. 602 (1875); or fails to file a statement of its condition as required by statute, the object of such filing having ceased, People *v.* Improvement Co., *supra;* or where the public are compelled to open a drawbridge for themselves, Commonwealth *v.* Breed, 21 Mass. 460 (1827); or where a bank has assigned its assets to trustees to pay its debts, State *v.* Commercial Bank, 21 Miss. 569 (1850); or for the insolvency of a bank, it having since then become solvent, People *v.* Bank of Niagara, 6 Cow. 196 (1826); People *v.* Washington, etc. Bank, 6 Cow. 212 (1826) (but the contrary has been held as regards a suspension of specie payments and a subsequent resumption, Commercial Bank *v.* State, 14 Miss. 599 (1846); Planters' Bank *v.* State, 15 Miss. 163—1846); or where a bridge company gives reduced rates to constant patrons, and gives free passage in payment for land and fails to file required statements, Commonwealth *v.* Alleghany, etc. Co., 20 Pa. St. 185 (1852); or that the corporation has incorporated also in another state, Commonwealth *v.* Pittsburg, etc. R. R., 58 Pa. St. 26 (1868); or that required statements are not filed, State *v.* Barron, 58 N. H. 370 (1878). Though a corporation take more interest than

holders reside in another state; nor because it keeps its books out of the state, in violation of a statute.[1]

A charter will be forfeited where it contemplates a medical school and is actually used to sell medical diplomas.[2]

In charging misuser the word "wilful" is not necessary.[3]

§ 634. *Non-user as a cause for forfeiture — Forfeiture for failure to complete a railroad or enterprise.* — Non-user of its franchise is a cause for forfeiture where a corporation is possessed not only of its franchise to be a corporation, but also other franchises, such as a right of way, which the public are

allowed by charter it may recover. The only penalty is such as the usury law prescribes. Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a vigorous and interesting but futile effort to oust a going railroad company from its franchises for all kinds of misfeasances, malfeasances, and non-feasances, see International, etc. R'y *v.* State, 75 Tex. 356 (1889); and for a successful case in the same line, see East Line, etc. R'y *v.* State, 75 Tex. 434 (1889). It is not for the state to institute an action to dissolve and wind up a mutual benefit and building corporation merely because some of the members are dissatisfied. People *v.* Lowe, 117 N. Y. 175, 190 (1889). No *quo warranto* lies for using an abbreviated corporate name. People *v.* Bogart, 45 Cal. 73 (1872). The averments of misuser must be definite and certain. Danville, etc. Pr. Co. *v.* State, 16 Ind. 456 (1861). And the misuser must be wilful. State *v.* Columbia, etc. Co., 2 Sneed (Tenn.), 254 (1854); Baltimore *v.* Connellsville, etc. R'y, 6 Phila. 190 (1866). Concerning the pleadings in *quo warranto*, see People *v.* Stanford, 77 Cal. 360 (1888). An information in the nature of *quo warranto* to forfeit the charter of a temperance enterprise is not definite enough in its charges when it charges a perversion of funds. People *v.* Dashaway Assoc., 84 Cal. 114 (1890), containing also a discussion on the pleadings and practice. Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held, contrary to the statutes and constitution of the state, by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and give it a right to own such stock. South Carolina *v.* Port Royal, etc. R'y, 56 Fed. Rep. 333 (1893).

[1] North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). In Kansas the charter of a corporation may be forfeited at the instance of the state if the corporation fails to keep its general office and the office of its treasurer within the state in accordance with the terms of the statutes. State *v.* Topeka Water Co., 52 Pac. Rep. 422 (Kan., 1898). Where a corporation removes all its offices from the state, a stockholder may apply, under a statute, for a dissolution on the ground of an abuse of powers. Simmons *v.* Norfolk, etc. Steamboat Co., 113 N. C. 147 (1893); State *v.* Park, etc. Lumber Co., 58 Minn. 330 (1894).

[2] Illinois, etc. University *v.* People, 46 N. E. Rep. 737 (Ill., 1897).

[3] State *v.* Equitable L. etc. Co., 41 S. W. Rep. 916 (Mo., 1897).

interested in having kept in active use. Thus, where a charter required a street railway company to lay its tracks on certain streets, and the company did so on a part of such streets and then removed them, and for many years operated no cars thereon at all, the court held that the charter might be forfeited at the instance of the state.[1] Where a street railway does not run its cars as required by the ordinance, the state, at the instance of the city, may by *quo warranto* proceedings oust the company from its rights in said ordinance. The remedy in such a case is not in equity.[2] A street railway grant from the city may be

[1] People *v.* Broadway R. R., 126 N. Y. 29 (1891). A suit for forfeiture lies where a railroad company takes up part of its track. State *v.* West, etc. R'y. 34 Wis. 197 (1879); S. C., 36 Wis. 166 (1874). Or where a railroad company constructs but part of its road, has no station or freight-houses and no passenger coaches, but engages only in getting out coal from beds owned by those interested in the company. State *v.* Railway Co., 40 Ohio St. 504 (1884). But the suit does not lie on the ground that the company does not *intend* to complete its road. State *v.* Kingan, 51 Ind. 142 (1875); State *v.* Beck, 81 Ind. 501 (1882). No forfeiture is decreed because a railroad company discontinues passenger trains over a branch line which is run at a loss by reason of horse-car competition. Commonwealth *v.* Fitchburg R. R., 78 Mass. 180 (1858). The lessee of a railroad is a proper party defendant to a suit to forfeit franchises for non-user. People *v.* Albany, etc. R. R., 77 N. Y. 232 (1879); State *v.* Minnesota Cent. R'y, 36 Minn. 246 (1886). An assignment of all corporate assets to others, thereby rendering the corporation incapable of continuing business, is cause for forfeiture. State *v.* Real Estate Bank, 5 Ark. 595 (1843). A bank which ceases to do business and to file statements, and which makes improper loans to its directors, is liable to forfeiture of charter. State *v.* Seneca County Bank, 5 Ohio St. 171 (1856). It is not a non-user for a county-fair corporation to rent its grounds. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Where the statute prescribes that non-user for a year shall be cause for forfeiture, a non-user for a few days is insufficient. People *v.* Atlantic, etc. R. R., 125 N. Y. 513 (1891). A railroad which is leased to another company without statutory provisions to do so is subject to forfeiture at the instance of the state. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888). As to a failure of a railroad corporation to complete its road, see § 638, *infra*. The abandonment of the right of way by the railroad is no ground for an action of trespass by the former owner to recover it. Logan *v.* Vernon, etc. R. R., 90 Ind. 552 (1883). See, on this subject, § 905, *infra*. In Tennessee, where a corporation has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. Tennessee, etc. Co. *v.* Ayers, 43 S. W. Rep. 744 (Tenn., 1897).

[2] In this case the company had not run its cars for three years. State *v.* East Fifth St. R'y, 41 S. W. Rep. 955 (Mo., 1897).

forfeited at the instance of the state where the company runs but one car a day in order to hold the franchise. It may also be forfeited for failure to construct the entire line within the time specified by statute.[1]

It is good cause for forfeiture of a charter by judicial decree that a railroad company does not complete its road, or does not complete it within a prescribed time.[2] And such a forfeiture at the instance of the state, by reason of the failure of the corporation to complete its enterprise as required by charter, has often been decreed.[3]

[1] People *v.* Sutter St. R'y, 49 Pac. Rep. 736 (Cal., 1897), holding also that the court may impose a fine instead of forfeiting the rights.

[2] The failure of a railroad corporation to complete its line as laid down in the charter is ordinarily good cause for forfeiture of its charter, but the state may waive it. People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). See also New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). A railroad may construct its line long subsequently to the date of its charter, there being no limit in its charter as to time of construction. Western, etc. R. R.'s Appeal, 104 Pa. St. 399 (1883); Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410 (1836). If the time limited for the completion of the road has expired, this is a defense to eminent-domain proceedings. Morris, etc. R. R. *v.* Central, etc. R. R., 31 N. J. L. 205 (1865). *Cf.* § 637, *infra*. The state may forfeit the charter where the road is not constructed within the time fixed by the charter and amendments; also where it abandons a part of its lines. State *v.* Nonconnah Turnp. Co., 17 S. W. Rep. 128 (Tenn., 1875). Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers R'y *v.* Hodgens, 85 Pa. St. 501 (1877). The court will not forfeit the municipal grant to a water-works company, even though the latter does not extend its mains as required by the charter. Mandamus is the proper remedy. City of Topeka *v.* Topeka Water Co., 49 Pac. Rep. 79 (Kan., 1897). *Cf.* § 931, *infra*.

[3] People *v.* Kingston, etc. Turnp. Co., 23 Wend. 193 (1840), where the road was not constructed as required; Thompson *v.* People, 23 Wend. 537 (1840), reversing 21 Wend. 235, holding that an immaterial omission is not fatal; People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill., 1887), forfeiting for failure to complete subscriptions as required by charter; Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853), for failure to pay in capital stock as required by charter; People *v.* City Bank, 7 Colo. 226 (1883), to same effect. See People *v.* Jackson, etc. P. R. Co., 9 Mich. 285 (1861), for a case of the construction of a road in sections. And where the charter prescribes that a certain number of miles shall be completed within a certain time, but does not prescribe that the effect of non-compliance shall be a forfeiture, then the only way of forfeiting the charter is by a suit and a decree of a court. Hughes *v.* Northern Pac. R'y, 18 Fed. Rep. 106 (1883); Arthur *v.* Commercial Bank, 17 Miss. 394, 430 (1848).

A water-works charter will be forfeited where the company has abandoned business and attempted to sell out.[1] It is not the duty of the attorney-general, however, to lie in wait for all corporations which have not fully or technically complied with all

The fact that a corporation commences business in another state within a year suffices for a charter provision that it must commence business within a year. *Re* Capital F. Ins. Co., L. R. 21 Ch. D. 209 (1882); People *v.* Kankakee Improvement Co., 103 Ill. 491 (1882). In this case the charter required the proposed improvements to be completed within eight years as far east as the state line. The company completed as far east as Kankakee City, and claimed the right to exercise the option of making or not making further improvements between that point and the state line. The court say: "The non-compliance with the requirements was *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken;" and "we can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvements above Kankakee City was a condition annexed to this entire franchise. . . . We think the non-compliance with the requirement in question was a cause of forfeiture of the entire franchise." Briggs *v.* Cape Cod Land Co., 137 Mass. 71 (1884). In this case the charter of a corporation required it to deposit with the state treasurer within four months from its date the sum of $200,000 as security for certain purposes, among others for the payment of damages for taking land, and the corporation did not deposit the $200,000 in cash, but in bonds of the United States of the par value of $200,000, and of the market value of $230,000. *Held*, a sufficient compliance, as the object of the provision was to provide security to various interests. Also held that the question whether a corporation has ceased to exist for non-compliance with charter provisions could only be judicially determined in a suit to which the commonwealth was a party. The corporation itself, when sued for taxes, cannot set up this defense. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). Where a charter, by its terms, is to be void unless the capital stock is subscribed within two years and business commenced, a failure to secure the whole subscription within that time renders the charter void, though business was commenced. *Quo warranto* lies. People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill., 1887). An owner of land which a railroad has taken cannot reclaim possession by reason of the failure of the company to complete its road within the time limited by charter. Cincinnati, etc. R. R. *v.* Clifford, 113 Ind. 460 (1888); Bravard *v.* Cincinnati, etc. R. R., 115 Ind. 1 (1888). The bondholders of the company take the risk of this forfeiture of the charter for non-compliance with conditions. Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876), where, however, the corporate officers were endeavoring to enforce fraudulent bonds. Some of the English railway acts are plainly not obligatory, but only enabling; and it is held that the evident intention of parliament was to permit the companies to complete their lines as far as possible or desirable before the limit of time set, and to abandon the remaining portion. York, etc. R'y *v.* The Queen, 1 El. &

[1] City Water Co. *v.* State, 33 S. W. Rep. 259 (Tex., 1895).

the requisites of their charters.[1] Even though a corporation exercises no franchise except that of being a corporation, yet if it is guilty of a non-user, the weight of authority holds that *quo warranto* will lie.[2] Where a river-improvement company that has received a land grant from the state for the purpose of improving the river has long ceased operations, and the parties interested in it departed, an injunction and dissolution at the instance of the state may be obtained.[3]

§ 635. *Forfeiture for ultra vires acts and usurpation of franchises — Quo warranto and injunction at the instance of the state.* — Frequently a corporation does acts which its charter

Bl. 878 (1853), reversing same case, 1 El. & Bl. 178; Great Western R'y *v.* The Queen, 1 El. & Bl. 874 (1853), reversing same case, 1 El. & Bl. 253; Edinburgh, etc. R'y *v.* Philip, 2 Macq. H. L. Cas. 514, 526 (1857); Scottish N. E. R'y *v.* Stewart, 3 Macq. H. L. Cas. 382, 414 (1859). See also Rex *v.* Birmingham Canal, 2 W. Bl. 708 (1780), by Lord Mansfield; Blakemore *v.* Glamorganshire Canal, 1 Myl. & K. 162 (1832), by Lord Eldon; The Queen *v.* Eastern Counties R'y, 10 Ad. & El. 531 (1839); The Queen *v.* Lancashire, etc. R'y, 1 El. & Bl. 228 (1852).

[1] People *v.* De Grauw, 133 N. Y. 254 (1892); People *v.* Equity G. L. Co., 141 N. Y. 232 (1894); Lorillard *v.* Clyde, 142 N. Y. 456, 465, 466 (1894). A bill filed by the attorney-general to enjoin the construction of an electric street railroad will be dismissed where it was filed really at the instance of rival companies. People *v.* General Electric R'y, 50 N. E. Rep. 158 (Ill., 1898).

[2] The state may forfeit a charter for wilful non-user, although the corporation is a private one. People *v.* Milk Exchange, 133 N. Y. 565 (1892); Edgar Coll. Inst. *v.* People, 142 Ill. 363 (1892). See Attorney-General *v.* Simonton, 78 N. C. 57 (1878), holding that the suit will not lie, although only five shares of stock were subscribed for and no other act done by the corporation; State *v.* Société Republicaine, etc., 9 Mo. App. 114 (1880), holding the same, though the company was dormant. But the case of State *v.* Pipher, 28 Kan. 128 (1882), forfeited the charter of an agricultural college for non-user for nineteen years. And see dicta in Terrett *v.* Taylor, 9 Cranch, 43, 51 (1815); State *v.* Commercial Bank, 21 Miss. 569 (1850). In New York by statute such a suit will lie. Code Civ. Pro., § 1798. See also *Re* Jackson, etc. Ins. Co., 4 Sandf. Ch. 559 (1847). Where a corporation has abandoned its authorized business and engaged in another it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re* Crown, etc. Bank, 62 L. T. Rep. 823 (1890). An abandonment by a corporation of part of the purposes of its incorporation is no cause for dissolution. Norwegian Titanic Iron Co., 35 Beav. 223 (1865), where, its purpose being to purchase English and Norway mines, it sold the English mines. By the terms of a new constitution all corporations which have failed to organize before its adoption may be deemed to have forfeited their franchises thereby. Chincleclamanch, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882).

[3] State *v.* Cannon, etc. Assoc., 69 N. W. Rep. 621 (Minn., 1896).

does not authorize it to do, or which its charter or a statute expressly prohibits it from doing. The question then arises, What is the remedy of the state? The right of a stockholder, or the corporation itself, or a person contracting with the corporation, to object to such acts is discussed elsewhere.[1] But may the state object? Undoubtedly it may. It seems that the state has four remedies. Its legislature may repeal the charter of the corporation under the reserved right of the state to repeal;[2] or the state may institute a proceeding to forfeit the charter for misuser of powers; or such proceeding may be only to oust the corporation from the exercise of the usurped powers; or, according to some authorities, a suit may be commenced in equity for an injunction restraining the corporation from committing the *ultra vires* acts. Taking up first the subject of *quo warranto*, it seems that the judgment in an ordinary *quo warranto* proceeding may be either a forfeiture of all the corporate franchises and of the charter, or may be a forfeiture only of the right to continue to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered.[3] *Quo warranto* lies to forfeit the exclusive feature of a franchise without forfeiting the remainder of the franchise.[4] The nature of *scire facias*, *quo warranto*, and information in the nature of a *quo warranto*, is explained in the notes below.[5]

[1] See Part IV, *infra*.

[2] See § 639, *infra*.

[3] State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885), where only a discontinuance of the acts complained of was ordered; People *v.* Improvement Co., 103 Ill. 491 (1882), where a complete forfeiture of charter, etc., was decreed. See also People *v.* Utica Ins. Co., 15 Johns. 357 (1818), where an insurance company had engaged in banking contrary to statute. In State *v.* Building Assoc., 35 Ohio St. 258 (1879), the court said that where the corporation is guilty of an offense which by statute is cause for forfeiture of its franchise as a corporation, the court will decree that forfeiture; but where the cause of forfeiture is outside of those prescribed in the statutes, then the court may decree either a forfeiture of the franchise to be a corporation or an ouster from the powers and acts illegally assumed or done. There may be a judgment of ouster of a particular franchise, and not of the whole charter. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892). "Corporate charters are not forfeited in fragments, or annulled as damages for the violation of private contracts." In condemnation proceedings the defendant cannot set up that the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894).

[4] Commonwealth *v.* Sturtevant, 37 Atl. Rep. 916 (Pa., 1897).

[5] Professor Dwight explained these as follows:

"*Scire facias* is resorted to where there is original defect in the char-

Quo warranto at the instance of the state does not lie merely because a street railway company has been given street rights in perpetuity by a municipality, although the statute limits its

ter, as if, *e. g.*, a grant obtained by fraud. It may be used also in the case where the charter was valid but the powers of a corporation have been abused. The distinction taken in England is this: that a *scire facias* may be resorted to where a legal corporation in full possession of its powers abuses them, while a *quo warranto* is applicable where a corporation, from a defect in its constitution, such as a loss of part of its members which are integral to its existence, becomes an imperfect body, but nevertheless continues to act as a corporation. See Grant on Corporations, 296.

"*Writ of quo warranto.* This is an ancient writ, employed by the king against any one who claims or usurps an office or franchise, or who, having had a right to the franchise, neglects to exercise it, to inquire by what warrant he still claims to exercise it. The theory of the writ is, there is an unlawful encroachment upon the royal prerogative, and, being a dilatory proceeding and technical, it is not now so much employed as the succeeding remedy.

"*Information in the nature of a quo warranto.* This is in form a criminal proceeding. There were two proceedings in the criminal law for the conviction of criminals. One is termed an information and the other an indictment. They differ in this respect: that while an indictment is found by a grand jury, an information is simply the allegation of an officer who files it. In this case the attorney-general proceeds on twofold ground, both to punish the usurper and to prevent the unlawful exercise of its franchises. In the case of a corporation the main object is to interfere with the exercise of the franchise. The inquiry is the same as in the writ of *quo warranto;* that is, by what warrant the franchise is exercised. The reason why it is more resorted to is that it is easy and simple of application.

"Under the New York code the proceeding is simply an action brought by the attorney-general, governed by the same general rules as an action at common law. If judgment goes against the corporation it is liable to be dissolved. This proceeding in England was instituted in the great criminal court, the king's or queen's bench, and in New York in the supreme court only, which represents the queen's bench."

In the case of State *v.* Merchants', etc. Trust Co., 8 Humph. (Tenn.) 235 (1847), the court said: "By the common law the forfeiture of a charter can be enforced in a court of law only; and the proceeding to repeal it is by a *scire facias* or an information in the nature of a writ of *quo warranto.* A *scire facias* is the proper remedy where there is a legal existing body capable of acting, but which had been guilty of an abuse of the power entrusted to it; a *quo warranto* where there is a body corporate *de facto,* which takes upon itself to act as a body corporate, but from some defect in its constitution it cannot legally exercise the power it affects to use." Citing 8 Wheat. 483, 484. In Pennsylvania, where the state filed an information to declare *ultra vires* a contract between a canal company and a coal company, whereby one-half of the canal facilities were monopolized by the latter, the court held that an information was a proper remedy, and that the court, in its judgment in favor of the state, might order the corporation to

corporate existence to thirty years.[1] *Quo warranto* lies against a railroad corporation to recover back to the state canal lands which the railroad is using.[2] Where a public corporation, vested with state property for public use, makes a lease of it which is *ultra vires*, a private person cannot sustain a suit to contest it; this can be done only by the state or the corporation.[3] *Quo warranto* or an information in the nature thereof is the proper remedy where the corporation has not been legally incorporated.[4] The attorney-general may file an information in *quo*

discontinue the unauthorized act, and that the judgment need not oust the corporation from its charter and franchises. Commonwealth *v.* Delaware, etc. Canal Co., 43 Pa. St. 295 (1862). For the ancient learning as to *scire facias* in forfeiting charters, see State *v.* Moore, 19 Ala. 514 (1851). When the information has for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it must be filed against individuals. When the object is to effect a dissolution of a corporation which has had an actual existence, or to oust such corporation of some franchise which it has unlawfully exercised, the information must be filed against the corporation. People *v.* Rensselaer, etc. R. R., 15 Wend. 113 (1836). Although the state proves the case, yet the court will not adjudge a forfeiture unless justice requires it. State *v.* Essex Bank, 8 Vt. 489 (1836). *Quo warranto* against a corporation in its corporate name admits that it was legally incorporated. North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). As to the pleadings in *quo warranto*, see Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895); People *v.* Stanford, 77 Cal. 360 (1888). As to the pleadings in *quo warranto* against a street railway company assuming to be a corporation, see Smith *v.* State, 140 Ind. 343 (1895). The state cannot file a *quo warranto* proceeding to forfeit a charter, where a receiver is already in charge, unless the consent of the court is first obtained. Wayne Pike Co. *v.* State, 134 Ind. 672 (1893).

[1] Attorney-General *v.* Detroit Suburban R'y, 96 Mich. 65 (1893).

[2] State, etc. *v.* Pittsburgh, etc. R'y, 41 N. E. Rep. 205 (Ohio, 1895).

[3] Directors, as such, of such corporation, cannot sustain such a suit. Smith *v.* Cornelius, 41 W. Va. 59 (1895).

[4] The state may forfeit a charter where the statute required five persons to sign and acknowledge the articles, but only four out of the five actually did acknowledge them. People *v.* Montecito Water Co., 97 Cal. 276 (1893). In *quo warranto* proceedings on the ground that the company was not properly incorporated, the corporation itself is a necessary party defendant. People *v.* Montecito Water Co., 97 Cal. 276 (1893). Under the statutes of Alabama in reference to watered stock, *quo warranto* lies where $1,000,000 of stock is issued for the possibility of patents to be thereafter granted. In such *quo warranto* proceedings stockholders need not be made parties. State *v.* Webb, 97 Ala. 111 (1893). In an action by the state to forfeit a railroad charter the state must prove not only that a cause of forfeiture did exist, but that it still continues to exist. Moreover some public interest must be involved in obtaining the forfeiture. People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). A charter of the

warranto without leave of the court.[1] *Quo warranto* for claiming to be a corporation should be against the officers of the corporation as individuals.[2] Under the Massachusetts statutes any person who is injured by a corporation may file an information in the nature of *quo warranto* against the corporation.[3] *Quo warranto* lies against foreign corporations doing business illegally in the state.[4] The state by *quo warranto* may oust a

company will be forfeited at the instance of the state where some of the parties who are alleged to join in the corporation did not so join, but their names were inserted without their sanction or authority. Such parties are not liable as stockholders. La Banque d'Hochelaga *v.* Murray, 63 L. T. Rep. 63 (1890). In a *quo warranto* proceeding to declare void an alleged charter the corporation is a necessary party defendant. People *v.* Flint, 64 Cal. 49 (1883). After the attorney-general institutes *quo warranto* proceedings, and much testimony is taken, and then the proceeding is discontinued, and the company proceeds to expend money and make contracts, the attorney-general will not be allowed to institute new proceedings. *Re* Equity Gas-Light Co., 10 N. Y. Supp. 801 (1890). In *quo warranto* charging defendants with usurping a public franchise to operate a ferry, where they attempted to defend on the ground that they had a legal right to use the ferry, the burden was on them to show a valid title. Gunterman *v.* People, 138 Ill. 518 (1891). Where an incorporation is for several objects, one of which is illegal, the charter will be forfeited, the objects not being clearly separable. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). The issuing of transferable certificates of stock is not assuming the functions of a corporation. Rice *v.* Rockefeller, 56 Hun, 516 (1890). A suit instituted by the state to forfeit a charter cannot be removed to the federal court on the ground that a contract exists between the corporation and the state, and that such contract will be violated. Commonwealth *v.* Louisville Bridge Co., 42 Fed. Rep. 241 (1890). The court may forfeit the charter of a railroad corporation for illegally leasing its road, and need not merely enjoin the continuation of the lease. East Line, etc. R. R. *v.* State, 75 Tex. 434 (1889). A corporation incorporated for an illegal purpose, such as buying a majority or all of the stock in each of four competing gas corporations, and thereby creating a monopoly, is subject to having its charter forfeited at the instance of the attorney-general. People *v.* Chicago Gas Trust Co., 130 Ill. 268 (1889). In *quo warranto* proceedings against a turnpike company, the latter has the burden of proof to show by what authority it is exercising its privileges. People *v.* Volcano, etc. Co., 100 Cal. 87 (1893).

[1] State *v.* Equitable Loan, etc. Co., 41 S. W. Rep. 916 (Mo., 1897).

[2] State *v.* Fleming, 44 S. W. Rep. 758 (Mo., 1898).

[3] Hartnett *v.* Plumbers' Supply Assoc., 47 N. E. Rep. 1002 (Mass., 1897)

[4] State *v.* Western, etc. Ins. Co., 47 Ohio St. 167 (1890); State *v.* Fidelity, etc. Co., 39 Minn. 538 (1888). *Quo warranto* against a foreign corporation illegally doing business in the state must be against the corporation as such and not merely against its officers and agents. State *v.* Somerby, 42 Minn. 55 (1889).

railroad from discriminations in favor of oil shipped in tank cars.[1] An exemption from taxation is not a franchise. Hence, *quo warranto* does not lie to oust the corporation from such exemption.[2] Although *quo warranto* can be only for acts committed within five years in Ohio, yet it serves to oust a company from exercising a power which it has not exercised continuously for twenty years.[3] The court has no power to appoint a receiver in *quo warranto* proceedings. A receiver can be appointed only in a suit in equity unless a statute provides otherwise.[4]

Turning now to the subject of injunction as a remedy, it is very doubtful whether the state may file a bill in equity to enjoin a corporation from committing an *ultra vires* act. The remedy of the state is *quo warranto*. In England a bill has been sustained to restrain a railroad corporation from engaging in the coal business.[5] It lies to enjoin a corporation, the same as an individual, from creating a public nuisance.[6] The state may enjoin a railroad corporation from purchasing a competing line in violation of the constitution.[7] In Wisconsin it

[1] State *v.* Cincinnati, etc. R. R., 47 Ohio St. 130 (1890).

[2] International, etc. R'y *v.* State, 75 Tex. 356 (1889).

[3] State *v.* Standard Oil Co., 49 Ohio St. 137 (1892).

[4] Commonwealth *v.* Order of Vesta, 156 Pa. St. 531 (1893).

[5] Attorney-General *v.* Great Northern R'y, 1 Dr. & Sm. 154 (1860). But the attorney-general cannot enjoin a corporate act merely because it is *ultra vires*. Some injury to the public must be involved. The attorney-general's suit, at the instance of a manufacturer, to enjoin one railroad from leasing its rolling-stock to another failed. Attorney-General *v.* Great Eastern R'y, L. R. 11 Ch. D. 449 (1879). A court of equity cannot compel a corporation to cease collecting tolls, although it has not improved a stream as required by its charter. Pixley *v.* Roanoke, etc. Co., 75 Va. 320 (1881). In Attorney-General *v.* Mid-Kent R'y, L. R. 3 Ch. App. 100 (1867), a mandatory injunction requiring the defendant to construct a bridge was granted. The case of Attorney-General *v.* North, etc. Tramways Co., 72 L. T. Rep. 340 (1895), was an action brought by the attorney-general at the relation of several car manufacturers to restrain a street-railway company from manufacturing and selling rolling-stock to other companies on the ground that such acts were *ultra vires*.

[6] Attorney-General *v.* Jamaica Pond, etc. Corp., 133 Mass. 361 (1882). A corporation may be enjoined from doing criminal acts — in this case prize-fighting — and a receiver may be put in. Columbian Athletic Club *v.* State, 143 Ind. 98 (1895).

[7] Louisville, etc. R. R. *v.* Commonwealth, 97 Ky. 675 (1895); aff'd in 161 U. S. 677 (1896), *sub nom.* Louisville, etc. R'y *v.* Kentucky. A court of equity has no jurisdiction to forfeit the franchises of a corporation, but it may, at the instance of the attor-

is held that the attorney-general may enjoin railroad companies from taking greater rates than are prescribed by statute;[1] and in some of the states such a bill will lie by statute.[2]

The weight of authority, however, is that the remedy of the state is by *quo warranto* and not by a bill in equity for an injunction.[3] As, for instance, the attorney-general cannot enjoin

ney-general, enjoin the abuse or misuse of corporate franchises. State *v.* American, etc. Assoc., 67 N. W. Rep. 1 (Minn., 1896).

[1] Attorney-General *v.* Railroad Cos., 35 Wis. 523, 553 (1874), reviewing many cases; but *cf.* Strong *v.* McCagg, 55 Wis. 624 (1882). A lease by a domestic railroad company of its railroad to a foreign railroad corporation is illegal, especially where it is expressly prohibited by statute. The court will enjoin the lease upon the application of the attorney-general where the effect of the lease would be to create a combination in the transportation of coal and to destroy competition in production and sale. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 52 (1892). That a bill in equity will lie to declare invalid a violation of a charter, see U. S. *v.* Western U. Tel. Co., 50 Fed. Rep. 28 (1892); aff'd, 160 U. S. 1 (1895).

[2] State *v.* Merchants', etc. Co., 8 Humph. (Tenn.) 254 (1874), where an insurance company was restrained from banking. So also in New York Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 496 (1837); Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882), explaining the difference between this class of cases and cases where other parties are complainants. Concerning the power of the state to object to an *ultra vires* act of a private corporation by any proceeding other than *quo warranto*, see People *v.* Ballard, 134 N. Y. 269 (1892), a carefully-considered case.

[3] Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371 (1817); Attorney-General *v.* Bank of Niagara, Hopk. Ch. 354 (1825). But see People *v.* Ballard, 134 N. Y. 269 (1892). In Attorney-General *v.* Tudor Ice Co., 104 Mass. 239 (1870), an injunction restraining an ice company from importing teas was denied. Where a railroad leases its line in violation of a constitutional provision prohibiting the consolidation of parallel lines, it is subject to forfeiture. So also where it issues "watered stock" in violation of the constitution. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888). A state creating a corporation has no visitorial power over it — *i. e.*, power to correct corporate abuses — except "(1) where municipal, charitable, religious, or eleemosynary corporations, public in their nature, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds; and as they, from the nature of their corporate functions, were more or less under government supervision, the attorney-general proceeded against them to obtain correction of the abuse; or (2) where private corporations, chartered for private and limited purposes, had exceeded their powers, and were restrained or enjoined in the same manner from the further violation of the limitation to which their powers were subject." Hence the United States, as the creator of the Union Pacific Railroad, cannot exercise visitorial power over it in respect to frauds in its management. U. S. *v.* Union Pacific R. R., 98 U. S. 569, 617 (1878). *Cf.* Attorney-General *v.* Wilson, 1 Cr. & Ph. 1 (1840), holding that the court had jurisdiction over charitable corporations, and

a gas company from laying its pipes, even though he claims that the charter was void by reason of the company not having commenced work within the prescribed time.[1]

An injunction does not lie at the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein; nor does an injunction lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so.[2]

§ 636. *The state may waive its right to forfeit a charter.*— Various acts have been held to constitute such a waiver. "When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure* out of what before was only a *de facto* corporation." There must, however, be a *de facto* organization upon which this recognition may act.[3] Numerous instances of acts of the legislature which constitute a waiver are set forth in detail in the notes below.[4]

that when the trustees of them abused their trust the court would take notice of such abuse by reason of its visitorial powers. Also, on this point, Attorney-General *v.* Foundling Hospital, 4 Bro. Ch. 165 (1793). For pleadings in *quo warranto* proceedings by the state to oust a corporation from usurped franchises and to forfeit a railroad charter, see People *v.* Stanford, 77 Cal. 360 (1888), holding also that the statute of limitations is no bar. See the Pennsylvania cases in § 315, *supra*, where the state enjoined an illegal purchase of stock by a corporation.

[1] People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). The attorney-general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893).

[2] The remedy, if any, is by *quo warranto*. The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 36 Atl. Rep. 971 (N. J., 1897).

[3] Comanche County *v.* Lewis, 133 U. S. 198 (1890).

[4] A legislative recognition of a charter cures any unconstitutionality in the statute creating it. Snell *v.* Chicago, 133 Ill. 413 (1890). The extension of time to complete railroads applies so as to prevent forfeiture for non-completion within the original time. State *v.* Bergen Neck R'y, 53 N. J. L. 108 (1890). Although suit is brought to forfeit a street-railway franchise for using electric power

§ 637. *Who may allege that forfeiture or non-incorporation or dissolution exists — De facto corporations.*— It has already been shown that no one but the state can institute a suit to de-

without authority, the legislature may cure the defect of power. To forfeit for not commencing work within a year the pleading must allege when the work was commenced. People *v.* Los Angeles, etc. R'y, 91 Cal. 338 (1891). An amendment to a charter is a waiver of any forfeiture thereof due to not commencing business within the prescribed time. Farnsworth *v.* Lime Rock, etc. R. R., 83 Me. 440 (1891). Although the act requires the certificate of incorporation to specify the termini, and the certificate merely says the termini are in a certain city, yet if the legislature subsequently, by special act, recognizes the company, the legality of its existence cannot be questioned. Koch *v.* North Ave. R'y, 75 Md. 222 (1892). In this case the organization was under the general railroad law. Under such a charter the route and its termini are to be determined by the mayor and city council "under their general power of control and regulation of the streets." A statute authorizing a corporation to reduce its capital stock waives informalities in its incorporation, and such waiver may extend to an illegal issue of watered stock. State *v.* Webb, 20 S. Rep. 462 (Ala., 1896). A waiver may be express or by statutes recognizing its continued existence, *Re* New York El. R. R., 70 N. Y. 327, 338 (1877); People *v.* Manhattan Co., 9 Wend. 352, 380 (1832); or requiring it to make alterations on its road, Atty. Gen. *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 470 (1846); or authorizing a transfer of its property and franchises to another corporation, Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 G. & J. (Md.) 1, 127 (1832); or requiring a bank to resume specie payments by a certain date, Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599, 622 (1846). But waiver as to terminus is not a waiver of an abandonment of part of the road, nor of a defect as to the width of the turnpike. People *v.* Fishkill, etc. Co., 27 Barb. 445 (1857). Waiver may arise by a statute extending the corporate powers. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1885); Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 186 (1877); or by authorizing a change of route, State *v.* Fourth, etc. Co., 15 N. H. 162 (1844); or by expressly waiving the cause for forfeiture, Lumpkin *v.* Jones, 1 Ga. 27 (1846). The legislature may expressly waive a cause for forfeiture arising from suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). May waive by extending the time for completion. La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870). Amending charter, etc., is a waiver. White's, etc. Co. *v.* Davidson County, 3 Tenn. Ch. 396 (1877). An act reviving a corporation is a waiver, even though the act was fraudulently passed. *Re* Mechanics' Soc., 31 La. Ann. 627 (1879). The waiver protects a turnpike corporation from an indictment for obstructing the road. State *v.* Godwinsville, etc. Co., 44 N. J. L. 496 (1882). But the waiver must have been clearly intended. People *v.* Kingston, etc. Co., 23 Wend. 193 (1840). The appointment of a corporate officer by the governor and senate is not a waiver. People *v.* Phœnix Bank, 24 Wend. 431 (1840). Long delay in bringing the *quo warranto* may be a waiver. People *v.* Williamsburgh, etc. Co., 47 N. Y. 586 (1872); People *v.* Oakland, etc. Bank, 1 Doug. (Mich.) 282 (1843). *Dictum*, that the state may waive. Briggs *v.* Cape Cod, etc. Co.,

clare a forfeiture.[1] Also, that no one can institute a suit in equity to dissolve a corporation.[2] The question now arises whether the state or any person, either as plaintiff or defendant, may allege forfeiture or dissolution or non-incorporation where there have been no *quo warranto* proceedings instituted and prosecuted by the state to judgment. With a few exceptions such an allegation is not allowed.

A creditor of a supposed corporation cannot ordinarily hold the stockholders liable as partners although they did not legally incorporate.[3] It is true that in certain cases, where a stockholder is made liable to corporate creditors upon the dissolution of the corporation, a dissolution is held to exist where the corporation is hopelessly insolvent.[4] And it is true that where a railroad corporation attempts to acquire a right of way, the persons whose property will be affected thereby may oppose the acquisition of the right of way by showing that the company is not legally incorporated.[5] But aside from these exceptions no one

137 Mass. 71 (1884), citing cases. A special act amending the charter waives defects in the articles of association as filed. Basshor *v.* Dressel, 34 Md. 503 (1871). An amendment to a charter waives the right of forfeiture for fraud, non-user, and misuser. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1886). An amendment of the charter is a waiver. Attorney-General *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 456 (1846); Charles River Bridge Co. *v.* Warren Bridge, 24 Mass. 344 (1829). The waiver may be express. State *v.* Bank of Charleston, 2 McMull. (S. C.) 439 (1843); Enfield Bridge Co. *v.* Connecticut, etc. Co., 7 Conn. 28 (1828); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); S. C., 14 Fed. Cas. 108. Where the incorporation had been irregular, the recognition of a corporation by the legislature is equivalent to a charter. McAuley *v.* Columbus, etc. R'y, 83 Ill. 348 (1876); Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); Mead *v.* New York, etc. R. R., 45 Conn. 199 (1877); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); S. C., 14 Fed. Cas. 108; St. Louis R. R. *v.* Northwestern, etc. R'y, 2 Mo. App. 69 (1876); Atlantic, etc. R. R. *v.* St. Louis, 66 Mo. 228 (1877); State *v.* Morris, 73 Tex. 435 (1889). *Contra*, where charters must be granted by general laws. Oroville, etc. R. R. *v.* Supervisors, 37 Cal. 354 (1869). But see Brent *v.* State, 43 Ala. 297 (1869).

[1] § 632, *supra*.

[2] § 629, *supra*.

[3] See ch. XIII, *supra*.

[4] See § 631, *supra*.

[5] *Re* Brooklyn, etc. R'y, 72 N. Y. 245 (1878); *Re* New York Cable Co. *v.* Mayor, etc., 104 N. Y. 1 (1887). In condemnation proceedings the incorporation may be attacked as not being *de facto*. Its *de jure* existence cannot be so attacked. Brown *v.* Calumet River R'y, 125 Ill. 600 (1888). An adjacent owner cannot enjoin a street-railway company on the ground that its charter is invalid, unless his property rights are affected. Nichols *v.* Ann Arbor, etc. R'y, 87 Mich. 361 (1891). A person whose land a corporation seeks to

is allowed to assert that the corporation is dissolved, or its franchise forfeited, or its incorporation illegal, until after such a result has been decreed by a court in a proceeding instituted for that purpose by the state. Thus, a stockholder sued on his subscription cannot, unless his subscription was made previous to the incorporation, set up that the company was not legally incorporated.[1]

The corporation is called a *de facto* corporation, and only the state is allowed to question its existence. There are many instances where attempts have been made to avoid this rule of law by setting up that the charter has been rendered forfeitable at the instance of the state, but they have uniformly failed.[2]

take under power of eminent domain cannot set up that the articles of incorporation had not been filed with the secretary of state, as required by the incorporating statute. Portland, etc. Co. *v.* Bobb, 88 Ky. 226 (1889). A railroad charter is not good so far as the right to condemn land is concerned, where the terminus is stated to be on the state line in a certain county. Atlantic, etc. R. R. *v.* Sullivant, 5 Ohio St. 276 (1855). In condemnation proceedings the defendant cannot set up that the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894). The existence of a railroad corporation cannot be questioned in an action brought by it to condemn land. Wellington, etc. R. R. *v.* Cashie, etc. Co., 114 N. C. 690 (1894). Where a gas company opens the streets under a statute and pays damages, and partly lays its pipes, it cannot subsequently be enjoined by a property owner on the ground that the statute has subsequently been adjudged to be unconstitutional. King *v.* Philadelphia Co., 154 Pa. St. 160 (1893).

[1] §§ 183–186, *supra*. Concerning the question of who can complain of mistakes, irregularities, and illegalities in the corporation, see ch. I, § 5, *supra*.

[2] Thus, a person sued for tolls cannot set up that the corporation has not rendered required statements, and hence its charter is forfeitable. Kellogg *v.* Union Co., 12 Conn. 7 (1837). Nor that the charter was never legally vested or has been violated. Dyer *v.* Walker, 40 Pa. St. 157 (1861). Under the California Code, § 358, the regular incorporation of a *de facto* corporation cannot be questioned in an action by it for damages for an injury to property. Golden Gate, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890). In a suit by a water company to enjoin another company from diverting water, the legality of the incorporation of the plaintiff cannot be questioned where it is a *de facto* corporation. People's, etc. Co. *v.* '76 Land, etc. Co., 44 Pac. Rep. 176 (Cal., 1896). In a trial for embezzlement from a corporation, proof of a *de facto* corporation is sufficient. People *v.* Leonard, 106 Cal. 302 (1895). In a trial for receiving stolen goods belonging to a corporation, a corporate officer's testimony of its existence is sufficient if not contradicted. State *v.* Habib, 18 R. I. 558 (1894). In Irvine Co. *v.* Bond, 74 Fed. Rep. 849 (1896), an owner of land in California incorporated a company under the laws of

If there is a law authorizing incorporation, and a company has attempted to organize under it and has acted as a corporation, it is a *de facto* corporation, and its *de jure* existence can be ques-

West Virginia, and transferred to it in payment for stock certain portions of his land. He owned all the stock and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned. A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant. Lamming *v.* Galusha, 81 Hun, 247 (1894), where it was also claimed that the incorporation had been insufficient. Where two railroad companies claim a right of way, one cannot allege that the other's charter is forfeitable. Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 185 (1877). A religious corporation suing for its real estate cannot be met by a plea of dissolution, there having been no decree. Baptist House *v.* Webb, 66 Me. 398 (1877). A corporation suing for personal property is not defeated by a plea that it was not legally organized or is dissolved by non-user. Penobscot, etc. Corp. *v.* Lamson, 16 Me. 224 (1839). A grantee of a corporation's right to overflow land is not deprived of his right by dormancy and non-user of its franchises by the corporation. Heard *v.* Talbot, 73 Mass. 113 (1856). Attachment lies against the land of a foreign corporation though a receiver of it exists in the state creating it. Moseby *v.* Burrow, 52 Tex. 396 (1880). One corporation cannot enjoin a competing corporation from proceeding on the ground that the latter has subjected its charter to forfeiture by misuser or non-user. Elizabethtown Gaslight Co. *v.* Green, 46 N. J. Eq. 118 (1889). A county cannot seize a turnpike, although the company is guilty of misuser or non-user. A judgment of forfeiture is first necessary. Moore *v.* Schoppert, 22 W. Va. 282 (1883). A city seeking to lay out a road on a right of way cannot claim that the railroad company's right is forfeited by non-user. New Jersey R. R. *v.* Long Branch Com'rs, 39 N. J. L. 28 (1876). The corporation cannot avoid a tax on the ground that it has ceased business. Bank of U. S. *v.* Commonwealth, 17 Pa. St. 400 (1851). A grantor of land to a corporation cannot reclaim it on the ground of a dissolution, there having been no decree of dissolution. Bohannan *v.* Binns, 31 Miss. 355 (1856). Service on a corporation cannot be made by service on a stockholder on the ground that it has forfeited its charter by non-user. Bache *v.* Nashville, etc. Soc., 10 Lea (Tenn.), 436 (1882). A suit by the corporation on a bond is not to be met by a plea of forfeiture for non-user. West *v.* Carolina, etc. Ins. Co., 31 Ark. 476 (1876). Nor its suit on a note by the plea that it has abandoned its franchises. John *v.* Farmers', etc. Bank, 2 Blackf. 367 (1830); East Tennessee, etc. Co. *v.* Gaskell, 2 Lea (Tenn.), 742 (1879); Hartsville University *v.* Hamilton, 34 Ind. 506 (1870). The forfeiture can exist only after a decree to that effect. Chesapeake, etc. Co. *v.* Baltimore, etc. R. R., 4 G. & J. (Md.) 1 (1832). An agent sued for conversion of funds cannot allege that the corporation is guilty of a non-user of its franchises. Elizabeth, etc. Acad. *v.* Lindsey, 6 Ired. L. (N. C.) 476 (1846). A railroad suing on a note cannot be defeated by the defense that it has forfeited its charter, there being no adjudication to that effect. Toledo, etc. R. R. *v.* Johnson, 49 Mich. 148

tioned only by the state.[1] So, also, a party contracting with a corporation cannot defeat his obligation by showing that the corporation was never legally incorporated.[2] Irregularities in

(1882). A squatter on corporate land cannot dispute the corporate title by alleging that it was not legally incorporated or organized. Only the state can object. East, etc. Church *v.* Froislie, 37 Minn. 447 (1887). In a suit by a toll road to recover a penalty for refusal to pay toll, the validity of the company's organization and the condition of the road cannot be brought into the controversy by way of defense. Canal St. etc. Co. *v.* Paas, 95 Mich. 372 (1893). But a turnpike company cannot recover fares for the part of its road which is constructed beyond its chartered limits. Pontiac, etc. Co. *v.* Hilton, 69 Mich. 115 (1888). Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce. Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1881). See § 590, *supra*. But the failure of a railroad to cause to be paid in a certain amount of its capital stock before incorporation may defeat municipal bonds which are given to it. Farnham *v.* Benedict, 107 N. Y. 159 (1887). An indorser sued by the corporation cannot claim that it has rendered its charter liable to forfeiture by suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). A corporation cannot defeat its taxes by alleging failure to comply with conditions subsequent in its charter. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). Though the provision in the Kentucky statutes requiring publication of the charter is not complied with, yet the corporation is valid and complete, except that the state may proceed to annul the charter. No other party can raise the objection. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); rev'd on other grounds, 139 U. S. 417; Walton *v.* Riley, 85 Ky. 413, 421 (1887), overruling Heinig *v.* Adams, etc. Mfg. Co., 81 Ky. 300 (1883).

[1] Independent Order *v.* United Order, 94 Wis. 234 (1896). A corporation whose articles are not filed in the right county, and which has never had an organization meeting, is not *de jure* nor *de facto*. It cannot sue a director for preventing organization. Martin *v.* Deetz, 102 Cal. 55 (1894). In proving a *de facto* corporation the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. Johnson *v.* Schulin, 73 N. W. Rep. 147 (Minn., 1897).

[2] Keokuk Commercial Bank *v.* Pfeiffer, 108 N. Y. 242 (1888). The maker of a note to a bank cannot question its incorporation. Exchange Nat. Bank *v.* Capps, 32 Neb. 242 (1891); Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891); Butchers', etc. Bank *v.* McDonald, 130 Mass. 264 (1881); Jones *v.* Bank of Tennessee, 8 B. Mon. (Ky.) 122 (1847); Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862); Nutting *v.* Hill, 71 Ga. 557 (1883); Irvine *v.* Lumberman's Bank, 2 Watts & S. (Pa.) 204 (1841); Congregational Soc. *v.* Perry, 6 N. H. 164 (1833); Pape *v.* Capital Bank, 20 Kan. 440 (1878); Massey *v.* Building Assoc., 22 Kan. 624 (1879); Vater *v.* Lewis, 36 Ind. 288 (1871); Smith *v.* Miss. etc. R. R., 14 Miss. 179 (1846), where the maker of the note claimed that the corporation was fraudulently and illegally organized; Studebaker, etc. Co. *v.* Montgomery, 74 Mo. 101 (1881); Stoutimore *v.* Clark, 70 Mo. 471 (1875); Blake *v.* Holley, 14 Ind. 383 (1860); Jones *v.* Cincinnati, etc. Co., 14 Ind. 89 (1860), holding also that the corporation need not prove even a *de facto* exist-

the organization of a corporation created by a state will not be inquired into in the courts of another state, a charter having

ence. To same effect, Montgomery R. R. *v.* Hurst, 9 Ala. 513 (1846). *Cf.* White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844), where the remarkable decision was made that, if the corporation had been dissolved at the time the note was given, the maker was not liable and could have a mortgage which he gave as security set aside. A *de facto* corporation, as indorsee of a note, may enforce it. Wilcox *v.* Toledo, etc. R. R., 43 Mich. 584 (1880); Haas *v.* Bank of Commerce, 41 Neb. 754 (1894); Bank of Shasta *v.* Boyd, 99 Cal. 604 (1893). An officer cannot defend against an action to make him account, by setting up that the company was fraudulently organized. Haacke *v.* Knights, etc. Club, 76 Md. 429 (1892). In the case of Perine *v.* Grand Lodge, 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764 (1891). Where a corporation sues for the price of articles sold, the defendant cannot set up that the plaintiff sold the articles before its capital stock was fully paid up, as required by statute. Chase's, etc. Co. *v.* Boston, etc. Co., 152 Mass. 428 (1891); McCord, etc. Co. *v.* Glenn, 6 Utah, 139 (1889). In a suit by a *bona fide* indorsee of a note from a corporation as indorser, the maker cannot set up that the company was not properly incorporated. Brickley *v.* Edwards, 131 Ind. 3 (1892). The defendant cannot allege that the corporation was for an illegal purpose — that of running blockades — the charter not showing that fact. Importing, etc. Co. *v.* Lock, 50 Ala. 332 (1873). Where the suit is on a bond, a stockholder cannot sue to have the corporation declared a copartnership by reason of irregular incorporation. Baker *v.* Backus, 32 Ill. 79 (1863).

A corporation cannot be defeated in an action on a contract by the fact that twenty-four instead of twenty-five persons signed the articles of incorporation. Buffalo, etc. R'y *v.* New York, etc. R. R., 22 Alb. L. J. 134 (N. Y., 1886). Proof of organization in fact and user meets a plea of *nul tiel corporation* by the maker of a note to the corporation. Mitchell *v.* Deeds, 49 Ill. 416 (1867); Smelser *v.* Wayne, etc. T. Co., 82 Ind. 417 (1882). But see Williams *v.* Bank of Michigan, 7 Wend. 540 (1831). The corporation itself, when sued upon notes which it has made, cannot set up any informality in its incorporation. Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886); Empire Mfg. Co. *v.* Stuart, 46 Mich. 482 (1881), where the corporation re-incorporated in order to cure the irregularity. Estoppel as to corporate existence seems to mean that the corporation is obliged to prove only a *de facto* existence, and need not prove the details of incorporation. Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862). A person taking water from an irrigation company under contract cannot defend against an action thereon by alleging that the company was not incorporated. Fresno, etc. Co. *v.* Warner, 72 Cal. 379 (1887). In a suit by a corporation on a note, the execution of the note to the corporation is *prima facie* proof of its incorporation. A *de facto* corporation may enforce a note given to it. Hudson *v.* Green Hill Seminary, 113 Ill. 618 (1885); Booske *v.* Gulf Ice Co., 24 Fla. 550 (1888); Winget *v.* Quincy Bldg. etc. Assoc., 128 Ill. 67 (1889). A debtor sued by a corporation on an account cannot deny the corporate existence which he has

been issued to the company in the state where it was organized.[1]

A person who gives a bond to a corporation is not allowed to defeat the bond by alleging that the corporation was not duly incorporated;[2] nor can the corporation defeat its bonds by alleging its want of lawful incorporation.[3] A tenant cannot, in an ejectment suit, set up that his landlord was not duly incorporated.[4] A person who mortgages land to a supposed corporation cannot defeat a foreclosure of the mortgage by alleging that the mortgagee is not a corporation;[5] nor can

recognized. Plummer *v.* Struby, etc. Co., 23 Colo. 190 (1896). A debtor or creditor of a corporation cannot attack the incorporation on the ground that the certificate of the payment of the capital stock has not been filed as required by the New York statutes. Port Jefferson Bank *v.* Darling, 91 Hun, 236 (1895). That the corporation may ratify and enforce contracts entered into in its behalf by its promoters before incorporation, see § 705, etc., *infra*.

[1] Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894).

[2] McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847); St. Louis *v.* Shields, 62 Mo. 247 (1876); Loaners' Bank *v.* Jacoby, 10 Hun, 143 (1877); Commissioners, etc. *v.* Bolles, 94 U. S. 104 (1876); Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1729), where a foreign corporation sued, and the general issue was not pleaded.

[3] Independent Order, etc. *v.* Paine, 122 Ill. 625 (1887); Blackburn *v.* Selma, etc. R. R., 2 Flip. 525 (1879); S. C., 3 Fed. Cas. 526; Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868); Liter *v.* Ozokerite Min. Co., 7 Utah, 487 (1891); Aller *v.* Cameron, 3 Dill. 198 (1874); S. C., 1 Fed. Cas. 522, where a municipality set up this defense; Empire, etc. Mfg. Co. *v.* Stuart, 46 Mich. 482 (1882), a promissory note case. A corporation cannot defend against its contracts by alleging that it never published its articles of association as required by statute. Wood *v.* Wiley, etc. Co., 56 Conn. 87 (1888). A corporation is liable for a tax even though it failed to file its articles of association with the secretary of state as required by statute. Walton *v.* Riley, 85 Ky. 413 (1887).

[4] Ricketson *v.* Galligan, 89 Wis. 394 (1895). A lessee of corporate property cannot refuse to vacate on the ground that the company was not properly incorporated and officered, and that it did not own the property. Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. C. 343 (1896).

[5] People's Sav. Bank *v.* Collins, 27 Conn. 142 (1858); West, etc. Sav. Bank *v.* Ford, 27 Conn. 282 (1858); and Hasenritter *v.* Kirchhoffer, 79 Mo. 239 (1883), where the mortgagor's grantee was held to be estopped; Franklin *v.* Twogood, 18 Iowa, 515 (1865); Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883); Hubbard *v.* Chappel, 14 Ind. 601 (1860), where it was held that the mortgagee need not even prove itself to be a *de facto* corporation; Jones *v.* Kokomo, etc. Assoc., 77 Ind. 340 (1881). But the mortgagor may deny the corporate existence of the assignee of the mortgagee. Dundee, etc. Co. *v.* Cooper, 26 Fed. Rep. 665 (1886). A second mortgagee cannot question the incorporation of the first mortgagee. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389

the corporation itself, having given a mortgage, defeat a foreclosure by such a plea.[1] It has been held, however, that where a consolidation of two railroad companies without statutory authority is void, and the consolidated company is not even a *de facto* company, a mortgage deed of trust and the bonds given by such a consolidated company cannot be enforced and do not bind even the constituent companies.[2]

(1883). In a mortgage foreclosure case brought by a corporation, the mortgagee cannot claim that the corporation took the mortgage before stock was subscribed to the amount required by its charter. Johnson *v.* Elizabeth, etc. Assoc., 104 Pa. St. 394 (1883). Parties contracting with a corporation as such cannot attack a mortgage given by the corporation on the ground that the corporation was never legally organized. Andrews *v.* National, etc. Works, 77 Fed. Rep. 774 (1897). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A stockholder who has given a mortgage to the corporation cannot defeat the same on the ground that the charter was unconstitutional. Building & Loan Assoc. *v.* Chamberlain, 4 S. D. 271 (1893). As against its mortgage the corporation cannot set up the defense that it was not legally organized, in that no stock was ever subscribed for. Jones *v.* Hale, 52 Pac. Rep. 311 (Oreg., 1898).

[1] Quoted and approved in Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 678 (1894); Wallace *v.* Loomis, 97 U. S. 146 (1877); Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868). Where the mortgagor was a consolidated company, the grantee of the corporation cannot deny the validity of its mortgage to another person by alleging its want of legal incorporation. Hasselman *v.* U. S. etc. Co., 97 Ind. 365 (1884). The lessee of the road of a railroad corporation cannot defeat the foreclosure of a mortgage given by the latter by alleging that the latter was never duly incorporated. Beckman *v.* Henderson, etc. R'y, 35 Fed. Rep. 3 (1888). A mortgagee of a *de facto* corporation is not defeated by an attachment against the company. Defects in incorporation are immaterial herein. Duggan *v.* Colorado, etc. Co., 11 Colo. 113 (1888). In a mortgage foreclosure the defense that the mortgagor was not legally incorporated or organized cannot be set up. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883). A mortgagor corporation cannot defend against the mortgage on the ground that the special charter of the mortgagor was unconstitutional and void. McTighe *v.* Macon Const. Co., 94 Ga. 306 (1894).

[2] American L. & T. Co. *v.* Minnesota, etc. R. R., 157 Ill. 641 (1895). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. Louisville T. Co. *v.* Louisville, etc. Co., 84 Fed. Rep. 539 (1898). A general creditor cannot attack bonds on the ground that the corporation had no existence, inasmuch as that affects his claim also. A consolidation is binding as a *de facto* consolidation where the statutes rendered it possible to consolidate legally. Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897).

A grantor of land to a supposed corporation cannot deny the legality of his grant on the ground that the corporation was not duly incorporated.[1] And, in general, the courts do not allow parties to suits on contracts to question the due incorpo-

[1] Smith *v.* Sheeley, 12 Wall. 358 (1870); Frost *v.* Frostburg Coal Co., 24 How. 278 (1860). See also Cahall *v.* Citizens', etc. Assoc., 61 Ala. 232 (1878), where the corporation brought ejectment; Thompson *v.* Candor, 60 Ill. 244 (1871), where the grantor sued to recover possession; Sword *v.* Wickersham, 29 Kan. 746 (1883), where the grantee was a municipality; Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); affirmed, 100 U. S. 55 (1879), where the corporation sued for breach of covenant; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884), where the grantor claimed the right of way; Bakersfield, etc. Assoc. *v.* Chester, 55 Cal. 98 (1880); Keene *v.* Van Reuth, 48 Md. 184 (1877); Baker *v.* Neff, 73 Ind. 68 (1880); Snyder *v.* Studebaker, 19 Ind. 462 (1862),—cases where a grantee of the grantor was held estopped; Fay *v.* Noble, 61 Mass. 188 (1851), where a third person was not allowed to impeach a transfer of property by a corporation to another person, setting up that the transfer was invalid owing to informalities in the corporation.

The grantee of the corporation cannot defeat an attachment against it and levied on the land by setting up this defense. Dooley *v.* Walcott, 86 Mass. 406 (1862). But Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), allowed a grantor to a foreign corporation to allege this defense to its suit for possession. A grantor to a corporation who aids the corporation in conveying to others is certainly not allowed this defense. Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). A corporation may hold and sell land, though in its incorporation the incorporators did not attach a seal to their signatures as required by statute. Stoker *v.* Schwab, 1 N. Y. Supp. 425 (1888). A conveyance to or by a *de facto* corporation cannot be avoided on the ground of any defect in its organization. Doyle *v.* San Diego, etc. Co., 46 Fed. Rep. 709 (1891). The grantor who has been paid cannot rescind on the ground that the grantee corporation could not take. Long *v.* Georgia Pac. R'y, 91 Ala. 519 (1891). In ejectment the incorporation of a prior grantor need not be shown. Finch *v.* Ullmann, 105 Mo. 255 (1891). A creditor of a supposed corporation cannot attack a mortgage given by it to another creditor on the ground that the company was irregularly organized. Briar Hill Coal, etc. Co. *v.* Atlas Works, 146 Pa. St. 290 (1892). A deed to a corporation not in existence is void. Provost *v.* Morgan's, etc. Co., 42 La. Ann. 809 (1890). A transfer of land by a *de facto* corporation is valid as against all parties except the state. Crenshaw *v.* Ullman, 113 Mo. 633 (1893). The grantor of land cannot claim that the grantee was unincorporated and not qualified to hold land, the incorporation being only partially completed. Reinhard *v.* Virginia, etc. Co., 107 Mo. 616 (1891). In ejectment the corporate existence cannot be questioned, its deed being in the chain of title. Finch *v.* Ullmann, 105 Mo. 255 (1891). In a suit by a corporation to protect real estate held for it by trustees, the defendants cannot attack the incorporation of the company. First Baptist Church *v.* Branham, 90 Cal. 22 (1891). Where land has been condemned by a railroad corporation, the grantee of the party whose land has been so condemned, the grant having been made

ration of a company which it was possible to incorporate, which has attempted to incorporate, and which has acted as a corporation.[1]

prior to the condemnation, but the grantee being represented in the proceedings, cannot maintain ejectment therefor on the ground that the railroad charter provided "that the rights, privileges, and powers of said corporation shall be null and void," unless certain work was done within a certain time, even if the work had not been done within the prescribed time. Only the state can question the corporate existence on this ground. New York & N. E. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884).

[1] A junior mortgagee cannot question the incorporation of a senior mortgagee, the latter being a *de facto* corporation. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389 (1883). A director cannot escape his statutory liability by reason of the failure of the company to file its certificate of incorporation with the secretary of state. Meriden Tool Co. *v.* Morgan, 1 Abb. N. Cas. 125, n. (N. Y. Super. Ct., 1875). A *de facto* corporation suffices where it seeks to enjoin a city from disturbing its property. Denver *v.* Mullen, 7 Colo. 345 (1884). Or where an assignment by the corporation was illegal and the assignee is sued by creditors. Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368 (1869). Or where the president is sued by the company to recover its assets from him. Bank of Circleville *v.* Renick, 15 Ohio, 322 (1846). Or where an execution purchaser of the corporate property sues the mortgagee of the corporation. Morgan *v.* Donovan, 58 Ala. 241 (1877). Or where the corporation sues the sheriff for an illegal levy on its property. Dannebroge Min. Co. *v.* Allment, 26 Cal. 286 (1864). Or where the suit grows out of contracts with the corporation. Imboden *v.* Etowah, etc. Min. Co., 70 Ga. 86 (1883); Platte Valley Bank *v.* Harding, 1 Neb. 461 (1870). Or where a bank sues its correspondent bank. Bank of Toledo *v.* International Bank, 21 N. Y. 542 (1860). Or where the corporation sues for rent due on a lease made by it. Oregonian R'y *v.* Oregon, etc. Nav. Co., 22 Fed. Rep. 245 (1884); S. C., 23 Fed. Rep. 232 (1885). Or where a foreign corporation sues for a stipulated part of the oil taken from its land, and the defendant alleges that it is doing all its business outside of the state incorporating it. Newburg, etc. Co. *v.* Weare, 27 Ohio St. 343 (1875). See also §§ 237–239, *supra*. Or where a foreign corporation sues the sheriff for trespass. Persse, etc. Works *v.* Willett, 1 Rob. (N. Y.) 131 (1863). Or where the company sues for tolls. Smelser *v.* Wayne, etc. Turnp. Co., 82 Ind. 417 (1882). Although the charter states that it shall be forfeited unless the corporation is organized within two years, yet a stockholder cannot set up such a forfeiture in a suit involving a lien of the corporation on his stock. Boyd *v.* Redd, 27 S. E. Rep. 35 (N. C., 1897). A *de facto* corporation exists where the company might have incorporated under the statutes and has acted as a corporation. Methodist. etc. Church *v.* Pickett, 19 N. Y. 482 (1859). A person who agreed to and did convey property to a company to be incorporated may subsequently repudiate the corporation and his conveyance as against his associates who shared in the stock received therefor. Doyle *v.* Mizner, 42 Mich. 332 (1879). The case of Boyce *v.* Trustees, etc., 46 Md. 359 (1876), allowed a corporation to deny its existence as against a director who sued it for moneys advanced to it. Welland Canal Co.

In like manner the corporation itself is not allowed to defeat its contracts by such a plea.[1]

But there are cases where a party is not estopped from denying the incorporation of the other party.[2] Thus, the mere fact that a person contracts with a party and designates the latter as a "company" will not estop the former from denying the incorporation of the latter. This is the law, and is reasonable, since many copartnerships do business and make contracts under the name of "company."[3] Such, also, is the rule where a supposed incorporation is not even a *de facto* corporation.[4] But where the party contracted with is a *de facto* corporation, then the rules given above apply. It is to be borne in mind, also, that a company which is supposed to be incor-

v. Hathaway, 8 Wend. 480 (1832), allowed a contractor to deny the existence of a corporation which sued to recover back money which had been overpaid to him. A corporation receiving the stock of another corporation in consideration of certain agreements as to renting machines belonging to said latter company cannot, when enjoined from violating that agreement, set up that the latter company was not properly organized. Automatic, etc. Co. *v.* North American, etc. Co., 45 Fed. Rep. 1 (1891). Although there are less stockholders and less directors than the statute or charter require, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). It is no defense to a proceeding by a religious corporation to collect a legacy to allege that there were irregularities in its incorporation, and that there has been a nonuser of its franchises. *Re* Cutchogue Congregational Church, 131 N. Y. 1 (1892). In order to constitute a *de facto* corporation "there must at least be an organization under some existing charter or law. And such organization must be in good faith." Welch *v.* Old Dominion, etc. R'y, 10 N. Y. Supp. 174 (1890). Where an attorney sues for his services, the supposed corporation may set up that it is not a *de facto* nor *de jure* corporation. Welch *v.* Old Dominion, etc. R'y, 10 N. Y. Supp. 174 (1890). The California code provides that the existence of a *de facto* corporation shall not be called in question in private suits. Lakeside, etc. Co. *v.* Crane, 22 Pac. Rep. 76 (Cal., 1889): Golden, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890).

[1] Dooley *v.* Cheshire Glass Co., 81 Mass. 494 (1860); Callender *v.* Painesville, etc. R. R., 10 Ohio St. 516 (1860); Holbrook *v.* St. Paul, etc. Ins. Co., 25 Minn. 229 (1878). See also Bommer *v.* American, etc. Co., 81 N. Y. 468 (1880), where the corporation sought to escape royalties by alleging that it incorporated after the contract by it to pay them was made. A corporation sued for work done cannot set up that it was not regularly incorporated. Merrick *v.* Reynolds, etc. Co., 101 Mass. 381 (1869).

[2] Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), and the principles and cases *supra*. See also § 638, *infra*.

[3] See §§ 233, 234, *supra*.

[4] See §§ 233, 234, *supra*.

porated, but is not, may after incorporation ratify and enforce contracts made in its behalf.[1]

§ 638. *Lapse of charter by failure to comply with conditions.*— Frequently a charter of a railroad corporation requires it to complete its road or a certain number of miles of road within a certain time, and the charter expressly declares that for failure to comply with this requisite the corporate powers and existence shall cease. There is a strong line of decisions to the effect that such a provision as this forfeits the charter absolutely upon non-compliance, and that no decree of a court is necessary to effectuate that forfeiture.[2] But this drastic and

[1] See § 705, etc., *infra*.

[2] See Brooklyn, etc. Co. *v.* City, 78 N. Y. 524 (1879); *Re* Brooklyn, etc. R. R., 72 N. Y. 245 (1878); *Re* Brooklyn, etc. R. R., 75 N. Y. 335 (1878); Commonwealth *v.* Lykens, etc. Co., 110 Pa. St. 391 (1885); Farnham *v.* Benedict, 107 N. Y. 159 (1887). *Cf.* *Re* Kings County El. R'y, 105 N. Y. 97 (1887), rev'g 41 Hun, 415; People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill., 1887); aff'd, 129 Ill. 618 (1889). A new state constitution may forfeit all charters previously existing, but which have not been used by the incorporators. Chincleclamonche Lumber, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882), holding also that a constitutional provision that charters under which no organization has been made and business has been commenced shall lapse forthwith is constitutional and self-enforcing. In Putnam *v.* Ruch, 54 Fed. Rep. 216 (1893), the court, in a dictum, said that the repeal of a charter by a constitutional enactment may be self-executing, but that in the case before the court the judgment of the court was necessary. Where by its charter a street railroad is to be commenced within three years and completed within ten, but it does not even open books for subscriptions until nearly twenty years have elapsed, the corporation never came into existence, and an abutting property owner may enjoin the laying of tracks. Bonaparte *v.* Baltimore, etc. R. R., 75 Md. 340 (1892). *Contra*, New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). *Cf.* State *v.* Bull, 16 Conn. 179 (1844). In Texas the statute is self-executing, the words used being the same as in the New York statute. But the property rights survive for the benefit of creditors and stockholders. Sulphur Springs, etc. R'y *v.* St. Louis, etc. R'y, 2 Tex. Civ. App. 650 (1893). A provision that, unless certain roads should be completed within a certain time, "its corporate existence and its powers shall cease, so far as it relates to that portion of said road then unfinished," is self-executing. Houston *v.* Houston, etc. R'y, 84 Tex. 581 (1892). A subscriber, sued on his subscription for stock, may defeat the suit by showing that by statute the charter was to be void if no work was commenced within two years, and that such two years have elapsed and no work has been done. Bywaters *v.* Paris, etc. R'y, 73 Tex. 624 (1889). Under the Virginia law requiring organization within two years or else the charter is void, the charter becomes void "without legal proceedings of any kind, from mere operation of law." Welch *v.* Old Dominion, etc. Co., 10 N. Y.

dangerous construction of charters does not commend itself to law and justice. It adds one more to the perils which are attached to all great corporate enterprises. Even in New York, where the above doctrine seems to have had its origin, the courts are inclined to limit its application. The New York courts have recently held that a provision in a charter, that unless certain things are done within a certain time the company should "forfeit the rights acquired," does not work a forfeiture *ipso facto*,[1] and that a provision in a charter that unless work shall be commenced within two years "all rights and privileges granted hereby shall be null and void" is not self-executing, and a judgment of the court is necessary before forfeiture takes place.[2] Occasionally the charters of railroad corporations limit the time within which the road must be constructed, and prescribe a forfeiture of the charter in case of failure so to complete.[3] A statute that after a year's suspension of business the

Supp. 174 (1890); Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876). A provision in the general statutes to the effect that the powers of a corporation shall cease if it does not organize within one year does not apply to a special charter the terms of which indicate that organization might be after one year. People *v.* Bowen, 30 Barb. 24 (1859); affirmed on other grounds, 21 N. Y. 517. In Bybee *v.* Oregon, etc. R. R., 139 U. S. 663 (1891), the court reviewed the conflicting decisions on the question whether a corporate charter could be made by the legislature to lapse and cease *ipso facto* and without judicial action. As to the effect on corporate mortgages, see § 792, *infra*.

[1] Consequently this is no defense to condemnation proceedings. *Re* Brooklyn, etc. R. R., 125 N. Y. 434 (1891). A provision that if the road is not completed within a certain time "the charter shall be forfeited" is not self-executing. Galveston, etc. R'y *v.* State, 81 Tex. 572 (1891). Such also is the rule where the statute merely limits the term of existence of the corporation. Elizabeth Gaslight Co. *v.* Green, 46 N. J. Eq. 118 (1889). A provision in the charter that the corporate powers should cease and become void unless certain things were done within a certain time does not work a forfeiture *ipso facto*. A judicial proceeding is necessary. State *v.* Spartanburg, C. etc. R. R., 28 S. E. Rep. 145 (S. C., 1897).

[2] *Re* New York, etc. Bridge Co., 148 N. Y. 540 (1896). The attorney-general cannot enjoin a gas company from laying its pipes on the ground that the charter was void by reason of the company not having commenced work within the prescribed time. The local authorities are fully competent to raise the question if they wish. People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). Failure to commence work within a time specified in the charter, and a penalty that therefor the company should be dissolved, does not effect dissolution. A judgment is necessary. Day *v.* Ogdensburg, etc. R. R., 107 N. Y. 129 (1887).

[3] See § 633, *supra*.

franchises shall be deemed surrendered and the corporation be adjudged dissolved is not self-executory, but requires the judgment of the court.[1]

Where by a charter a bridge is to revert to the state after forty years, the state, upon the expiration of the forty years, may, by an information, enforce the reversion of the bridge to the public.[2] Proof of the charter and user is sufficient without proving organization within the time allowed by law.[3] Where a bank charter provided that it should be void unless the company should organize and proceed to business within two years, and the company organized, but failed to transact any business for fifteen years, a judgment of ouster against it will not be disturbed.[4] The failure of a street railway company to perform a condition of its charter may enable a city to make a new grant to another company.[5]

§§ 639, 640. *Repeals of charters — Right of stockholders to object.*— The repeal by the state of a charter before the expiration of the time it was to exist, or the repeal at any time where the charter is perpetual, is an unconstitutional breach of the contract between the state and the corporation and the stockholders.[6] Where, however, the right of repeal is reserved by the legislature, then such reservation becomes a part of the contract, and the repeal of the charter rests in the discretion of the legislature.[7] Upon a repeal the corporate property becomes a

[1] Mylrea *v.* Superior, etc. R'y, 67 N. W. Rep. 1138 (Wis., 1896).

[2] A subsequent act of the legislature waiving the reversion upon condition does not prevent the reversion if the condition is not performed. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892).

[3] St. Louis, etc. R. R. *v.* Belleville City R'y, 158 Ill. 390 (1895).

[4] Henderson, etc. Assoc. *v.* People, § 163 Ill. 196 (1896).

[5] Santa Rosa, etc. R. R. *v.* Central St. R'y, 112 Cal. 436 (1896). See also 931, *infra*, and § 634, *supra*.

[6] Greenwood *v.* Freight Co., 105 U. S. 13 (1881). "A grant of corporate privileges for a specified period cannot be resumed by the state within such period. If the charter be without limitation as to time it is forever irrepealable." Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). The legislature cannot forfeit a charter. Forfeiture can be decreed only by the courts. It is not a legislative function unless reserved. Allen *v.* Buchanan, 9 Phila. (Pa.) 283 (1873). Congress may repeal a charter granted by a territory. Mormon Church *v.* United States, 136 U. S. 1 (1890). A forfeiture of land by the government for non-compliance with the terms of the grant may be by legislative enactment. Farnsworth *v.* Minnesota, etc. R. R., 92 U. S. 49 (1875).

[7] Under a reserved power to repeal at the pleasure of the legislature the courts cannot question the necessity

fund to be applied, first to the payment of the debts of the corporation, and the balance to be distributed among the stockholders.[1] The question as to the right of a legislature to repeal a part of a charter, such as an exemption from taxation, is considered elsewhere.[2]

§ 641. *The assets upon dissolution — Distribution.*— Upon the dissolution of a corporation, all its property, both personal and real, is to be used to pay the debts of the corporation, and after the debts are paid the remainder is to be distributed among the stockholders.[3] Formerly it was held that the real es-

nor the legislative motives leading to a repeal. Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875). See Sinking Fund Cases, 99 U. S. 700, 720 (1878); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287, 302 (1856); Miners' Bank *v.* U. S., 1 Greene (Iowa), 553 (1848); McLaren *v.* Pennington, 1 Paige, 102 (1828); Crease *v.* Babcock, 40 Mass. 334, 344 (1839). If the power of repeal arises only upon an abuse of franchise the court may review the question whether there was an abuse. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856); Baltimore *v.* Pittsburgh, etc. R. R., 1 Abb. (U. S.) 9 (1865). Hence the legislature cannot forfeit a charter merely because the corporation has been incorporated elsewhere and has brought suits in the federal courts. Commonwealth *v.* Pittsburgh, etc. R. R., 58 Pa. St. 26 (1868). See, in general, Flint, etc. Plank-road Co. *v.* Woodhull, 25 Mich. 99 (1872); Montgomery *v.* Merrill, 18 Mich. 338 (1869); State *v.* Noyes, 47 Me. 189 (1859); Canal Co. *v.* Railroad Co., 4 G. & J. (Md.) 122 (1832); University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Cooley's Const. Lim. 106; Mayor, etc. *v.* Twenty-third Street, 113 N. Y. 311 (1889). Under this reserved power the state may authorize one corporation to build its road on a route which a prior corporation has designated but not acquired. *Re* Cable R'y, 40 Hun, 1 (1886). A general statute or constitutional provision reserving the right to repeal, alter, or amend charters enters into all charters granted subsequent thereto as much as if actually inserted in such charters. *Re* Lee's Bank of Buffalo, 21 N. Y. 9 (1860); Commissioners, etc. *v.* Holyoke Water-power Co., 104 Mass. 446 (1870); Delaware R. R. *v.* Tharp, 5 Harr. (Del.) 454 (1854). The repeal of a general incorporating act and the enactment of a new one does not repeal charters which have already been taken out under the old act. Freehold, etc. Assoc. *v.* Brown, 29 N. J. Eq. 121 (1878); United, etc. Assoc. *v.* Benshimol, 130 Mass. 325 (1881). *Contra*, Wilson *v.* Tesson, 12 Ind. 285 (1859).

[1] See § 641, *infra*.

[2] See §§ 501, 572*b*, *supra*.

[3] Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); Heath *v.* Barmore, 50 N. Y. 302 (1872); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); James *v.* Woodruff, 10 Paige, 541 (1844); Frothingham *v.* Barney, 6 Hun, 366 (1876); Wood *v.* Dummer, 3 Mason, 308, 322 (1824); S. C., 30 Fed. Cas. 435. *Cf. Re* Hodges Distillery Co., L. R. 6 Ch. 51 (1870); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Curran *v.* State, 15 How. 304, 307 (1853); Hastings *v.* Drew, 76 N. Y. 9 (1879), affirming S. C., 50 How. Pr. 254 (1887). The

tate of the corporation upon dissolution reverted to the grantor, its personal property to the state or sovereign, and the debts due to it and from it were forgiven and extinguished.[1] But contrary rules now prevail.[2] A deed made by a corporation after

same rule prevails where the charter is repealed by the legislature. Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); McLaren *v.* Pennington, 1 Paige, 102 (1828), by statute; Detroit *v.* Detroit, etc. P. R. Co., 43 Mich. 140 (1880); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238 (1882), per Field, J., holding that "the property of the corporation acquired in the exercise of its faculties is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business" (p. 279). People *v.* O'Brien, 111 N. Y. 1 (1888). The legislature cannot repeal a charter granted by the constitution of the state. New Orleans *v.* Houston, 119 U. S. 265 (1886).

[1] Hightower *v.* Thornton, 8 Ga. 486 (1850); Life Association *v.* Fassett, 102 Ill. 315 (1883); Commercial Bank *v.* Lockwood, 2 Har. (Del.) 8 (1835); State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844); Malloy *v.* Mallett, 6 Jones, Eq. (N. C.) 345 (1863), holding also that the stockholder's liability was extinguished; Port Gibson *v.* Moore, 21 Miss. 157 (1849); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Owen *v.* Smith, 31 Barb. 641 (1860); State Bank *v.* State, 1 Blackf. (Ind.) 267, 282 (1823); Acklin *v.* Paschal, 48 Tex. 147 (1877); St. Philip's Church *v.* Zion, etc. Church, 23 S. C. 297 (1885); Coulter *v.* Robertson, 24 Miss. 278 (1852); Bank of Mississippi *v.* Duncan, 56 Miss. 166 (1878); Hamilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

[2] Bacon *v.* Robertson, 18 How. (U. S.) 480 (1855); Heath *v.* Barmore, 50 N. Y. 302 (1872); Lum *v.* Robertson, 6 Wall. 277 (1867); Robinson *v.* Lane, 19 Ga. 337 (1856); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); S. C., 15 Fed. Cas. 922; Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); *Re* Woven Tape Skirt Co., 8 Hun, 508 (1876); Mumma *v.* Potomac Co., 8 Pet. 281 (1834); Fox *v.* Horah, 1 Ired. Eq. (N. C.) 358 (1841); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Curry *v.* Woodward, 53 Ala. 371 (1875); 2 Kent, Com. 307, n.; Powell *v.* North Missouri R. R., 42 Mo. 63 (1867); Wood *v.* Dummer, 3 Mason, 308 (1824); S. C., 30 Fed. Cas. 435. Land conveyed to a corporation in fee does not revert to the grantor or his heirs on the extinction of the corporation. Wilson *v.* Leary, 120 N. C. 90 (1897), overruling Fox *v.* Horah, 36 N. C. 358. Statutes are frequently enacted to this effect. Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846); McCoy *v.* Farmer, 65 Mo. 244 (1877); Owen *v.* Smith, 31 Barb. 641 (1860). A deed of property to a railroad for fifty years or so long as its charter continues, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889). So far as land grants are concerned the consolidated company is the same as the old company. U. S. *v.* Southern Pac. R. R., 45 Fed. Rep. 596 (1891). A consolidated company succeeds to land owned by one of the consolidating companies. Cashman *v.* Brownlee, 128 Ind. 266 (1891). An agreement that upon dissolution of the company the telegraph line should go to the railroad is binding. Latrobe *v.* Western Tel. Co., 74 Md. 232

its charter has expired is a nullity.[1] The dissolution of a corporation after an execution has been levied upon its property does not prevent a sale.[2]

When the corporation owns a right of way or other franchise obtained from a municipality or by the exercise of the state's power of eminent domain, this right-of-way franchise is a corporate asset upon the dissolution of the corporation and may survive the death of the corporation. It does not revert to the state or municipality.[3]

(1891). A deed duly authorized is good, though executed after the corporation is consolidated with another. Edison, etc. Co. *v.* New Haven, etc. Co., 4 R'y & Corp. L. J. 4 (1888).

[1] Bradley *v.* Reppell, 133 Mo. 545 (1896); Marysville Inv. Co. *v.* Munson, 44 Kan. 977 (1890). Where by statute, after dissolution, the corporation continues for three years for the purpose of winding up, it may, during those three years, convey its real estate to a trustee in trust to wind up its business. Hanan *v.* Sage, 58 Fed. Rep. 651 (1893). A corporation cannot deed land after its charter has expired. Marysville Invest. Co. *v.* Munson, 44 Kan. 491 (1890).

[2] Boyd *v.* Hankinson, 83 Fed. Rep. 876 (1897).

[3] Where a legislature, under its reserved right of repeal, repeals a street railroad charter, the right to use the streets and operate the road does not revert to the state, but passes as property to the receiver for the benefit of the creditors and stockholders of the corporation. People *v.* O'Brien, 111 N. Y. 1 (1888). See also § 792, *infra*. In Pennsylvania the franchise of the right of way of a railroad vests, upon its dissolution, in the state, and the state may grant it to another railroad. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). See also Plitt *v.* Cox, 43 Pa. St. 486 (1862). In Ohio it seems that the right of way reverts to the owner of the fee. New York, etc. R. R. *v.* Parmalee, 1 Ohio C. C. Rep. 239 (1885). See also, as to the rule in New York, Heard *v.* Brooklyn, 60 N. Y. 242 (1875); People *v.* White, 11 Barb. 26 (1851); Hooker *v.* Utica, etc. Turnp. Co., 12 Wend. 371 (1834). There is no reversion of the right of way on the dissolution of the company after fifty years. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889). A lottery grant cannot be repealed, when mortgaged by the corporation, until the mortgage is paid. Gregory *v.* Shelby College, 2 Metc. (Ky.) 589 (1859). Compare, in general, Turnpike Co. *v.* Illinois, 96 U. S. 63 (1877). Where the stockholders of an old plank-road company are still operating the road, but under another charter, they cannot be ousted from the latter by an injunction suit against their operating under the former. The court stated that it did not favor such a confiscating suit. People *v.* De Grauw, 133 N. Y. 254 (1892). An unused right of way does not revert to the original owner. McConihay *v.* Wright, 121 U. S. 201 (1887). See also § 906, *infra*. The state may grant an unused street-railway franchise to another company. Henderson *v.* Central, etc. R'y, 21 Fed. Rep. 358 (1884). No reverter where the railroad takes a fee. Yates *v.* Van De Bogert, 56 N. Y. 526 (1874). See also, in general, Norton *v.* Walkill, etc. R. R., 42 How. Pr. 228 (1871); State *v.* Rives, 5 Ired. (N. C.) L. 297 (1844); Hopkins *v.* Whitesides, 1 Head (Tenn.), 31 (1858). Where a turnpike

This is the natural and logical result of the principle of law that a railroad company may make a contract to run longer than its chartered existence;[1] may take a deed of land in fee, although the company's duration is limited;[2] and may acquire a perpetual right of way under the same circumstances.[3] On the dissolution of a corporation having no stockholders, the common-law rules of reverter and appropriation apply.[4] Upon

company is authorized to collect tolls only for fifteen years, the road is free after that date. People *v.* Anderson, etc. Co., 76 Cal. 190 (1888). The dissolution of a water-works company does not put an end to the contract between it and the city. Weatherly *v.* Capital, etc. Co., 22 S. Rep. 140 (Ala., 1897). In Haffcke *v.* Clark, 50 Fed. Rep. 531 (1892), the court said in a dictum that inasmuch as a license is not assignable the dissolution of a corporation, which is the licensee, puts an end to the license. See note 3, *sub.*

[1] A contract between two railroad companies by which one is given the right to run its trains over the tracks of the other may be for a period beyond the duration of the charter of one of the companies, the court saying that the contingency that the company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." Union, etc. R'y *v.* Chicago, etc. R'y, 163 U. S. 564, 592 (1896). A corporation may lease its property for a hundred years, even though the statutes forbid any disposition of property which suspends the absolute power of controlling the same for more than two lives and twenty-one years, and may mortgage its interest as lessor. Sioux, etc. Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897).

[2] Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854). See also § 694, note, *infra.*

[3] Miner *v.* New York, etc. R. R., 123 N. Y. 242 (1890); Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889); Bailey *v.* Platte, etc. Co., 12 Colo. 230 (1889). See note 3, p. 1246. A street railway company may legally receive from a city a grant of street rights for a period extending beyond the chartered life of the corporation. Detroit Citizens' St. R'y *v.* Detroit, 64 Fed. Rep. 628 (1894), rev'g Detroit *v.* Detroit City R'y, 56 Fed. Rep. 867, and 60 Fed. Rep. 161, a case where a thirty-year street easement was given to a corporation having only fourteen years of corporate life. Dissolution does not terminate a lease to a corporation. People *v.* National Trust Co., 82 N. Y. 284 (1880).

[4] Upon the dissolution of a public or charitable corporation its property goes to the state and former owners, subject to the trust that the property shall still be used for similar purposes if those purposes be legal. Mormon Church *v.* U. S., 136 U. S. 1 (1890). Upon the dissolution of an eleemosynary corporation having no stockholders or creditors, the title to its land reverts to the donor. Danville Seminary *v.* Mott, 136 Ill. 289 (1891). A private corporation — a normal college — cannot by act of the legislature be converted into a public corporation and the property vested in the state. Bakewell *v.* Board of Education, 33 N. E. Rep. 186 (Ill., 1893). In California, on the dissolution of a corporation for literary purposes, its land goes to the state. People *v.* College of California, 38 Cal. 166 (1869). Upon dissolution of a mutual insurance company having no stock-

dissolution the stockholders are entitled to an immediate settlement of the corporate debts and a distribution of the residue.[1] Usually they are not obliged to accept the stock of another corporation as payment upon a final distribution, but may demand that the distribution be in cash.[2] The stockholders upon dissolution may make a contract as to the mode of distribution.[3] The company by unanimous consent may distribute the assets without a dissolution, provided all creditors are paid.[4]

Upon dissolution a stockholder may file a bill for distribution of the assets.[5] When corporate assets are placed in the hands of a corporate officer or other person for distribution, a stockholder may file a bill in equity for his part, but in such a suit the corporation is a necessary party.[6] The remedy in such a

holders, its assets, after the payment of its liabilities, belong to the state. Titcomb *v.* Kennebec, etc. Co., 79 Me. 315 (1887). But where an insurance company is organized both on the stock and mutual plan, upon a dissolution of the stock part of the organization the guaranty accumulations belong to the stockholders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). Land reverts to the former owner. Mott *v.* Danville Seminary, 129 Ill. 403 (1889). Distribution of funds of incorporated association. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to unincorporated associations, see ch. XXIX, *supra*.

[1] Frothingham *v.* Barney, 6 Hun, 366 (1876).

[2] See § 671, *infra*.

[3] White *v.* Boreing, 45 S. W. Rep. 242 (Ky., 1898).

[4] Unless some statute prohibits it, or someone objects, a corporation may declare a dividend out of its capital stock. People *v.* Barker, 141 N. Y. 251 (1894). See also Rorke *v.* Thomas, 56 N. Y. 559 (1874). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable; but he must first obtain a judgment against the corporation, and execution must be returned unsatisfied. Lamar *v.* Allison, 28 S. E. Rep. 686 (Ga., 1897). See also § 548, *supra*.

[5] Brown *v.* Mesnard M. Co., 63 N. W. Rep. 1000 (Mich., 1895). Where a corporation has been dissolved at the instance of the state, a stockholder may file a bill for the appointment of a receiver to administer the assets. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895), the court holding also that the appointment could not be questioned collaterally.

[6] Young *v.* Moses, 53 Ga. 628 (1875). For the remedy and procedure when the directors on dissolution have divided the assets fraudulently, see Horner *v.* Carter, 11 Fed. Rep. 362 (1882). The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). The corporation may file a bill to distribute a specific fund only,

case is not at law.[1] The stockholders may insist on the application of the statute of limitations as far as it is a bar to the claim of corporate creditors upon the assets.[2] The statute of limitations does not run as against the estate of a dissolved corporation.[3] Where the corporation has been dissolved, and its assets distributed, and its trustees discharged by a decree of court, a creditor who was a party to the suit cannot afterward maintain a bill against the trustees to reach unpaid subscriptions.[4] The mode of distribution among corporate creditors, where some have other security and others not, is considered elsewhere.[5] The rights of the stockholders in the assets upon a dissolution depend upon the law of the country creating the corporation.[6] And these rights cannot be taken from the stockholders by an act repealing the charter.[7] It has been held that surplus assets ought to be distributed in proportion as the subscriptions to the stock have been paid.[8] In winding-up pro-

and need not in that bill have a general distribution of all its funds. Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886). If the directors, who by statute are made trustees to wind up the corporation upon dissolution, delay in so doing, the court will appoint a receiver. *Re* Pontius, 26 Hun, 232 (1882). Although the charter is forfeited at the instance of the state, yet the directors are trustees to wind up the company under the statute, unless a receiver is appointed at the instance of a creditor or stockholder. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Although the fund upon dissolution is small and the number of stockholders large, yet the directors cannot avoid their duty as to the distribution of the fund by turning it over to a court to administer. *Re* Centennial Board, 48 Fed. Rep. 350 (1891).

[1] Brown *v.* Adams, 5 Biss. 181 (1870); S. C., 4 Fed. Cas. 350. *Cf.* Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886); Hodsdon *v.* Copeland, 16 Me. 314 (1839).

[2] Johnston *v.* Talley, 60 Ga. 540 (1878). On a bill to wind up an insolvent corporation the stockholder may prove that some claims against the company were not legally contracted. Crutchfield *v.* Mutual, etc. Co., 2 S. W. Rep. 658 (Tenn., 1886).

[3] Ludington *v.* Thompson, 153 N. Y. 499 (1897).

[4] Chavent *v.* Schefer, 59 Fed. Rep. 231 (1894).

[5] See § 763, *infra*.

[6] Hamilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

[7] Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); S. C., 15 Fed. Cas. 922.

[8] Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); Sheppard *v.* Scinde, etc. R'y, 56 L. T. Rep. 180 (1887); *Re* Hodges, etc. Co., L. R. 6 Ch. App. 51 (1870). On winding up, stockholders who have advanced on the subscription price more than the calls required, under an agreement of repayment with interest, are entitled to repayment before a general dividend is made. So held where full-paid stock was issued for property, but other stock for cash was not fully paid up. Exchange, etc. Co., L. R. 38 Ch. D. 171 (1888).

ceedings an assessment may be levied upon stock which is not fully paid, in order to adjust the rights of the stockholders as between themselves.[1] Where increased capital stock is only partly paid up, and a dissolution is had, the court will order repayment of all that was paid on the original capital stock and on the increased capital stock, and then a distribution of the surplus on the whole capital stock.[2] In the distribution of the assets of a corporation upon its winding up, the accumulated profits will be considered separate from the capital, if some of the stock is held in trust for life tenants and remainder-men.[3] In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder, and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock.[4] A contest between the preferred and common stockholders as to who shall be entitled to the surplus will not be decided in a foreclosure suit, but the surplus will be paid to the corporation for distribution.[5] The distribution is made upon equitable principles.[6]

[1] Welton *v.* Saffery, 76 L. T. Rep. 505 (1897). Upon dissolution the court may and will call in unpaid subscriptions where this is necessary in order to make a proper distribution. *Re* Sheppard's, etc. Co., 70 L. T. Rep. 3 (1893). In *Re* Anglo, etc. of W. A., 78 L. T. Rep. 157 (1898), the court ordered a call as a matter of form on subscriptions, so as to equalize the amount already paid on such subscriptions with a view to distribution on dissolution.

[2] *Re* Driffield Gas L. Co., 78 L. T. Rep. 162 (1898). Founders' shares are a species of preferred or deferred stock; and where, on dissolution, the founders' shares are to have one-fifth of the surplus assets, the words "surplus assets" were construed to be the assets remaining after paying the debts, and also paying back whatever the stockholders had originally paid in. *Re* New Transvaal Co., [1896] 2 Ch. 750.

[3] *Re* Rogers, 22 N. Y. App. Div. 428, 435 (1897).

[4] Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897).

[5] Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898).

[6] Where the original stock is paid for in cash at par, and then increased stock is paid for at the rate of $3 on $10, and upon the winding up of the company a large surplus exists for distribution, the court ordered that the original stock should first receive $7 on each $10, and then that the remaining assets should be distributed

Debts due from the stockholder to the corporation are in any event to be deducted from his interest in the assets.[1] And an assignment or transfer of stock by a stockholder after the dissolution of the corporation is merely an equitable assignment of his interest in the assets of the concern as it may appear upon the settlement.[2] Where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be dividends. The creditors of the corporation are entitled to the *corpus* of the estate, but not to any profits. If there is preferred stock such profits go to that stock.[3]

A person who conveys property to the corporation in payment for stock may contract that upon dissolution he shall receive back that property.[4] Where the corporation is dissolved, but by statute suits may be brought during the three succeeding years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken.[5] A forfeiture of a charter by a state court does not affect the status of a receiver appointed by the United States court. Such receiver may proceed to administer the property.[6]

pro rata on all the stock. *Re* Weymouth, etc. Co., [1891] 1 Ch. 66. On a dissolution and winding up, where part of the stock is paid up and part not, each class of stockholders is repaid the amount paid upon that class of stock, and then the surplus is divided proportionately. *Re* Wakefield, etc. Co., [1892] 3 Ch. 165. On a winding up, if it turns out that the profits had been systematically overestimated for many years, thereby depriving common stockholders of the dividends, an account should be taken and such dividends be then paid. *Re* Bridgwater, etc. Co., [1891] 2 Ch. 317.

[1] James *v.* Woodruff, 10 Paige, 541 (1844); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Purton *v.* New Orleans, etc. R. R., 3 La. Ann. 1932 (1848). Where a stockholder in an insolvent national bank does not pay the assessment levied by the comptroller, he cannot participate in a dividend to the stockholders after the debts are paid, such dividend being less than his assessment. Neither can his transferee, nor the purchaser of his stock at an execution sale. Richardson *v.* Wallace, 39 S. C. 216 (1893).

[2] James *v.* Woodruff, 10 Paige, 541 (1844); aff'd, 2 Denio, 574 (1845); Sewall *v.* Chamberlain, 82 Mass. 581 (1860).

[3] Bishop *v.* Smyrna, etc. Co., [1895] 2 Ch. 265.

[4] Fish *v.* Nebraska, etc. Co., 25 Fed. Rep. 795 (1885).

[5] General Electric Co. *v.* West Asheville Imp. Co., 73 Fed. Rep. 386 (1896).

[6] City, etc. Co. *v.* State, 32 S. W. Rep. 1033 (Tex., 1895). But where, after an injunction has been obtained in the federal court, the corporation is dissolved in the state court, the suit in the federal court falls. Lang *v.* Louisiana Tanning Co., 56 Fed. Rep. 675 (1893).

§ 642. *The liabilities upon dissolution, consolidation, or sale.* As already seen, the old rule that upon dissolution all debts by or to the corporation are rendered unenforceable is no longer the law.[1]

An important question arises in this connection where one corporation sells out all its property to another corporation leaving some of the debts of the former corporation unpaid. The rights and remedies of the creditors in such a case are fully considered elsewhere.[2] So also it frequently becomes important to know whether a consolidated company is liable for the debts of the constituent companies,[3] and whether a purchaser at a foreclosure sale is liable for the debts of the foreclosed corporation.[4]

Dividends paid to the stockholders out of the capital stock are illegal as against corporate creditors whether paid before or at the time of dissolution.[5]

The question of liability where the corporation is a mere "dummy" is considered elsewhere.[6]

Another question is whether a person or corporation which owns all the stock of another corporation is ever liable for the debts of the latter on the ground that the latter is a mere "dummy" for the former. This subject also is considered elsewhere.[7]

At common law, upon dissolution of a corporation, all suits by or against it abate.[8]

[1] See preceding section. But a judgment declaring a corporation illegal, void, and the association dissolved puts an end to a contract by it to pay certain parties its bonds and stock if they would build its road. Vinal *v.* Continental, etc. Co., 32 Fed. Rep. 345 (1887).

[2] See ch. XL, *infra.*

[3] See ch. LIII, *infra.*

[4] See ch. LII, *infra.*

[5] See § 548, *supra.*

[6] See §§ 6, *supra,* and 663, 664, 709, *infra.*

[7] See §§ 6, *supra,* and 663, 664, 709, *infra.*

[8] McCulloch *v.* Norwood, 58 N. Y. 562 (1874); *Re* Norwood, 32 Hun, 196 (1884); Greeley *v.* Smith, 3 Story, C. C. 657 (1845); Saltmarsh *v.* Planters', etc. Bank, 17 Ala. 761 (1850); Merrill *v.* Suffolk Bank, 31 Me. 57 (1849); Ingraham *v.* Terry, 11 Humph. (Tenn.) 572 (1851); Life Assoc. *v.* Fassett, 102 Ill. 315 (1882); Platt *v.* Ashman, 32 Hun, 230 (1884). An action for tort abates upon the expiration of the corporate charter. Grafton *v.* Union Ferry Co., 13 N. Y. Supp. 878 (1891). Corporate suits end when the charter expires. Logan *v.* Western, etc. R. R., 87 Ga. 533 (1891). An action against a corporation may be continued against those who administer its assets where the corporation is dissolved pending the suit. Hepworth

Suit does not lie against a corporation which has been dissolved.[1] But the statutes often contain a provision that the corporate existence shall be continued for a fixed time, pending the proceedings for dissolution, so that suits may be brought by and against the corporation for the purpose of closing the business and disposing of the assets.[2]

v. Union Ferry Co., 62 Hun, 258 (1891). Where by consolidation a corporation ceases to exist, suits against it abate. Council, etc. R'y *v.* Lawrence, 45 Pac. Rep. 125 (Kan., 1896). A dissolution of a corporation puts an end to a suit at law for damages for personal injuries. Grafton *v.* Union Ferry Co., 19 N. Y. Supp. 966 (1892). Under the New York statute dissolution does not bar an action for damages. Marstaller *v.* Mills, 143 N. Y. 398 (1894). Upon dissolution of a corporation all suits abate. Marion Phosphate Co. *v.* Perry, 74 Fed. Rep. 425 (1896). The dissolution of a foreign corporation ends a suit against it. Wamsley *v.* Horton, 12 N. Y. App. Div. 312 (1896). A judgment in Illinois against a New York corporation that has already been dissolved in New York is not good in New York. Rodgers *v.* Adriatic F. Ins. Co., 87 Hun, 384 (1895). An action in tort for personal injuries abates upon the dissolution of the company. *Re* Yuengling Brewing Co., 24 N. Y. App. Div. 223 (1897). See 87 Fed. Rep. 256.

[1] Dobson *v.* Simonton, 86 N. C. 492 (1882); Gold *v.* Clyne, 58 Hun, 419 (1890). The legislature may provide for suits against corporations after dissolution, thus changing the common-law rule. Stetson *v.* City Bank, etc., 2 Ohio St. 167 (1853); Foster *v.* Essex Bank, 16 Mass. 244 (1819). A corporation may be sued as such for a tort committed by it after its charter has expired. Miller *v.* Newburg, etc. Co., 31 W. Va. 836 (1888). Where an attorney brings suit in the name of a corporation that has been dissolved before the action, he is liable for costs if beaten. Attleboro Nat. Bank *v.* Wendell, 64 Hun, 208 (1892). After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged. Coxon *v.* Gorst, [1891] 2 Ch. 73. Upon dissolution, the directors becoming trustees by statute, the statute of limitations begins to run against claims against the secretary. Landis *v.* Saxton, 105 Mo. 486 (1891). A corporation may give a bond on appeal, even though the charter has been forfeited, an appeal having been taken from the judgment of forfeiture. Texas, etc. R. R. *v.* Jackson, 22 S. W. Rep. 1030 (Tex., 1893).

[2] Stetson *v.* City Bank of New Orleans, 12 Ohio St. 577 (1861); McGoon *v.* Scales, 9 Wall. 23 (1869); Mariners' Bank *v.* Sewall, 50 Me. 220 (1861); Muscatine Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Thornton *v.* Marginal Freight R'y, 123 Mass. 32 (1877); Folger *v.* Chase, 35 Mass. 63 (1836); Crease *v.* Babcock, 51 Mass. 525, 567 (1846); *Re* Independent Ins. Co., Holmes, 103 (1872); S. C., 13 Fed. Cas. 13; Franklin Bank *v.* Cooper, 36 Me. 179 (1853); Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846). The life of the corporation is frequently extended by these statutes for three years. Herron *v.* Vance, 17 Ind. 595 (1861); Foster *v.* Essex Bank, 16 Mass. 245 (1819); Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); Van Glahn *v.* De Rosset, 81 N. C. 467 (1879); Michigan State Bank *v.* Gardner, 81 Mass. 362 (1860). Sometimes five

A contract made by the officers after the charter has been forfeited does not bind the stockholders.[1]

A director who is a creditor of the corporation may share proportionately with other creditors in the assets.[2]

Where a company owing debts allows a foreclosure of a mortgage and buys in the property and holds it secretly in the name of a trustee, an execution may be levied on it by a judgment creditor of the company.[3]

The dissolution of a company does not put an end to its executory contract to employ a person,[4] nor obligations which were created for a period longer than the duration of the corporate charter.[5]

Where a corporation is dissolved before a lease taken by it runs out, the lessor may hold its assets liable for the breach of contract.[6] Dissolution may put an end to a guaranty of dividends on the stock of the company.[7] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[8] Where suit for dissolution is instituted against an insurance company, the claims against it are figured at their value at the commencement of the suit, even though an insured person dies thereafter and before distribution.[9]

years. Tuskaloosa, etc. Assoc. *v.* Green, 48 Ala. 346 (1872). *Cf.* Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820). A suit abates upon the expiration of the time limited, where by statute the corporation continues for five years after dissolution for the purpose of prosecuting and defending suits. Dundee, etc. Co. v. Hughes, 77 Fed. Rep. 855 (1896).

[1] Wilson *v.* Terson, 12 Ind. 285 (1859).

[2] Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892).

[3] State *v.* McBride, 105 Mo. 265 (1891).

[4] Tiffin Glass Co. *v.* Stoehr, 54 Ohio, 157 (1896). A contract made by a corporation to pay when it is in funds is not enforceable if the company abandons business. Zimmer *v.* Brooklyn Sub. R'y, 6 N. Y. Supp. 316 (1889).

[5] See § 841, *infra*.

[6] Kalkhoff *v.* Nelson, 60 Minn. 284 (1895). Damages for breach of a contract should be allowed in liquidation, even though the time for the performance of such contract is not yet complete. Rosenbaum *v.* United States, etc. Co., 40 Atl. Rep. 591 (N. J., 1898).

[7] Lorillard *v.* Clyde, 142 N. Y. 456 (1894).

[8] Drew *v.* Longwell, 81 Hun, 144 (1894).

[9] People *v.* Commercial A. L. Ins. Co., 154 N. Y. Rep. 95 (1897).

PART IV.

FRAUDS—ULTRA VIRES ACTS—INTRA VIRES ACTS—NEGLIGENCE AND IRREGULAR CONTRACTS OF DIRECTORS, STOCKHOLDERS, PROMOTERS, AND AGENTS.

CHAPTER XXXIX.

FRAUDULENT ACTS OF DIRECTORS, MAJORITY OF STOCKHOLDERS, AND THIRD PERSONS.

A. THE OCCASION, SCOPE, AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. The cause and occasion of this subject.
644. The three classes of stockholders' wrongs herein—The corporation is ordinarily the party to remedy these wrongs.
645. But the corporation failing to do so, a stockholder may bring the action.
646. The facts and conditions which allow and sustain a stockholder's suit herein.

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCKHOLDERS, OR OF THIRD PERSONS, TO REMEDY WHICH A STOCKHOLDER MAY BRING SUIT.

§ 647. Different methods of perpetrating these frauds.
648. Directors as trustees.
649. Director or other corporate officer interested in construction company — Contracts between a director and his company.
650. Secret gifts to directors from persons contracting with the corporation.
651. Promoters' frauds on the corporation.
652. Sales of property by corporate officers to the corporation.
§ 653. Sales of property by the corporation to corporate officers, and purchases by corporate officers at foreclosure and execution sales.
654. Reorganizations of corporations.
655. Issue of "watered" stock and of bonds at a discount — Division of assets, leaving creditors unpaid.
656. Stockholders' actions against persons, other than directors, for frauds, etc., against the corporation.
657. Salaries or compensation to corporate officers.
658. Contracts between corporations having one or more directors in common.
659. Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.
660. Directors' purchases of property needed by the corporation — Buying up the debts of the corporation.
661. Loans by the directors to the corporation, mortgages by the corporation to directors, and the right of a corporation—solvent or insolvent—to give a mortgage or assignment of its property to a director in order to prefer the payment of his debt.

§ 662. Frauds by a majority of the stockholders on the minority—Directors owning stock in another corporation with which a contract is made—Stockholders' ratification of the voidable acts of directors—One corporation voting stock in another competing corporation.
663. "Dummy" corporations—The courts will ignore the corporate existence where it is fraudulently used to do what the stockholders cannot legally do.
§ 664. "Dummy" corporations—An individual or corporation owning all the stock of another corporation is not ordinarily liable for the debts of the latter.
665. Participation, ratification, and laches as a bar to stockholders' complaints.
666. Parties, pleadings, etc.

A. THE OCCASION, SCOPE, AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. *The cause and occasion of this subject.*— Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have accumulated or distributed enormous gains and profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto—the stockholders of the company. Corporations, with their vast capital stock, their great income, their rapidly-changing personal property, and their large purchases and sales, have proved to be a temptation which corporate officers are too often unable to withstand. These companies have been found to be efficient instruments of fraud, speculation, plunder, and illegal gain. In these latter days the robbery and spoliation of corporations and stockholders by the corporate directors and managers have been systematized into well-known methods of proceeding, and the carrying out of such plans has become a profession and an accomplishment. Skill, audacity, experience, and talent of the highest order have reduced to a certainty the methods of diverting the profits, capital, and even the existence of the corporation itself to the enrichment of the corporate managers and their co-conspirators. Corporations become insolvent, and stockholders lose their investment, while individuals become millionaires. Illegitimate gains are secured and enormous fortunes are amassed by the few at the expense of the defrauded but generally helpless stockholders.

The expense, difficulty, and delays of litigation; the power, wealth, and unscrupulousness of the guilty parties; the secrecy, skill, and evasive nature of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all combine to baffle investigation and exposure, to discourage the stockholders, and to encourage and protect the parties guilty of the wrong.

In England, ever since the year 1720, when the "South Sea Bubble" exploded and unsettled the finances of the kingdom, there has been a constant recurrence of "bubble companies" and dishonest promoters. The English reports are filled with cases of frauds of corporate directors, corporate agents, and corporate organizers. A system of jurisprudence has grown up from these cases. This system, however, is as yet in a formative state; and there is no branch of the law more complicated, difficult, and full of pitfall, for the court, practitioner, and client than that growing out of the frauds of corporate directors.

In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation. These cases frequently involve colossal transactions, and exhibit a scope, grasp, and ability for railway management and manipulation that excite the stockholder's admiration fully as much as his indignation.

It is a curious fact that the American talent for organization, executive management, and the invention and adoption of means to ends — a characteristic talent that formerly was engrossed in the political affairs of the nation — is now very largely engaged in the development and management of the American railroads. With energy, enterprise, daring, and sagacity the American railway has been built, improved, consolidated, and perfected, frequently far in advance of even the remarkable growth of the country itself. For the most part this work has been done honestly, efficiently, and creditably. But not always has this been the case. The ingenuity and fruitful cunning of adroit, experienced, and unscrupulous talent have plundered and robbed the corporations and the stockholders, and have brought reproach on the management of the American railway. Great fortunes have been accumulated by "wrecking" great corporations. Railroads which were capa-

ble of earning a fair return upon the capital invested have been rendered insolvent by the fraudulent management and illegal gains of the corporate officers. The plans, devices, and methods of accomplishing this result have been systematized and elaborated to a degree equal to the great resources and fertility of mind employed in their execution. It is the purpose of this part of the present work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong.

§ 644. *The three classes of stockholders' wrongs herein—The corporation is ordinarily the party to remedy these wrongs.*— Stockholders' wrongs, arising from a breach of trust by directors or a majority of the stockholders or third persons, are clearly divisible into three classes. They are: first, fraudulent acts;[1] second, *ultra vires* acts;[2] third, negligence of corporate directors.[3]

There is another class of grievances — that of internal dissensions in the corporation and dissatisfaction with its policy and acts. These, however, are *intra vires* of the directors or majority of the stockholders. The law gives no remedy for such dissensions, since the stockholder has the corporate elections as a remedy. The majority are to rule so long as they do so without fraud and within the powers of the corporation.[4] So also the decision of the board of directors is binding as regards the usual suits which a corporation might bring against third persons.[5]

These frauds, *ultra vires* acts, and acts of negligence are injuries to the corporation; and the corporation is ordinarily the party to bring suit to rectify them. The frauds, *ultra vires* acts, and negligence of directors do not affect the stockholder directly; but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value and privileges of the stock. Accordingly it is the duty and right of the corporation to bring suit to remedy these wrongs, just as it is the duty and right of the corporation to bring suit to remedy an ordinary trespass, conversion, or fraud, whereby third parties injure the corporate property and interests. That

[1] This is the subject of this chapter.
[2] See ch. XL, *infra*.
[3] See ch. XLII, *infra*.
[4] See ch. XLI, *infra*.
[5] See § 750, *infra*.

a corporation may bring suit to remedy the frauds, *ultra vires* acts, or negligence of its trustees or directors was the decision of Lord Chancellor Hardwicke, in 1742, in the case of The Charitable Corporation against Sutton.[1]

§ 645. *But the corporation failing to do so, a stockholder may bring the action.*— During the next hundred years, however, corporations having a capital stock and stockholders came into existence and rose into prominence. The large capital and great profits of many of these corporations led to frequent frauds, breaches of trust, and illegal acts on the part of the directors. It was the duty of the corporation to bring suit to remedy these wrongs. But it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found, where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy; and it became apparent that there was a wrong which had no remedy. The time had come when the minority of the stockholders of a defrauded corporation — the corporation itself being controlled by the guilty parties — must be given a standing in court for the purpose of taking up the cause of the corporation, and in its name and stead bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of Foss *v.* Harbottle,[2] a stockholder brought suit in the name of himself and other defrauded stockholders, and for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholders on the ground that the complainant did not prove that the corporation itself was under the control of the guilty parties, and that it was unable to institute the suit. The court, however, broadly intimated that a case *might* arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion,

[1] 2 Atk. 400. In this case the court said: "Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." As to the power of the state to remedy such abuses, see § 635, *supra*.

[2] 2 Hare, 461.

and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continued to institute these suits and to urge the courts of equity to grant relief.[1] These efforts were unsuccessful in clearly establishing the rights of stockholders herein until the cases of Atwool against Merryweather, in England, in 1867,[2] and of Dodge *v.* Woolsey, in this country, in 1855.[3] These two great and leading cases have firmly established the law for both England and America, that where corporate directors have committed a breach of trust either by their frauds, *ultra vires* acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.[4]

The rule as formulated and enounced therein has been repeated, applied, explained, and extended by subsequent cases and by text-books until a system of jurisprudence may be said to be based thereon. That system is the subject of the present fourth part of this work. It may be well to add that stockholders are not liable for libel and slander by reason of allegations in their suit against directors for fraud. Not even a director who was not a party can sue them for libel.[5]

[1] Mozley *v.* Alston, 1 Phil. Ch. 790 (1847), where the court said there was no reason assigned "why the corporation does not put itself in motion to seek a remedy;" Lord *v.* Copper Miners, 2 Phil. Ch. 740 (1848), where the court refused relief because the acts were capable of confirmation and had been confirmed by the majority; Gray *v.* Lewis, L. R. 8 Ch. App. 1035, 1050 (1873). See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), in regard to the principle of law decided by these cases.

[2] L. R. 5 Eq. 464, *n.*

[3] 18 How. 331. The case of Hawes *v.* Oakland, 104 U. S. 450 (1881), is perhaps of even greater importance than Dodge *v.* Woolsey, and may take the place of the latter.

[4] It is to be noticed that long prior to these cases it had been held by the courts in various cases that a stockholder's action herein would lie, but the principle was not clearly established until the foregoing decisions were made. Thus, in New York, as early as 1832, in the case of Robinson *v.* Smith, 3 Paige, 222 (1832), the remedy was declared to exist. In the early case of Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840), a bill by a stockholder in behalf of himself and others to render certain persons liable as stockholders, they having subscribed in order to get a charter, and then declared that they subscribed as trustees for the corporation, was sustained.

[5] Runge *v.* Franklin, 72 Tex. 585 (1889).

§ 646. *The facts and conditions which allow and sustain a stockholder's suit herein.*—Before a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts, or negligence of directors, he should be certain that three distinct facts or conditions exist in his favor. These are: first, that the acts complained of are such as amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone;[1] second, that the complaining stockholder himself is free from laches, acquiescence, or ratification of the acts to remedy which the suit is brought;[2] third, that the corporation has been requested and has neglected or refused to institute the suit; that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties and other proper parties have been made defendants.[3]

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCKHOLDERS, OR OF THIRD PERSONS, TO REMEDY WHICH A STOCKHOLDER MAY BRING SUIT.

§ 647. *Different methods of perpetrating these frauds.*—The various ways in which stockholders are generally defrauded out of their legal rights in a corporation are described in subsequent sections of this chapter. These, however, are the older and more easily-remedied wrongs. The principles of law governing them are known to those who contemplate such frauds. Consequently, new plans and methods of circumventing the law are being constantly devised. There is a continual contest between the courts in branding certain acts as frauds and the unscrupulous corporate officers in forming new and unknown methods of defrauding the corporation and stockholders. Some of these devices vary little from the older ones, but others are new and are evolved by the fertile resources of the misdirected talent of corporate managers.

Thus, a frequent fraud is perpetrated by withholding or improperly increasing dividends in order that the corporate managers may cause fluctuations in the price of the stock, and by

[1] This subject is treated in the remainder of this chapter and in chapter XL, *infra*. See also as to such ratification, § 740, *infra*.

[2] See ch. XLIV, *infra*.

[3] See ch. XLV, *infra*.

speculation in the market enrich themselves.[1] It exists also when the statements of the corporate condition and business are garbled and arranged so as to mislead the investing public. A favorite modern device is the purchase, by corporate officers, of the stock and bonds of another corporation, followed by a consolidation of the two corporations, to the ruin of the former and the enrichment of the holders of the stock and bonds of the latter. Still another method is the diversion of traffic from a corporation, or a use of its income for improvements, whereby its dividends are cut off, until the managers have purchased the stock and bonds at a price far below the real value. These various frauds, and many others which might be enumerated, are discovered and exposed with difficulty, and generally at great expense and delay.[2] The courts of equity are ready and reliable in remedying the wrong whenever the fraud can be proved. But in the fact that the proof is concealed or destroyed, and generally beyond the reach of the defrauded stockholder, lies the safety of the guilty parties.

§ 648. *Directors as trustees.*— It is frequently said, both in the cases and in the text-books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as *cestuis que trust*.[3] The New York court of appeals, however, has recently said that directors are trustees in their

[1] It probably was by reason of such frauds that the New York legislature in 1884 passed the act (ch. 223) prohibiting directors from selling stock "short."

[2] For a vivid description of a number of these devices to defraud stockholders and the public generally, see Swann, "Investor's Notes on American Railroads," p. 29 (1886).

[3] That directors occupy the position of trustees towards the stockholders, see European, etc. R'y *v.* Poor, 59 Me. 277 (1871); Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862). See also Green's Brice, Ultra Vires (2d ed.), p. 478, citing many cases. *Cf.* Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Imperial Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 12 (1882); Angell & A. Corp., § 312, etc.; Pierce, Railroads, 36-44. In Wasatch Min. Co. *v.* Jennings, 5 Utah, 243 (1887), the court well said in reference to corporate directors: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded." The corporation, however, stands in no fiduciary relation towards its stockholders. Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867). As stated in Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873), whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary. Fougeray *v.* Cord, 50 N. J. Eq. 185 (1892); Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

relations towards the corporation, but not in their relations towards the stockholders.[1] Nevertheless, the obligations of this trusteeship, whether to the corporation or to the stockholders, have been the means of ascertaining what acts of directors constitute a fraud, and what remedies may be applied. These fraudulent acts and remedies have been quite accurately defined and ascertained. New methods and devices, however, are constantly being devised by unscrupulous directors and managers. There will be much doubt, confusion, inconsistency, and difficulty in working out the questions which will arise; but there can be no doubt of the result if courts of equity are allowed the same freedom and power of searching and circumventing all frauds that characterized the origin of the courts themselves.

§ 649. *Director or other corporate officer interested in construction company — Contracts between a director and his company.*— The law is well settled that a director cannot, as against the dissent of a single stockholder, become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between a third person and the company of which he is a director.[2] Where a construction company con-

[1] Bloom *v.* National United, etc. Co., 152 N. Y. 114 (1897).

[2] Port *v.* Russell, 36 Ind. 60 (1871), where an injunction was granted against the payment by a plank-road company of money to a construction company of which a director of the former was a member. The court said that the three leading American cases on the subject of frauds by directors are Michoud *v.* Girod, 4 How. 503 (1846); Cumberland, etc. Co. *v.* Sherman, 30 Barb. 553 (1859); and S. C., 20 Md. 117 (1863); and Hoffman Steam Coal Co. *v.* Cumberland, etc. Co., 16 Md. 456 (1860); and in England the case of Aberdeen R'y *v.* Blakie, 1 Macq. 461 (1854). Where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two, by means of "dummy" intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson *v.* McLean, 36 Fed. Rep. 213 (1888). A president is personally liable on loans by his bank to an insolvent person with whom he has other interests. First Nat. Bank *v.* Reed, 36 Mich. 263 (1877). A waiver of the statute of limitations by the board of directors is illegal where the party benefited was a director and was present when the resolution was passed. Lowndes *v.* Garnett, etc. Co., 33 L. J. (Ch.) 418 (1864). Although the officers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. Case *v.* Kelly, 133 U. S. 21 (1890).

tracts with a corporation, the director cannot be interested in the construction company at the time the contract is made, nor subsequently; and it is immaterial that the contract was fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract.[1] If the company contracting with the

[1] See § 662, *infra*. Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). See also Bayliss *v.* Lafayette, etc. R'y, 8 Biss. 193 (1878); S. C., 2 Fed. Cas. 1079; Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869); Flint, etc. R'y *v.* Dewey, 14 Mich. 477 (1866), where a director had become interested in the construction work after the contract had been given. To same effect, see Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883), rev'g 2 Fed. Rep. 877, where, however, it is held that bonds issued to a construction company in which a director is interested cannot be altogether repudiated, but are valid to the extent of the actual value of work done. See also Ryan *v.* Leavenworth, etc. R'y, 21 Kan. 365 (1879), holding also that a stockholder in a corporation which is a stockholder in the defrauded corporation may sue to remedy the wrong to the latter; European, etc. R'y *v.* Poor, 59 Me. 277 (1871). See also Risley *v.* Indianapolis, etc. R. R., 62 N. Y. 240, 248 (1875); Whitman *v.* Bowden, 27 S. C. 53 (1887), where a building committee of a joint-stock company secretly contracted with themselves. Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Such an issue is also illegal by the statutory law of the state. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891). In Lewis *v.* Meier, 14 Fed. Rep. 311 (1882), the remarkable decision is made that the corporation cannot have such a contract set aside, since the corporation is responsible for the frauds of its directors, and hence both parties are *in pari delicto*. Where one of the common council and of the committee granting a street-railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed, the franchise is void as having been fraudulently obtained. Finch *v.* Riverside, etc. R'y, 87 Cal. 597 (1891). Where three out of a board of five public officers give a contract for the supply of water to the town, and one of the three is interested in the contract, the contract is illegal. Santa Ana Water Co. *v.* San Buenaventura, 65 Fed. Rep. 324 (1895). Under the Kentucky statute a contract between a city and a printing company, in which company a member of the common council is a stockholder, is illegal. Nunemacher *v.* Louisville, 98 Ky. 334 (1895). Where two competing street-railway companies apply for the right to lay

corporation secretly gives to the contracting agent of the latter a subcontract for the construction work, the corporation may attack the whole contract and recover back the profits realized therefrom.[1] Nor is a contract valid and enforceable

tracks, and the board of public works grants the right to a company in which one of the members of the board is a stockholder, the other company may have the grant set aside. State *v.* Board of Public Works, 29 Atl. Rep. 163 (N. J., 1894). Where one corporation buys a street railroad from another, a stockholder in the former cannot question the validity of bonds issued by the latter and expressly assumed by the former, nor can he raise the question of fraud in constructing the road. Smith *v.* Ferries, etc. R'y, 51 Pac. Rep. 710 (Cal., 1897). Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made. Edison *v.* Gilliland, 42 Fed. Rep. 205 (1890). Where the rolling-stock is purchased by the directors and in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling-stock that the title to the rolling-stock passed to the company, and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling-stock belonging to another corporation should be distinct, unequivocal, and above suspicion." McGourkey *v.* Toledo, etc. R'y, 146 U. S. 536, 567 (1892).

[1] "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court." Panama, etc. Tel. Co. *v.* India Rubber, etc. Tel. Works Co., L. R. 10 Ch. App. 515 (1875). In this case the secret subcontractor was the agent and engineer of the corporation. He received a commission for his work, and the work was to be accepted subject to his approval. The case of Currier *v.* New York, etc. R. R., 35 Hun, 355 (1885), goes still further, and holds that a stockholder may compel the contractors to disgorge when they obtain the contract with the corporation through their associates or hirelings being made directors. An agreement of an attorney to share his fees with a director who votes and aids him in getting the company's business is void. The courts will not compel the attorney to carry out the agreement. All parties are left as they are found by the law. Attaway *v.* Third Nat. Bank, 93 Mo. 485 (1887). See also Lindley, Company Law, pp. 328, 368. Where the managing director of the Union Pacific Railroad caused a contract for its construction to be given to a person who acted as his agent, and the director then formed the Credit Mobilier company, a Pennsylvania corporation, and had the construction contract assigned to it, and all the stockholders of the railroad were invited to become stockholders in the latter company, and all the facts herein were more or less known to all parties, a court of equity refused to enjoin the Credit Mobilier from collecting the contract price of the construction work. Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883).

against the corporation where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.[1] Where a director of a construction company compels an iron concern to agree to give a bonus to the company under threat that otherwise the railroad would be run on another route, the contract cannot be enforced.[2] The circumstances may be such, however, as will vary these rules. Thus, where the director was a surety for the contractor, and the latter failed, the former, who finished the construction work under compulsion by the company, may set up its acquiescence as a bar to its suit to recover from him the profits of the transaction.[3] Where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract, and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par.[4] Again, where a director purchased an interest in the construction contract after it had been entered into, but sold

Although an assistant engineer of the company is secretly interested with the contractor in the profits of the construction, yet where the former had nothing to do with the letting the contracts or accepting the work, and merely testified in an arbitration in the settlement, but did not testify falsely, the parties need not give up their profits. Union R. R. *v.* Dull, 124 U. S. 173 (1888). In Fox *v.* Hale, etc. Co., 108 Cal. 369 (1895), the president was held liable for fraud in reducing ores belonging to the company.

[1] Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896); Wardell *v.* Railroad Co., 103 U. S. 651 (1880). A person who brings about a contract whereby the president obtains a secret profit in a corporate contract cannot recover for his services. Van Valkenburgh *v.* Thomasville, etc. R. R., 4 N. Y. Supp. 782 (1889). Where the directors appropriate the money of the corporation to themselves, a minority stockholder may bring them to account. Sage *v.* Culver, 71 Hun, 42 (1893); aff'd, 147 N. Y. 241. Where the directors are secretly interested in the construction contract and are to have a portion of the profits, bonds issued under the contract are void except in *bona fide* hands. Vanderveer *v.* Asbury Park, etc. R'y, 82 Fed. Rep. 355 (1897). See also § 650, *infra*.

[2] Woodstock Iron Co. *v.* Richmond, etc. Co., 129 U. S. 643 (1889).

[3] Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886).

[4] Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). Although the president is secretly to participate in the construction contract, yet if the company does not rescind the contract on this ground, and the corrupt relation is terminated before the completion of the contract, bonds issued under the contract are valid. Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898).

that interest before any work was done thereunder, the illegality of his connection with the construction company cannot affect the legality of his sale of that interest.[1] Where the business of a lumber railroad has been exhausted, it is legal for the majority of the directors to vote to extend the road, even though the extension is to enable them to market their own timber.[2] Upon the consolidation of two companies, it is legal for one of the companies to pay the president and vice-president of the other company a sum of money in consideration of their agreeing not to engage individually in the same business during the period of ten years within a defined territory. A stockholder in the company in which such persons were officers cannot compel the officers to account for the money if the consolidation itself is acquiesced in and the transaction was honest in fact.[3] But a settlement between a corporation and its creditors, made by a board of directors of whom a majority are interested in the matter adversely to the corporation, is voidable as against the corporation and non-assenting stockholders, even though the settlement may have been for the best interests of the corporation at the time.[4] In England it is customary to insert in the by-laws a provision that if a director is interested in a corporate contract without declaring his interest, his office is thereby vacated.[5] A person dealing with a director, and taking from him notes or securities which the corporation has issued, must investigate as to the legality of the issue of such securities.[6]

A contract between a director and the corporation is voidable, and not void. Accordingly, if none of the stockholders object to such a contract it is legal.[7] Where the directors

[1] Barnes *v.* Brown, 80 N. Y. 527 (1880).

[2] Bucksport, etc. R. R. *v.* Edinburgh, etc. Co., 68 Fed. Rep. 972 (1895).

[3] Bristol *v.* Scranton, 57 Fed. Rep. 70 (1893); aff'd, 63 Fed. Rep. 218 (1894).

[4] Higgins *v.* Lansingh, 154 Ill. 301 (1895).

[5] See Turnbull *v.* West Riding, etc. Co., 70 L. T. Rep. 92 (1894).

[6] See § 727, *infra*, and § 293, *supra*.

[7] If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). Where neither the corpora-

own all the stock of a corporation, the usual rules preventing a director from contracting with the corporation do not apply.[1] A stockholder may be interested in the construction company, and bonds may be issued to him, even though he owns a majority of the stock and thereby has control.[2]

§ 650. *Secret gifts to directors from persons contracting with the corporation.*— It is a well-established principle of law that

tion nor any stockholder objects, it is legal for the directors to have an interest in the profits of a contract for the construction of the road, and they may compel the contractor to pay over to them their part of the profits. The contract was voidable, not void. Robison *v.* McCracken, 52 Fed. Rep. 726 (1892); aff'd, 57 Fed. Rep. 375, *sub nom.* McCracken *v.* Robison. Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable where all the stockholders assented to such contract. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). The letting of a construction contract to one who owns ninety-nine one-hundredths of the stock, in payment for such stock, is legal, although he as president issues it to himself, where a *bona fide* board of directors ordered it in the usual discharge of their duties. The fact that the contractor received stock and bonds four times in par value the value of the work is not fatal where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate at the sale, all for the purpose of cutting off other creditors, he is liable to them. Cleveland, etc. Co. *v.* Crawford, 9 R'y & Corp. L. J. 171 (Chicago, 1891). In McGourkey *v.* Toledo, etc. R'y, 146 U. S. 536 (1892), the court, speaking of a contract in which the directors were interested, said: "Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract,— if there be a thread of covin running through the web and woof of the entire transaction,— in other words, if the purpose be unlawful, it is not perceived that an open avowal of such purpose makes it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily involved actual fraud on the part of those participating in it." A contract between the president and a third party from whom the company buys lumber, that such third party shall pay him a commission, is not illegal *per se*. The president may collect such commissions unless it is shown that the agreement was concealed from the corporation, or that the president was exercising some discretion or trust. Jameson *v.* Coldwell, 23 Oreg. 144 (1892). See also ch. XLIV, *infra*.

[1] McCracken *v.* Robison, 57 Fed. Rep. 375 (1893).

[2] Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887).

a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him. Thus, an agreement of a third person to pay a certain sum to a director if a certain location of a railroad is adopted, or an agreement to allow him to participate in the profits derived from such location, is not an enforceable contract.[1] So also where a director receives a commission from one who obtains a loan from the corporation through the director's influence, the latter may be compelled to pay over the commission to the corporation.[2] A treasurer who receives a secret commission from a party selling to a corporation must turn the same over to the corporation.[3]

A similar rule was applied where a director of an insolvent insurance company accepted a secret gift for re-insuring the company's risks in a certain other insurance company.[4] And, in general, whenever an officer or agent of the corporation accepts a secret gift or participates in the profits of a contract with the corporation, the corporation is entitled to the gifts or

[1] Wardell *v.* Railroad Co., 103 U. S. 651 (1880); Bestor *v.* Wathen, 60 Ill. 138 (1871); Linder *v.* Carpenter, 62 Ill. 309 (1872); Fuller *v.* Dame, 35 Mass. 472 (1836), holding that a promissory note given therefor is void. See also Union Pac. R. R. *v.* Durant, 3 Dill. 343 (1874); S. C., 24 Fed. Cas. 628, holding that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors; Holladay *v.* Patterson, 5 Oreg. 177 (1874), where the agreement to pay money to a director and president of a railway if a depot was located in a certain place was held unenforceable. A subscription, however, conditioned upon the location of a depot is valid. See § 83, *supra*. *Cf.* § 681, *infra*. In Cook *v.* Sherman, 20 Fed. Rep. 167 (1883), the court refused to enforce specifically a contract whereby corporate officers agreed to purchase lands, the purpose of all the parties being to influence thereby the location of the railroad. A note for $5,000 given to a general manager to use his influence to have the company remove its mill is illegal. Lum *v.* McEwen, 56 Minn. 278 (1894).

[2] Farmers', etc. Bank *v.* Downey, 53 Cal. 466 (1879); Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873).

[3] In this case the commission was received by an outside party in the way of stock issued at par which he immediately and secretly turned over to the treasurer. Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896).

[4] Bent *v.* Priest, 86 Mo. 475 (1885); Gaskell *v.* Chambers, 26 Beav. 360 (1858), where the director received a secret gift for bringing about a consolidation. *Contra*, if all assented. Southall *v.* British, etc. Assoc., L. R. 6 Ch. App. 614 (1871).

profits, and a stockholder may bring the suit to compel the officer or agent to pay over.[1]

[1] In Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), the president and secretary were held liable for stock received by them secretly from a patentee to whom all the capital stock had been issued for his patent. Directors receiving stock as a gift from one who sells property to the company for stock will be compelled to give it up to the company. So also will an outside party who aided in the bribe and took some stock himself. Paducah, etc. Co. *v.* Mulholland, 24 S. W. Rep. 624 (Ky., 1894). Where the party selling property to the company for stock gives part of the stock to directors, a person who afterwards becomes president and takes a part of this stock as a gift is liable for it or its value to the company, even though he did not know of the fraud until after he took the stock. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky., 1893). In Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 (1894), a promoter and director was compelled to restore to the corporation the cash or stock which he had received secretly as a gift from a party who had sold patents to the company. The same case holds that such a contract cannot be enforced by the promoter against the patentee. Where the incorporating act required all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of $500,000 in bonds, of which bonds $480,000 were turned back by the vendor to the directors, who divided them among themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." Campbell *v.* Cypress Hills Cemetery, 41 N. Y. 34 (1869). In Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862), a solicitor was compelled to repay with interest a secret gift; General Exch. Bank *v.* Horner, L. R. 9 Eq. 480 (1870), where the manager was paid a large sum in order to obtain his aid to a consolidation scheme. Where the company pays to its solicitor a commission for shares which he induces the president to take, he must repay the commission on the winding up. *Re* Stapleford Colliery Co., 49 L. J. (Ch.) 253 (1880). A manager who takes secret gifts from parties with whom he contracts for his company must disgorge the same. He also may be dismissed and his contract salary stopped. Boston, etc. Co. *v.* Ansell, L. R. 39 Ch. D. 339 (1888). Where corporate agents organize local branch companies on a basis prescribed by the parent company, and the agents demand and obtain from the local company more than the parent company prescribed, the excess belongs to the parent company. Sheridan *v.* Sheridan, etc. Co., 38 Hun, 396 (1886). Directors borrowing money from the corporation and giving notes therefor cannot defend against the notes on the ground that a discount thereon was to be allowed to them. Alford *v.* Miller, 32 Conn. 543 (1865). See Western U. Tel. Co. *v.* Union Pac. R'y, 3 Fed. Rep. 721 (1880); and *quære*, as to the effect of the contract between the complainant and defendant where one of the minor provisions was that the railway officers were to have free telegraph service for themselves and families. Although the purchasing agent of a railroad company buys coal from a coal company in which such agent owns one quarter of the stock, the dividends received by such agent on such stock

The contract being illegal it cannot be enforced by the guilty officer or agent as against the party with whom it is made.[1]

The party paying the bribe may also be held liable in damages to the defrauded party.[2] An agreement to turn over the control of a co-operative insurance company is illegal, and money received therefor cannot be recovered by the company.[3]

There is another large class of cases, particularly in England, wherein persons who desire to form a company for the purpose of purchasing and working certain property, such as patents and mines, cause their friends to accept the position of directors or agents, and then give them money or stock in compensation therefor. This is still a common practice in business; but the courts have uniformly held that a stockholder or the corporation or a receiver on the winding up may compel such

may be retained by him, although the railroad company was ignorant of the fact that he was such stockholder, there being no proof of fraud and the coal being sold cheaper than the going rate. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn., 1897).

[1] A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. Smith *v.* Seattle, etc. R'y, 72 Hun, 202 (1893). The officers cannot recover secret commissions on sales to the corporation where the corporation repudiated the purchase by reason of such commissions and then bought from the same parties at a lower figure. Jameson *v.* Coldwell, 25 Oreg. 199 (1894). A secret commission paid to the agent of the other party to the contract invalidates the contract. Findlay *v.* Pertz, 66 Fed. Rep. 427 (1895). "It seems to be illogical to contend that a contract can be avoided as between the officer and the corporation, and yet be held to be valid in favor of the officer against the party with whom he has contracted." Gillig *v.* Barrett, N. Y. L. J., Jan. 6, 1891. A general manager of a road cannot enforce a contract by which he was to receive stock in another road for aiding the latter in procuring municipal bonds, his aid being due to his influence as general manager. Sargent *v.* Kansas Mid. R. R., 48 Kan. 672 (1892).

[2] The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock.

[3] McClure *v.* Law, 20 N. Y. App. Div. 459 (1897).

directors or agents to pay over to the corporation the money received, or, if stock was received, then to pay to it the highest price reached by such stock between the time when the gift was made and the time when it was discovered.[1]

[1] Where a director is required to hold a certain amount of stock, and he takes that stock with a secret agreement by which the promoter is to purchase the stock from the director at a certain price whenever the director so desires, and after the company becomes insolvent the director sells the stock to the promoter at such price and receives the money, the director may be compelled to turn in the money to the corporation. *Re* North Australian, etc. Co., [1892] 1 Ch. 322. A gift by a promoter to a director of a company whilst there are any questions open between the company and the promoter must be accounted for by the director to the company; and the company is entitled to the highest value of the gift at any time between the wrongful act and the time when it came to their knowledge. Eden *v.* Ridsdales, etc. Co., L. R. 23 Q. B. D. 369 (1889); Pearson's Case, L. R. 5 Ch. D. 336, aff'g L. R. 4 Ch. D. 222 (1876), the court saying: "Whether the purchase was or was not an advantageous one for the company . . . is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances;" Leeke's Case, L. R. 6 Ch. App. 469 (1871); De Ruvigne's Case, L. R. 5 Ch. D. 306 (1877); Ormerod's Case, 25 W. R. 765 (1877), where the director was elected and the gift received even after the contract was made. The court said: "If it is lawful that a man may be bought as a director, it must be decided by some one else. I never will decide it;" Weston's Case, L. R. 10 Ch. D. 579 (1879), where the director was held liable for the full price of the stock less what he paid therefor; *Re* Eskern Slate, etc. Co., 37 L. T. (N. S.) 222 (1877), where the articles of association allowed the gift, but were held to be fraudulent; McKay's Case, L. R. 2 Ch. D. 1 (1875), where the secretary of the corporation was compelled to pay over; Hay's Case, L. R. 10 Ch. App. 593 (1875), where the court said: "No agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal;" *Re* Englefield Colliery Co., L. R. 8 Ch. D. 388 (1878); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879), where the mining experts of the corporation were compelled to disgorge; *Re* Carriage, etc. Assoc., L. R. 27 Ch. D. 322 (1884); *Re* Drum, etc. Co., 53 L. T. 250 (1885), where the party gave money to the directors. See also Madrid Bank *v.* Pelly, L. R. 7 Eq. 442 (1869), where the directors were held liable for the money received by them, but for no more; Nant-y-Glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878), holding that the corporation may sue herein the same as a liquidator; Mitcalfe's Case, L. R. 13 Ch. D. 169 (1879), where a director was held liable for the market value of stock given to him by the person to whom the stock was issued as full paid in consideration of property. There was no evidence that the director acted unfairly or acted as a promoter. He was held liable, although he had sold part of the stock. The secretary need not give up a profit which he made as one of the promoters. La Salle, etc. Gardens, Ltd., 78 L. T. Rep. 368 (1898), rev'g 77 L. T. Rep. 631. Where the directors

A vendor of property to a corporation may, however, pay the officers of the corporation for services in promoting and

vote money to a promoter, and he invests it in the company's debentures and divides them among the directors, the latter must refund the money so voted, and cannot offset a debt due to them from the company. *Re* Anglo-French Co-op. Soc., L. R. 21 Ch. D. 492 (1882). Money paid to directors by the person selling to the company, in order to induce them to become directors, cannot be retained. *Re* Brighton Brewery Co., 37 L. J. (Ch.) 278 (1868). Where the company's agent, in negotiating a contract, procures a larger sum for the company than it demands, on a secret agreement that it should pay him the increase, he cannot collect it. *Re* Owens, Ir. Rep. 7 Eq. 235, 424 (1873). Where the owners of property, the promoters, the directors, and the solicitor sold to the company property the title to which was bad, and divided the proceeds, each was made to repay the amount received by him. Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877). And see many English cases in Healey, Company Law and Pr., pp. 543, 544. Directors will be compelled, upon the dissolution of the company, to pay to it the par value of stock which has been presented to them by the promoters in order to induce them to act as directors, even though the arrangement was known to all stockholders, it appearing that stock had been offered to the public without mention of these facts, although the public did not subscribe for any of the stock. So far, however, as the contract between the promoter and the company disclosed the facts, the directors were protected. *Re* Postage Stamp, etc. Co., [1892] 3 Ch. 566.

Re Drum, etc., 53 L. T. Rep. 250 (1885). Here a director of a company received from the promoters a present of £1,000 to buy one hundred shares in the company, which was the qualification of a director, the present being expressly stated to be a commission for certain contracts which he was about to enter into at the request of the promoters in relation to the proposed company. The director afterwards took part in making an agreement for the purchase by the company of a quarry of which the promoters were part owners, the carrying out of which was stated in the memorandum and articles of association of the company to be the first object of the company. The company was subsequently wound up. *Held*, that the director was liable to account to the liquidator for the value of the shares at the value at which they stood at the date he received the present, together with interest at five per cent from the date of such gift. *Re* Carriage, etc. Assoc., L. R. 27 Ch. D. 322 (1884). Here the articles of association of a company provided that each of the first directors (of whom R. was one) must take or hold at least twenty £5 shares within three months of his appointment, which shares might be shares originally issued as fully-paid shares, or otherwise. It was also provided by a contemporaneous agreement for the payment to the promoters of the company, for preliminary expenses and promotion, of £3,000 in cash and three hundred fully-paid shares. Towards the end of the three months the five original directors, in order to qualify for their office, accepted from the promoters, at a board meeting, transfers without consideration of the requisite number of fully-paid shares, part of the promotion shares. The company was afterwards ordered to be wound up. It

organizing the company and procuring the purchase of his lands, there being no fraud or concealment in the matter.[1]

In a somewhat similar class of cases the person selling to the corporation acts himself as a director and a promoter of the enterprise, and by the aid of other friendly directors controls the corporation; or the guilty party may be merely a promoter and also a director. Even though the articles of incorporation provide that the directors shall not be liable for their profits as promoters, yet where one of the directors receives a gift from another of the promoters he is liable therefor, and is liable also for a similar gift to another promoter.[2] And even though a party purchases property and makes a part payment thereon, yet, where he then proceeds to form a corporation and controls the corporation, and acts as a director in taking over the property at a largely increased price, the corporation may compel him to turn over to it all the profit he has made by the transaction.[3] In any case, unless all persons interested are

was not disputed that each director was liable to the extent of the par value of his own shares if unpaid for; but, all of the directors except R. being unable to pay, it was sought to make R. liable for the whole amount — £500. R. contended that he was not liable for anything, having, since the date of the transfer, advanced £520 to the company, and having, since acknowledging his liability, paid £100 more to the company, intending it to be as and for satisfaction of the amount due upon his twenty shares. He also urged that in any case there was no joint and several liability under the circumstances. *Held*, that there was no right of set-off in his favor; that the £100, however it had been intended, had been accepted as a further advance, and not in payment for his shares; and that he must be declared liable for the whole £500. As to the American cases on this subject, see the notes *supra*.

[1] Dexter *v.* McClellan, 22 S. Rep. 461 (Ala., 1897). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement, must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., 78 L. T. Rep. 237 (1898).

[2] *Re* Westmoreland, etc. Co., [1895] 2 Ch. 612.

[3] The only way he could have avoided this result would have been by making a full disclosure of all the facts, and by furnishing the company with a board of directors capable of forming a competent and impartial judgment as to the wisdom of the purchase and the price to be paid. The company may enjoin him

fully informed of the facts and assent thereto, the promoter, director, or vendor may be brought to account.[1] Thus, a person who agrees with the owner of patent-rights to form a corpo-

from voting or selling stock. Plaquemines, etc. Co. *v.* Buck, 52 N. J. Eq. 219 (1893).

[1] As regards the duties and liabilities of a promoter, pure and simple, see the next section. That a director is disqualified to buy for the corporation from himself, see § 652, *infra*. The cases now under consideration involve a combination of frauds. Thus, where the owner of property agrees with two persons that if they form a company to purchase the property he will secretly pay them a certain amount, and they form a company and act as a minority of the directors, and it purchases the property even at a fair valuation, the court, upon corporate insolvency, will refuse to allow the two persons their salaries and will declare their agreement to be a fraud. *Re* Hereford, etc. Co., L. R. 2 Ch. D. 621 (1876). Where the directors, who were also promoters, had purchased property before the company was formed, and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company. Simons *v.* Vulcan, etc. Co., 61 Pa. St. 202 (1869). Where the directors had purchased property before the company was formed, and then as directors bought it for the company at an advance, the title passing direct from the first vendor to the company, and the directors' interest being concealed, the court held the directors liable to the company for their profit, the suit being brought by stockholders. Hichens *v.* Congreve, 1 Russ. & M. 150 (1829). Under similar facts and to same effect, Benson *v.* Heathorn, 1 Y. & C. 326 (1842). A stockholder cannot rescind a subscription for fraud where a person purchased a patent outright on condition that he could resell it, and then proceeded to promote and organize a company and to sell to it the patent at an advanced price, even though he was a director, it being clearly known to all that he owned and sold the patent as his own. Gover's Case, L. R. 1 Ch. D. 182 (1875). Where, however, parties purchase property and agree absolutely to pay therefor themselves, and not by the issue of the stock of a corporation to be formed, or by the money of that corporation, the fact that they intend to and do then form a company to buy the property from themselves at an advance does not render them liable to the company for the profit. If they had formed the company partially or completely before they purchased, the case might be different. The court referred to the word "promoters," but only to refuse to use it on account of its indefiniteness. The party purchasing the mine and afterwards selling to the company was a director in the latter at the time of purchase. The right to rescind, however, was barred by the fact that the company had lost the property, a leasehold, by nonpayment of rent. Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887). For a valuable explanation of this case, see 2 R'y & Corp. L. J. 481. It is to be borne in mind in all transactions of this kind that the objections mentioned above may be obviated by the unanimous consent of the stockholders or by their acquiescence or participation with knowledge, all of which is considered in § 662 and ch XLIV, *infra*.

ration to buy them is a promoter, and is liable to give up a secret gift given to him by the patentee, especially where such promoter was a director when the purchase was made by the company.[1]

§ 651. *Promoters' frauds on the corporation.*— A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[2] A person who procures subscriptions

[1] Yale Gas Stove Co. *v.* Wilcox, 29 Atl. Rep. 333 (Conn., 1894).

[2] Quoted and approved in Burbank *v.* Dennis, 101 Cal. 90 (1894). Great difficulty is experienced in determining who is and who is not a promoter. An old English statute defined a promoter as "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company" being fully incorporated (7 & 8 Vict., c. 110, § 3). Other definitions are, "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose." Twycross *v.* Grant, L. R. 2 C. P. D. 469, 541 (1877); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371, 381, 382, 407 (1877). See also New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73, 118 (1877); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, 1268 (1878); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 111 (1879); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396, 407 (1879), where Lindley, J., said: "The term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it." See also *Re* Great Wheal Polgooth, 32 W. R. 107 (1883), holding that the solicitor was not a promoter; *Re* Great Western, etc. Co., L. R. 31 Ch. D. 496 (1886), practically overruling *Ex parte* Valpy, L. R. 7 Ch. App. 289 (1872). But see Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862). An agent of a person selling property to the corporation may be also a promoter of the latter and liable as such. Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328. For other definitions, see Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887); Healey, Company Law and Pr. (3d ed.), p. 35, and articles in 1 R'y & Corp. L. J. 27, 2 R'y & Corp. L. J. 1. In Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), a promoter is defined as "a trustee, agent, or person in a fiduciary position as regards the company; one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company." No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest and not acting merely as agents for others. Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889). A banker is not a promoter. *Re* Imperial Land Co., L. R. 10 Eq. Cas. 298 (1870). See also an article in 10 R'y & Corp. L. J. 238.

and aids in organizing the company and frames the papers and manages the procuring of options and the vesting of title is a promoter, even though he is also a subscriber.[1]

It is legal for persons to contract to form a corporation and to provide for its future management and control.[2] But it is not legal for promoters to cause the board of directors to vote stock to such promoters for services already performed;[3] nor is it legal for him to make his profit indirectly, by contracts between the corporation and others. A promoter is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation, and is subject to the disabilities of such. There are two classes of cases in which he may be guilty of a breach of his duties to the company.

First, where he sells property to the corporation. If he purchased the property before he began promoting the company, he may sell to the company at an advance without disclosing his profit.[4] But where the promoter obtains merely an option on property and then causes a company to be formed to which he sells it at a profit, without disclosing the amount of that profit, he is liable in damages to subscribers for the stock.[5] So

[1] Woodbury, etc. Co. *v.* Loudenslager, 35 Atl. Rep. 436 (N. J., 1896).

[2] King *v.* Barnes, 109 N. Y. 267 (1888).

[3] Where a company issues fully paid-up stock to parties in payment for services rendered to the company in its formation, and in establishing its business, such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re* Eddystone, etc. Ins. Co., 68 L. T. Rep. 408 (1893); aff'd, 69 L. T. Rep. 363. See also § 46, *supra*.

[4] See note 1, p. 1275, *supra*. A person who buys property at a foreclosure sale and then organizes a company to take it over, and who discloses the price which he paid at such sale, should disclose the fact that he had previously bought a part of the mortgage bonds of the bankrupt company and had made a profit thereby. *Re* Olympia, Limited, 78 L. T. Rep. 629 (1898). A person who purchases land and partly pays therefor may afterwards cause a corporation to be organized to purchase the land at a higher figure, and is not liable to the corporation for the profit if there was no concealment of the fact. He may also legally pay a commission to parties to induce them to subscribe for stock. The fact that he was a director in the corporation does not necessarily change the rule. Milwaukee, etc. Co. *v.* Dexter, 74 N. W. Rep. 976 (Wis., 1898).

[5] In Brewster *v.* Hatch, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave $5,000, and by which they had the privilege of purchasing certain mines at any time within four months for $135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed

also if he purchased after he began promoting and then sold to the company, the sale is valid only when he informs the directors that the property belongs to him, and when, also, the directors are competent and impartial judges as to whether the

to purchase the mines for all its capital stock, which was to be $1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for $610,000 par value were received, netting $244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. In the case of Franey *v.* Warner, 71 N. W. Rep. 81 (Wis., 1897), where promoters purchased land for $22,000 and sold it to the corporation for $45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. A person holding an option right to purchase land for $6,000 may cause a corporation to be organized to purchase such land for $8,500, thereby giving a profit to the promoter, for which the company may issue to him its stock, it being known in advance that such promoter was the owner of such option and would sell the same at that price. Richardson *v.* Graham, 30 S. E. Rep. 92 (W. Va., 1898). In South Joplin Land Co. *v.* Case, 104 Mo. 572 (1891), it was held that a person who secures an option on a property with a view to organizing a corporation and selling the property to it, and who, together with another person employed by him, forms the company and places the stock on representations that the property cost $2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transaction. The court said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court also said that a vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company "if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control and who are practically himself in disguise. He

purchase ought or ought not to be made.[1] Where the promoters misrepresent the price paid by them for property sold by them to the company, they are liable to the company for their

also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." Where the person holding an option for the purchase of a mine represents that he is to pay a certain price for the mine, and induces parties to form a corporation and to have the corporation purchase the mine at that price, the corporation may rescind the contract if the actual price paid by such person was much less. But the corporation cannot recover back its expenses. Cortes Co. *v.* Thannhauser, 45 Fed. Rep. 730 (1891).

[1] Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Coal, etc. Co., L. R. 20 Eq. 114 (1875); S. C., L. R. 1 Ch. D. 182; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), where the promoter was compelled to disgorge a gift given to him by the vendors of a mine to the corporation, but he was allowed to retain therefrom his disbursements. It is immaterial that the sale was a fair one. The court said: "He must let his company know what profit he has taken, and deal with them, so to say, at arms' length;" South Durham Iron Co. *v.* Shaw, 14 W. N. 159 (1879); Beck *v.* Kantorowicz, 3 K. & J. 230 (1857); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879), holding also that if the vendor has not yet paid the money to the promoter the corporation may recover it from the former; Twycross *v.* Grant, L. R. 2 C. P. D. 469 (1877), disapproving Craig *v.* Phillips, L. R. 3 Ch. D. 722 (1876); Kent *v.* Freehold, etc. Co., L. R. 4 Eq. 588 (1867). Where a person who is the owner of land buys options on adjoining lands and takes deeds for the whole for $66,000 (the deeds reciting the consideration as $80,000), and then sells the same to a corporation, which he forms, for $80,000 cash and $40,000 stock, and then divides the stock among the stockholders, keeping the cash himself, he is liable to refund to the corporation his profit, the court holding open the question as to whether he was liable for the profit of the others. Woodbury, etc. Co. *v.* Loudenslager, 35 Atl. Rep. 436 (N. J., 1896). In *Re* Hess Mfg. Co., 23 S. C. of Can. 644, 658 (1894), the court said of a promoter: "It was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further, it was, above all, the duty of Dr. Sloan, as a vendor selling property to a company towards which he stood in a fiduciary relation, to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence, and which would, as the expression is, keep him at 'arms' length' in making the bargain." But the court held that the promoter is not liable unless the company rescinds and restores whatever it has received. In this case the court stated that although the promoter stands in a fiduciary

profits, even though the property is worth all that the company paid for it.[1]

If the promoter conceals the fact that he is selling his own property to the company, the latter may rescind the sale;[2] or,

relation to the company, yet that he is not necessarily a trustee of property which he acquires to sell to the company; and that even if he were, the remedy is rescission and the turning back of the property to him. In Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43 (1870), the court refused to hold the defendants liable who owned property and formed a company, and sold the property to the company at a profit, without disclosing the original price, but without misrepresenting that price. The court said, however, "that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs." Where a promoter, after the company is formed, buys land for $6,000 and sells it to the company at $12,000, and represents to a subscriber for stock that the land cost $12,000 originally, the stockholder may recover from the promoter the amount paid for his stock. Short *v.* Stevenson, 63 Pa. St. 95 (1869). In Rice's Appeal, 79 Pa. St. 168 (1875), where a promoter elected the directors and sold property to the corporation at an exorbitant price, taking payment in money, stock, and bonds, the court refused to allow the bonds upon the winding up. In McElhenny's Appeal, 61 Pa. St. 188 (1869), where a person bought land for $2,000, and then induced others to join him in organizing a company to purchase it for $10,000 after he had sold it to them for $12,000, is liable to account to the company for his part of the $28,000 profit, but not for his $10,000 profit. A person may purchase property and then proceed to form a corporation and sell the property to it at an advanced price. He is not bound to disclose his profit, nor is he liable therefor unless he makes misrepresentations. Lungren *v.* Pennell, 10 W. N. Cas. 297 (Pa., 1881).

[1] Burbank *v.* Dennis, 101 Cal. 90 (1894).

[2] Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, aff'g New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). But not if the company is unable to restore the property, where the disability to restore it is due to the company and not the promoter. Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145 (1867); Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877); Head *v.* Tattersall, L. R. 7 Exch. 7 (1871); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). The company may rescind as to part if the transaction is severable. Maturin *v.* Tredinnick, 2 N. R. 514 (1863); S. C., 4 N. R. 15. Where a mine was sold to a company for $30,000, the promoters representing that they did not have any interest therein, and it afterwards was discovered that they received $20,000 of the price, the corporation succeeded in having the whole purchase set aside and the $30,000 and interest

if the promoter was a promoter at the time he purchased the property, the company may recover from the promoter the profit made by him.[1] If the promoter owns the property at the time of forming the company, and sells it to the company at an advance over its cost to him, and then induces persons to subscribe by stating that he made no profit thereby, he is liable in equity to account to them for the injury they have sustained.[2]

and expenditures refunded. St. Louis etc. Co. *v.* Jackson, 5 Cent. L. J. 317 (1877, St. Louis Ct.).

[1] *Re* Cape Breton Co., L. R. 26 Ch. D. 221 (1884); Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862); Benson *v.* Heathorn, 1 Y. & C. Ch. 326 (1842); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880).

[2] Getty *v.* Devlin, 54 N. Y. 403 (1873); S. C., 70 N. Y. 504 (1877); Getty *v.* Donelly, 9 Hun, 603 (1877); Brewster *v.* Hatch, 10 Abb. N. Cas. 400 (1881); aff'd, 122 N. Y. 349. See also chs. IX and XX, *supra*. In the important case of Ex-Mission, etc. Co. *v.* Flash, 97 Cal. 610 (1893), where persons purchased land at $5 an acre and subsequently proceeded to organize a corporation to purchase it at $25 an acre, representing to the stockholders that $25 an acre was the lowest price at which the land could be purchased, it being concealed from the stockholders that one of their number, a large subscriber, was interested in the contract, and that the organizers of the corporation were his agents, the corporation caused to be set aside a mortgage and foreclosure thereof which was given to the promoters in part payment for such land, and the notes were ordered canceled. In this case it appears that the representation was made that $25 per acre was the lowest price for which the land could be purchased, and that the subscribers came in "on the ground floor at bedrock figures." The Solicitors' Journal (vol. 31, p. 740) has summarized the law on this subject: "Where the promoter had originally bought, not for himself, but for a company to be afterwards formed, in such a case it was an ordinary instance of purchase by an agent, and the company would be entitled both to keep the property and to call upon the promoter to repay the profit he had made. But it is for the company to prove this relationship of principal and agent, and also that it existed at the time of the original purchase. Hence, where this is not shown, the above rule does not apply, not even although the promoter subsequently becomes a director of the company. In this case it is his duty to inform the company of the profit he is making; and in default they are entitled, if they so choose, to a rescission of the contract. But they cannot affirm the contract and also claim the profits; and if rescission of the contract has become impossible, they seem to have no remedy at all." 3 R'y & Corp. L. J. 143, citing cases. Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee

Second, a promoter may commit a breach of trust by accepting a commission or bonus from a person who sells property to the corporation. The company may compel a promoter to turn his profit into the corporate treasury,[1] or the company may rescind its purchase of the property.[2]

named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy *v.* Transportation, etc. Co., 33 Atl. Rep. 889 (Md., 1896). Where the promoters represented that property cost them $23,000, at which price they turned it in to the corporation, and as a fact it cost them $13,000, they are each liable for the $10,000 profit, even though they did not personally make the representations, a conspiracy being shown. Fountain, etc. Co. *v.* Roberts, 66 N. W. Rep. 399 (Wis., 1896). Where promoters have a right to purchase land for $31,000, and induce persons to join with them to form a corporation to purchase the land at $55,000, and represent to such persons that $55,000 is what the land actually costs, the persons so induced to subscribe may have the purchase of the land rescinded. Hebgen *v.* Koefller, 72 N. W. Rep. 745 (Wis., 1897). Where a promoter misrepresents to subscribers the cost of property which is to be and is sold to the corporation for cash, the corporation may rescind. Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 74 N. W. Rep. 633 (Wis., 1898). In Franey *v.* Wauwatosa Park Co., 74 N. W. Rep. 548 (Wis., 1898), the subscription was held to be binding, although the promoters were individually liable to the subscribers for the profit made by the promoters. Where promoters represent that the territorial rights which they sell to a corporation cost a certain sum, when in fact one-half of that sum went to them, the corporation may compel them to pay to it such one-half. Cook *v.* Southern, etc. Co., 21 S. Rep. 795 (Miss., 1897). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern; concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business; and statements leading to the conclusion that all subscribers for stock stood on an equal footing,—constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893). Where partners organize a corporation to take over their business, each of the partners is liable for misrepresentations and concealments of the others committed while engaged in promoting and bringing out the enterprise. They are liable as promoters. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893).

[1] Where the promoters receive pay from the contractor, such pay being in excess of their disbursements, the company may compel them to turn

[2] Munson *v.* Syracuse, etc. R. R., 103 N. Y. 58 (1886); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877). *Cf.* Smith *v.* Sorby, L. R. 3 Q. B. D. 552, n. (1875).

If the commission or bribe paid to the promoter consisted of shares of stock, then the company may recover from him the amount received by him upon a sale of the shares and all dividends previously received, together with interest;[1] or, if he still holds the shares, the company may recover the highest price which the shares of the company have touched in the interval between the gift and the action, together with interest.[2]

in the amount to the company, although all the stockholders and directors knew of the transaction. Mann *v.* Edinburgh, etc. Co., [1893] A. C. 69; Hichens *v.* Congreve, 4 Russ. 562 (1828); Beck *v.* Kantorowicz, 3 K. & J. 230 (1857); Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879), holding also that, if the bonus has not yet been paid to the promoter, the company may claim it from the person contracting with it. *Cf.* Arkwright *v.* Newbold, L. R. 17 Ch. D. 301, 319 (1881); Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Albion, etc. Co. *v.* Martin, L. R. 1 Ch. D. 580 (1875). The promoter is allowed a reasonable sum for disbursements. Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886). *Cf.* Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877); South Durham Iron Co. *v.* Shaw, 14 W. N. 159 (1879). The promoter must disgorge, though by his efforts the company paid for the property less than it was worth. Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879). The statute of limitations bars the suit. Metropolitan Bank *v.* Heiron, L. R. 5 Exch. D. 319, 325 (1880). But only from the time when the facts are known to the directors, or, if the directors are also implicated, to the stockholders. *Re* Fitzroy, etc. Co., 50 L. T. 144 (1884). Where promoters, in collusion with the owner of a mine, pay him $20,000 therefor, and cause him to transfer it to a corporation for $100,000 of the capital stock, and then induce third persons to buy such stock at par on representations that the mine cost the promoters $90,000, and then receive from the owner of the mine the proceeds from the sale of the stock, less the $20,000, the corporation may compel them to pay over the profits to it. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307 (1889).

[1] Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879).

[2] McKay's Case, L. R. 2 Ch. D. 1 (1875); Pearson's Case, L. R. 4 Ch. D. 222, L. R. 5 Ch. D. 336 (1877); *Re* Fitzroy, etc. Co., 50 L. T. 144 (1884); Nanty-glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878); and see § 650, *supra;* Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), where promoters were compelled, at the option of the corporation, to transfer stock back to it or pay over the amount received by them for stock sold, or to pay to it the market value of stock which they as promoters had received from him to whom all the capital stock had been issued in payment for a patent. The agent of the person who deals with the corporation may recover his compensation from that person, but he cannot recover compensation for improperly influencing the agents of the corporation to make the contract. Lydney, etc. Co. *v.* Bird, L. R. 31 Ch. D. 328 (1885); Arkwright *v.*

The subscriber for stock may sue the directors for fraudulent representations if they knew that the promoter was secretly receiving large illegal profits.[1] Bondholders cannot complain of promoters in the same way that the corporation may.[2]

A plaintiff may, upon the trial, be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation.[3]

A compromise and settlement of suits between promoters and the corporation will be upheld by the court.[4]

§ 652. *Sales of property by corporate officers to the corporation.*—It is well said in the case of Michoud *v.* Girod[5] that a person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. Especially is this the rule with corporate directors. If they make sales to the corporation they may be compelled to pay over to the corporation the profit realized by such sales,[6] or the corporation may refuse altogether

Newbold, L. R. 17 Ch. D. 301 (1881); Davison *v.* Seymour, 1 Bosw. (N. Y.) 88 (1857), where the court said: "There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting and whose reward he was to receive."

[1] Persons induced to subscribe by a prospectus stating that a certain price was paid for a business, when in fact a large part of that price went as a bonus to promoters, may sue the directors for fraudulent misrepresentations. Capel *v.* Sim's, etc. Co., 58 L. T. Rep. 807 (1888). Where a promoter induces a person to subscribe and pay for stock by representing that property conveyed by the promoter to the company cost the promoter $20,000, when in fact it cost him $14,000, the subscriber may sue the promoter for damages for false representations. Teachout *v.* Van Hoesen, 76 Iowa, 113 (1888). See also ch. XX, *supra*. *Cf.* Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), where merely deceit was involved.

[2] Banque, etc. *v.* Brown, 34 Fed. Rep. 162, 196 (1888). *Cf.* §§ 42, 43, *supra*, and § 735, *infra*.

[3] Brewster *v.* Hatch, 122 N. Y. 349 (1890).

[4] Coburn *v.* Cedar Valley, etc. Co., 138 U. S. 196 (1891).

[5] 4 How. 503 (1846).

[6] Where the directors buy property for $2,500 and sell it to the company for $8,000, they can collect only $2,500 from the corporation, although the corporation has sold the land for $17,000. Higgins *v.* Lansingh, 154 Ill. 301 (1895); Albion Steel, etc. Co. *v.* Martin, L. R. 1 Ch. D. 580 (1875), holding the director liable to refund profits on contracts made subsequent to incorporation, but not on those made previous to incorporation;

to complete the contract.[1] Generally the director has purchased the property for the express purpose of selling it to the corporation. When such is the case the company may ratify and confirm the transaction, or it may keep the property and recover from the director the profit realized by him, or the company may repudiate the whole transaction, return the property, and recover back the purchase-money.[2] Where the presi-

Dunne *v.* English, L. R. 18 Eq. 524 (1874), where two brokers, having agreed to divide the profits on a mine to be bought by one and sold by the other, the former compelled the latter to divide a secret profit which the latter had obtained; Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), § 650, *supra*, and other cases therein. Concerning the right of the corporation to confirm the sale and sue the director at law or in equity for the profit made by him, see "The remedial rights of corporations against their directors," by Judge Fenn, 3 Yale L. J. 111. See also § 660, *infra*.

[1] Coleman *v.* Second Ave. R. R., 38 N. Y. 201 (1863). A contract by a corporation to buy land of a director is not enforceable by the latter where it was authorized by only three out of five directors, and two of those three were interested in the contract. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). *Cf. Re* Cape Breton Co., 19 W. N. 54 (1884), where, however, the court declined to hold a director responsible for profits made by a sale of property from himself to the company, and declined to rescind the sale, since the corporation could not restore the property. Where the corporation is insolvent, a director cannot turn in his property in payment of his debt due to the corporation. White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887). A purchaser of corporate assets at a receiver's sale cannot claim a leasehold which the president holds to premises which were used by the corporation. Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 37 Hun, 9 (1885). Directors cannot purchase machinery and then sell it to the company at an advance. Redmond *v.* Dickerson, 9 N. J. Eq. 507 (1853). In Great Luxembourg R'y *v.* Magnay, 25 Beav. 586 (1858), where the director purchased for the corporation property secretly owned by himself, the court refused to interfere after the corporation had resold the property without loss. Under the above principle of law the court refused to enforce a contract by a director to furnish railway chairs to his corporation. Aberdeen R'y *v.* Blakie, 1 Macq. 461 (1854). And in Flanagan *v.* Great Western R'y, L. R. 7 Eq. 116 (1868), the court refused to enforce a corporate agreement to lease property to a director. A stockholder's bill does not lie to enjoin an execution sale of the corporate franchise and property on a judgment obtained against the corporation by a director for property sold to it by him, there being no actual fraud, nor proof of directorship at the time of the sale. Ward *v.* Salem St. R'y, 108 Mass. 332 (1871). School directors may be enjoined from selling their property to the district. Witmer's Appeal, 15 Atl. Rep. 428 (Pa., 1888).

[2] Parker *v.* Nickerson, 112 Mass. 195 (1873), where the directors were held liable for the profit on a price paid by the corporation for a boat purchased from another corporation, in which the directors were also the directors and sole stockholders. They were held liable to refund all profit

dent of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land.[1]

Where, however, the directors sell to the corporation at a profit to themselves, but with a full and fair disclosure thereof to the stockholders, and without participating in the acceptance of the property by the corporation, and no objection is made, the transaction cannot be impeached afterwards.[2]

above the cost of the boat to the vendor corporation. If the corporation has made improvements on land purchased from the director, it cannot compel him to take the land and pay it the price paid him and also the cost of the improvements. Paine *v.* Irwin, 16 Hun, 390 (1878). Where the corporation secretly agrees to give a subscriber extra stock if he will subscribe for a certain amount, and he subscribes and intends that his subscription shall be used to induce others to subscribe without knowledge of the secret gift, and they do subscribe, he cannot receive from the corporation such extra stock. The contract is void as against public policy. Nickerson *v.* English, 142 Mass. 267 (1886). A sale of mortgaged property, under a power to sell, by the mortgagee, to a newly-formed corporation in which he holds stock, does not invalidate the sale, though he could not sell to himself. Farrar *v.* Farrars, L. R. 40 Ch. D. 395 (1888). The president of a stockyard company, who takes a lease of property in his own name, and then assigns the lease to the company on a guaranty of a large stockholder in the corporation that said president shall have one-fifth of the profits from the use of the property, cannot enforce that guaranty. Robinson *v.* Jewett, 14 N. Y. St. Rep. 223; aff'd, 116 N. Y. 40 (1889). A director cannot be a partner with the corporation in sharing profits. Rudd *v.* Robinson, 54 Hun, 339 (1889). It is illegal for directors to buy from themselves lots for the corporation. Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[1] Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa., 1898).

[2] Where a director sells a plant to the corporation, and the sale is ratified unanimously at a stockholders' meeting, a stockholder cannot subsequently cause it to be set aside, especially where a great majority of the stockholders still object to its being set aside. The terms of the sale were held by the court to be reasonable. Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. Rep. 86 (1893). A director who assigns a contract to the company at a profit of $40,000 to himself must refund his profit to the company, but will be allowed such sums as he paid out for commissions. It is immaterial that all of the directors knew all of the facts and assented to the transaction. *Re* George Newman & Co., [1895] 1 Ch. 674. Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. Stetson *v.* Northern Inv. Co., 73 N. W. Rep. 869 (Iowa, 1898); Chesterfield, etc. Co. *v.* Black, 37 L. T. Rep. 740 (1877), where the

Moreover, it is within the power of the majority of the stockholders to ratify and confirm such a transaction where there is no *actual* fraud involved. The fraud is not an *actual* one if the director sold at a fair price and did not use his position to induce the corporation to purchase. Such a sale, however, is always a constructive fraud, and unless legally ratified is voidable at the option of any director or stockholder.

There is some difficulty in determining what will constitute a confirmation of such a transaction. If a majority of the directors and of the stockholders, without counting the votes controlled by the director who is interested, favor a confirmation of the transaction, a dissenting stockholder cannot bring suit to set it aside unless he can show the existence of some fraud other than the mere fact that the vendor was a director when he made the sale. If, however, a majority of the stockholders, excluding the votes owned directly or indirectly by the guilty parties, are in favor of bringing the directors to an accounting, greater difficulty arises. The weight of authority holds that the votes of the director as a stockholder are to be counted. If, however, *actual* fraud is involved, this question is immaterial, since no majority, however large, can ratify actual fraud.[1]

court refused to hold liable for profits a director and a promoter where they had purchased a mine before incorporation and had sold it to the company at a profit, it being clearly stated to the company that a profit was being made, but the amount of that profit not being divulged; Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887). In St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), it is held that a sale, by the directors, of a road-bed to the corporation is legal where all the facts are known to all except a few nominal holders of stock. But a partial disclosure is insufficient. Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558. Where, upon foreclosure of corporate property, the president and manager of the corporation purchases the property at its full value, other judgment creditors of the corporation cannot attack his purchase. Inglehart *v.* Thousand, etc. Co., 109 N. Y. 454 (1888). It is not for the purchaser of land from a company to raise the objection that the company purchased it from one of its directors. Farnham Brewery Co. *v.* Hunt, 68 L. T. Rep. 440 (1893). The vice-president and manager may lease property to the corporation, and may execute the lease for the corporation, where the lease is fair and the other officers approve. Louisville, etc. R'y *v.* Carson, 151 Ill. 444 (1894). Where the president, by fraudulent representations, induces the corporation to buy property from himself, a minority stockholder may cause the purchase to be set aside, even though all had consented to the purchase. Gerry *v.* Bismarck Bank, 47 Pac. Rep. 810 (Mont., 1897). See also ch. XLIV, *infra*.

[1] See § 662, *infra*.

§ 653. *Sales of property by the corporation to corporate officers, and purchases by corporate officers at foreclosure and execution sales.*— One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly, or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as or more than the property is worth. This principle of law was fully established by the cases of Cumberland Coal Company against Sherman[1] and Hoffman Steam Coal Company against Cumberland Coal and Iron Company.[2]

[1] 30 Barb. 553 (1859). The court also held that the purchase by the directors could be ratified only by the unanimous vote of all the stockholders, and that a ratification by proxy would not bind the stockholder himself. Cumberland Coal Co. *v.* Sherman, 20 Md. 117 (1863).

[2] 16 Md. 456 (1860), where a minority of the directors purchased part of the corporate property at an undervaluation and then sold it to the Hoffman Company, in which they were large stockholders. The court held that the latter was chargeable with notice of the voidable act. This case and the preceding one grew out of the same transaction. See also Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding that the purchase is voidable, but not void. It may be avoided, however, without proving any actual fraud on the part of the director or injury to the corporation. It is fraudulent *per se*. See also Jones, etc. Co. *v.* Arkansas, etc. Co., 38 Ark. 17 (1881), involving a scheme where a director purchased at a foreclosure sale and reorganized. A stockholder who did not come in caused the purchase to be set aside. See also Dennis *v.* Kennedy, 19 Barb. 517 (1854). Where the directors had purchased corporate property after its sale on a lien, and the purchase by them was held to be fraudulent, the passive connivance of a director renders him liable the same as though he participated. Weetjen *v.* Vibbard, 5 Hun, 265 (1875). A sale of corporate bonds to a syndicate of which three of the directors are members is valid, the price being adequate. Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). Where a director takes for himself the right of the corporation to subscribe for new stock he is liable in damages. Greenfield Sav. Bank *v.* Simons, 133 Mass. 415 (1882). But corporate creditors cannot have set aside an old sale of land by the corporation to the directors through "dummies," even though the sale was at a totally inadequate price. Graham *v.* Railroad Co., 102 U. S. 148 (1880). And a sale of an insolvent corporation's property to a director for its full value is upheld when *bona fide* and advantageous to all. Ashhurst's Appeal, 60 Pa. St. 291 (1869). A director may be the trustee in a trust deed executed by his corporation. Bassett *v.* Monte Christo, etc. Co., 15 Nev. 293 (1880). Although a company is insolvent, a lease of its property to a director on fair terms is legal, especially where for many years there is no complaint. Pneumatic Gas Co. *v.* Berry, 113 U. S.

Where all the stockholders and directors assent to a lease of corporate property to a director, a receiver appointed at the instance of a foreclosing mortgagee cannot have the lease declared void, it not being shown that he represents creditors or is vested with equities to maintain the suit. Leases to a director "will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation."[1] More difficult questions arise in regard to a director's purchases of corporate property at foreclosure sale thereof. The old rule was that he could not be a purchaser, either directly or indirectly, at the foreclosure sale. This was the rule whether the foreclosure was instituted by

322 (1885). A sale of the property of an insolvent foreign corporation, for an insufficient consideration, by the executive committee to two of the trustees, is void. Third Nat. Bank *v.* Elliott, 42 Hun, 121 (1886); aff'd, 114 N. Y. 622. See also Reilly *v.* Oglebay, 25 W. Va. 36 (1884). Where a sale of land is made by the corporation to a director, in order to raise funds to pay debts due to mismanagement, the corporation itself may subsequently cause the sale to be set aside. Crescent City, etc. Co. *v.* Flanner, 44 La. Ann. 22 (1892). Where a director buys land of the corporation at one-tenth of its value, a stockholder may cause the transaction to be set aside. Woodroof *v.* Howes, 88 Cal. 184 (1891). Where a contract is made by a corporation to sell coal to one of its directors, and the corporation does not fulfill, the director cannot recover damages where the money for the coal was to pay a personal debt of the president, and the director has relieved the corporation from liability. Main Jellico, etc. Co. *v.* Lotspeich, 20 S. W. Rep. 377 (Ky., 1892). A corporation having a leasehold with the privilege of purchasing the fee may sell the latter to a director where the company has neither the money nor credit to exercise such privilege. Hannerty *v.* Standard Theater Co., 109 Mo. 297 (1892). A receiver may replevy corporate personalty fraudulently sold to a director. Mish *v.* Main, 81 Md. 36 (1895).

[1] Tyler *v.* Hamilton, 62 Fed. Rep. 187 (1891). Where the directors of an insolvent corporation lease the property to themselves, they must account to corporate creditors for the profits, but the creditors cannot claim material which the directors have purchased and manufactured by means of the property. Hutchinson *v.* Bidwell, 24 Oreg. 219 (1893). A corporation cannot hold the directors liable on stock which the corporation issued to them for services, being taken by the directors at five cents on the dollar in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock, that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely speculative and had no market value. Divine *v.* Universal, etc. Co., 38 N. W. Rep. 93 (Tenn., 1896). A deed from the corporation to the president's firm is not void. It is voidable by the corporation or its stockholders only. Fudickar *v.* East, etc. Dist., 109 Cal. 29 (1895). See also Nye *v.* Storer, 168 Mass. 53 (1897).

those interested in the corporation or by third parties. If the director purchased at such a foreclosure sale he held the property as trustee for the benefit of the corporation and the stockholders. Upon being repaid the price he gave therefor, he was bound to make over the property to the corporation.[1] The

[1] Harts *v.* Brown, 77 Ill. 226 (1875). To same effect, Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885), where the directors resold the property at three times its cost to himself. See also Jackson *v.* Ludeling, 21 Wall. 616, 625 (1874), where the directors were part of those who purchased at a foreclosure sale of the corporate property; also, Munson *v.* Syracuse, etc. R'y, 29 Hun, 76 (1883), where the directors purchased for the purpose of reorganizing the corporation; S. C., 103 N. Y. 58 (1886), where Munson was a director in an insolvent railroad corporation, and also a director in a corporation that wished to purchase said railroad, and in behalf of the latter company contracted to purchase the said railroad from the bondholders after the latter should purchase the same at a foreclosure sale. The court refused to enforce the contract; Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501 (1887), where the directors of a corporations owning land subject to a mortgage allowed a foreclosure to be made, and then purchased at the sale. See Foster *v.* Oxford, etc. R'y, 13 C. B. 200 (1853). See also Allen *v.* Jackson, 122 Ill. 567 (1887), holding a director who had purchased corporate property at a foreclosure sale liable to former purchasers of that property from the corporation, subject to the mortgage. Where a director purchases property from an insolvent corporation, "it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property." Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). A sale of property to a syndicate, of which a director is a member, will not be set aside when the full value was received by the corporation, and the sale was made in order to protect the parties who were sureties for the price to be paid by the corporation for the property. Hill *v.* Nisbet, 100 Ind. 341 (1884). In Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875), a director loaned money to the corporation, took bonds therefor, and had the bonds secured by a mortgage running to a third person as a trustee, and upon a sale by the trustee the director purchased for himself. Laches barred any remedy. Directors may purchase at a foreclosure sale, under some circumstances. Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888). A director may own bonds and may purchase at the foreclosure sale. The sale is valid even though allowed by the directors from corrupt motives, and this was known to the purchasing trustee. At least the stockholders must offer to redeem before they can do anything. Harpending *v.* Munson, 91 N. Y. 650 (1883). The president of the company may purchase at the foreclosure sale. He does not thereby become a trustee for the bondholders. Credit Co. etc. *v.* Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1889). At a reorganization sale a director may pur-

supreme court of the United States, however, has recently held in regard to the president that if the foreclosure is not brought about by the president "in violation of his duties as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property or from being interested in its purchase" by another.[1]

Again, it has been held that where the directors find it necessary to extend the plant in order to meet competition, and the cost is greater than expected, and bonds are offered to the stockholders and not taken, and the directors loan money to the company on the bonds at par, and then on foreclosure buy in the property, their purchase will be upheld, there being no actual fraud in the transaction.[2] In Michigan it is held that as against a stockholder a director may purchase the property at foreclosure sale.[3] Judgment creditors cannot complain where, upon the foreclosure sale of the corporate property, the president purchases the property at its full value.[4] Where the directors are sureties on corporate notes secured by mortgage, they may buy in the property at the foreclosure sale for their

chase in behalf of a part of the stockholders, and the transaction will be upheld if the price is a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things, but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne *v.* Monks, 21 S. W. Rep. 101 (Ky., 1893). Where a contractor taking stock and bonds in payment for work subcontracts the work for the stock, and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock. McLane *v.* King, 144 U. S. 260 (1892). An insurance company cannot refuse payment of a loss on the ground that the insurer was a director and had bought the corporate property at a foreclosure sale. Caraher *v.* Royal Ins. Co., 63 Hun, 82 (1892).

[1] McKittrick *v.* Arkansas Central R'y, 152 U. S. 473, 497 (1894). See also cases in preceding note. As to the purchase of the property by the president and others on a foreclosure, with a view to reorganization, see ch. LII, *infra*.

[2] Foster *v.* Belcher's, etc. Co., 118 Mo. 238 (1893).

[3] Lucas *v.* Friant, 69 N. W. Rep. 735 (Mich., 1897).

[4] Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888).

own protection.[1] There is a limit, however. Thus, where a director who practically controlled the board of directors caused all the earnings of the railroad to be used in improving the property, thereby preventing a payment of interest on the corporate indebtedness and bringing about a foreclosure of the mortgage, the director himself having purchased the bonds secured by the mortgage and having purchased the railroad at the foreclosure sale, the court held that the purchase at the foreclosure sale by the director was voidable. Upon repayment to him of the purchase price he was compelled to retransfer the property to the corporation, even though another foreclosure would be the result. Third persons who had purchased the road from him with notice stood in no other position than the director himself.[2]

The same general rules apply to execution sales. A director is disqualified from purchasing corporate property sold under execution.[3] Where a director causes the property to be sold on

[1] College, etc. Line *v.* Ide, 40 S. W. Rep. 64 (Tex., 1897).

[2] Covington, etc. R. R. *v.* Bowler, 9 Bush (Ky.), 468 (1872). In Kitchen *v.* St. Louis, etc. R'y, 69 Mo. 224 (1878), the court said: "Whatever is sufficient to put a person on inquiry is notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it." So also where a director agrees to redeem from an execution sale certain corporate property, on an understanding that he does it for the corporation, and his payment is to be a preferred corporate debt, the corporation may redeem long subsequently, even though the director had, after a time, treated the property as his own. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1887). Where a corporation is liable to an officer on a debt, the officer may purchase at a foreclosure sale property upon which the corporation has a subsequent lien; may pay the prior lien out of the corporate funds; and may hold the title to secure the debt due him. Smith *v.* Lansing, 22 N. Y. 520 (1860).

[3] Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873). Where the president and a director purchase the corporate property at an execution sale, and agree to convey it to the corporation upon repayment of the amount paid, the corporation may redeem it long subsequently upon payment and reimbursement for improvements made. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1888). Where in a joint-stock company one member buys all the company's property at an execution sale, though he owes the company more than the price paid, the company is entitled to the property and an accounting lies. Bradbury *v.* Barnes, 19 Cal. 120 (1861). Where the director of an insolvent corporation buys its property at an execution sale to which he is not a party, he is liable to the corporation for the value of the property less the amount he paid for it. Tobin Canning Co. *v.* Fraser, 81 Tex. 407 (1891). The purchase of a boat at

an execution issued on his own debt, and buys in the property, he must allow other creditors to participate in the price paid at the execution sale.[1] He cannot be interested in the purchase of corporate property sold for the non-payment of taxes.[2] The corporation may reclaim the property upon payment to the director of the amount he paid therefor. A similar rule applies where a director allows or brings about a forfeiture of a lease which the company holds as lessee, and then takes a new lease of the same property in his own name.[3] But a corporate officer may purchase property at an execution sale where he does so in good faith and pays the full value of the property.[4] The disability of directors to purchase property from the corporation may restrict their right to subscribe for unissued stock of the corporation.[5] There is some difficulty in determining

judicial sale by the manager of the corporation owning such boat, for himself and other stockholders, may not cut off the maritime lien of another person. Crosby *v.* The Lillie, 42 Fed. Rep. 237 (1890). Where a director and treasurer buys corporate land at an execution sale brought about by himself, he cannot maintain an action of forcible entry and detainer against the company. Hoffman *v.* Reichert, 147 Ill. 274 (1893), aff'g 31 Ill. App. 558. Where a director purchases for $8,400 property of the company sold on an execution on a judgment obtained by him against the company, and within a year sells the property for $23,000, he must pay over the profit to the company. *Re* Iron, etc. Mfg. Co., 19 Ont. Rep. (Can.) 113 (1889). Where the president turns over claims against the corporation to his wife, even for value, and the corporate property is sold out to her on judgments on the notes, although the corporation was doing a good business and in no danger, the court will set the transaction aside. J. W. Butler, etc. Co. *v.* Robbins, 151 Ill. 588 (1894).

[1] Kittel *v.* Augusta, etc. R. R., 78 Fed. Rep. 855 (1897).

[2] Smith *v.* Fagan, 17 Cal. 178 (1860).

[3] Bengley *v.* Wheeler, 45 Mich. 493 (1881); Smith *v.* Bank of Victoria, 41 L. J. (P. C.) 34 (1872). In the latter case the director reorganized and allowed part of the old stockholders to come in. A dissenting stockholder caused the whole transaction to be set aside.

[4] Horbach *v.* Marsh, 37 Neb. 22 (1893).

[5] Where the directors cause treasury stock to be sold to themselves at less than its real value, and for the purpose of carrying an election, the court will set the transaction aside as fraudulent. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where, long after the company has commenced business, it has disposed of its property and is ready to declare a five per cent dividend, the directors' issuance to themselves at par of that part of the original capital stock which never had been issued is a fraud on the remaining stockholders. Arkansas, etc. Soc. *v.* Eichholtz, 45 Kan. 164 (1891). Where a director issues to himself at par stock belonging to the corporation, and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce

whether this disqualification of a corporate officer to purchase property from the corporation extends to officers other than the president and directors. It has been held to affect the treasurer of the corporation[1] and also the cashier of a bank.[2] It has also been intimated that a superintendent of the corporation is under the same disability.[3] A stockholder, however, even though he owns a majority of the stock of the corporation, may at a *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves."[4]

An insurance company's secretary has no right to insure in the company his own property, unless other officers properly approve of it.[5]

therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91 (1890). But see Sims *v.* Street R. R., 37 Ohio St. 556 (1882). See also §§ 65, 70, 286, 614, *supra*. *Cf.* Charleston Ins. & T. Co. *v.* Sebring, 5 Rich. Eq. (S. C.) 342 (1853), where the directors purchased from the corporation stock which the corporation had previously issued and had purchased for itself. See also Parker *v.* McKenna, L. R. 10 Ch. App. 96 (1874) and York, etc. R'y *v.* Hudson, 16 Beav. 485 (1853), holding that upon an increase of the capital stock the directors have no right to make a secret profit in its disposal.

[1] McAllen *v.* Woodcock, 60 Mo. 174 (1875), holding that the treasurer's purchase of the corporate property at an execution sale thereof is a purchase for the benefit of the corporation. See also Parker *v.* Nickerson, 112 Mass. 195 (1873).

[2] First Nat. Bank *v.* Drake, 29 Kan. 311 (1883); Torrey *v.* Bank of Orleans, 9 Paige, 649 (1842); aff'd, Bank of Orleans *v.* Torrey, 7 Hill, 260.

[3] Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433 (1877). In this case the superintendent's purchase was illegal, inasmuch as one of the directors was a secret partner in the purchase. A corporation may set aside an execution sale fraudulently concealed by its agent, who was interested in the judgment, which fact the purchaser knew. Lang Syne, etc. Co. *v.* Ross, 20 Nev. 127 (1888). The superintendent and surveyor of a rural cemetery association may purchase from it a large number of lots in the cemetery, although he intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890).

[4] Price *v.* Holcomb, 89 Iowa, 123 (1893); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844).

[5] Pratt *v.* Dwelling, etc. Ins. Co., 130 N. Y. 206 (1891). Where the secretary, who is also general manager, buys in the corporate property at an execution and tax sale, he must yield it up to the company upon payment of the amount for which it was sold, and his grantee, who is also in a fiduciary relation, must do the same. San Francisco Water Co. *v.* Pattee, 86 Cal. 623 (1890).

§ 654. *Reorganization of corporations.*— This subject is considered elsewhere.[1]

§ 655. *Issue of "watered" stock and of bonds at a discount— Division of assets leaving creditors unpaid.*— The general subject of the legality of issues of stock[2] and of bonds[3] at less than their par value is considered elsewhere. The fact that such issues are made to directors instead of to the public is immaterial, unless *actual* fraud is involved. As will be shown hereafter, bonds may legally be issued to directors,[4] and such issues may be at less than par.[5] A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent.[6] Nevertheless, although none of the stockholders and creditors of a company, which is in difficulties, object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.[7] As between the directors and the stockholders the rule invalidating contracts between the corporation and its directors[8] would apply to the sale of bonds at a price which is unfair. The stockholders may sue the directors for gross mismanagement, and for damages, where fraudulent mortgages have been placed by them on the corporate property.[9] A division of the assets of a corporation leaving its creditors unpaid has already been considered.[10] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached.[11] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been absorbed by another corporation may hold its directors liable for the

[1] See ch. LII, *infra*.
[2] See ch. III, *supra*.
[3] See ch. XLVI, *infra*.
[4] See §§ 660, 661, *infra*.
[5] Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883).
[6] Bank of Toronto *v.* Cobourg, etc. R'y, 10 Ont. Rep. (Can.) 376 (1885).
[7] London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893).
[8] See §§ 649, 652, *supra*.
[9] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).
[10] See ch. XL, *infra*.
[11] Angle *v.* Chicago, etc. R'y, 151 U. S. 1 (1894).

loss, and his suit may be at law or in equity.[1] Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply.[2] As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company.[3]

§ 656. *Stockholders' actions against persons other than directors for frauds, etc., against the corporation.*— Ordinarily, where third persons have defrauded a corporation, and have defrauded it by collusion with the corporate officers, the stockholder's action is against both the officers and the third persons, all being joined as parties defendant. When such is the case the cause of action comes under some one of the sections of this chapter.[4] Where the directors have turned over the

[1] Mason *v.* Henry, 152 N. Y. 529 (1897).

[2] Sidell *v.* Missouri Pac. R'y, 78 Fed. Rep. 724 (1897).

[3] Levins *v.* Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn., 1896).

[4] Thus, where a railroad has been leased to another railroad company under a certain agreement of the latter guaranteeing a fixed sum to the former, and the lessee railroad company refuses to fulfill its contract and has control of the lessor railroad, a stockholder of the latter may bring suit against the former to remedy the wrong. March *v.* Eastern R. R., 40 N. H. 548 (1860). And the case of Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878), very properly says "that whenever the trustee has been guilty of a breach of trust, and has transferred the trust property by sale or otherwise to any third party, the *cestui que trust* has a full right to follow such property into the hands of such third party, unless he stands in the situation of a *bona fide* purchaser for value without notice." See also Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873). A person receiving corporate money in compromise of his suit against guilty directors may be compelled to pay it back to the corporation. Erie R'y *v.* Vanderbilt, 5 Hun, 123 (1875). A person sued on a contract by a corporation cannot claim that the contract is unenforceable because

property to an assignee to pay illegal debts, the stockholders may file a bill to set the transaction aside.[1] A stockholder will be allowed to intervene and defend a suit pending against the corporation on a note where he alleges that the note is fraudulent, and the directors, by a conspiracy, do not intend to defend.[2] An attorney who receives money from a company for a specific purpose cannot retain it and set it off against his fees.[3] A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government.[4]

Another class of cases arises when third persons commit frauds against the corporation without the collusion of the corporate officers, but the latter neglect or refuse to institute a suit to rectify the wrong. The right of the stockholder is then not so clear. It is ordinarily within the discretion of the corporate officers to enforce, compromise, or abandon claims which the corporation may have against third persons. Generally this exercise of discretion cannot be questioned or remedied by the stockholders, except by electing at a subsequent election directors more in accord with the stockholders' views. It is possible, however, that cases may occur where the judgment of the directors is so palpably and injuriously wrong that the courts will sustain a stockholder's action herein. This subject is treated elsewhere.[5]

another of the parties thereto was a director of the corporation. Stewart *v.* Lehigh Valley R. R., 38 N. J. L. 505 (1875). In Beach *v.* Cooper, 72 Cal. 99 (1887), in a stockholder's suit to hold officers liable for paying $315,000 for a few months' loan of $140,000, the court held that the act was not a fraud *per se*, and that it was possible that the directors might explain it. See § 738, *infra*. The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme. Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893). Where trust deeds to a trust company run to the president as trustee, the court will compel him to administer the trusts for the benefit of the company. Tulleys *v.* Keller, 45 Neb. 220 (1895).

[1] People's Sav. Bank *v.* Colorado, etc. Co., 8 Colo. App. 354 (1896).

[2] Majors *v.* Taussig, 20 Colo. 44 (1894).

[3] *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567. Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896).

[4] Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895).

[5] See § 750, *infra*.

§ 657. *Salaries or compensation to corporate officers.*— A frequent fraud upon corporations and stockholders is perpetrated by the corporate funds being used to pay salaries and compensation to corporate officers and assistants. It is well-established law that a director is not entitled to any pay for his services to the corporation as a director where there has been no agreement in advance that he shall have a salary.[1] Hence a salary or back pay voted to a director after the services have been

[1] American Cent. R'y *v.* Miles, 52 Ill. 174 (1869); Illinois Linen Co. *v.* Hough, 91 Ill. 63 (1878); Citizens' Nat. Bank *v.* Elliott, 55 Iowa, 104 (1880); Smith *v.* Putnam, 61 N. H. 632 (1882). The president cannot claim a salary for services after dissolution. Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). A president who is a large stockholder, and who of his own accord renders services to advance its interests, cannot afterwards recover a salary or even his personal expenses, the claim of the president in this case being $1,000.000. McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). The vice-president of a bank is not entitled to a salary where none had been agreed upon. Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896). In a suit by a director for reasonable compensation the company may show its practice in regard to salaries; also the holdings of the director as a stockholder, and also any agreement between the original incorporators that no salaries be paid. McCarthy *v.* Mt. Tecarte, etc. Co., 111 Cal. 328 (1896). Where one company sells out to another, and the president of the former goes into the employ of the latter, the presumption is that his salary as president ceases. Simonson *v.* New York City Ins. Co., 141 N. Y. 12 (1894). Where, by agreement between the corporation and its creditors, the corporate affairs are managed by a committee of the creditors, the committee may collect for their services. The committee may sue jointly. Dallas *v.* Columbia, etc. Co., 158 Pa. St. 444 (1893). In Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa., 1898), where the court compelled the president of the company to refund a back salary which had been voted and paid to him, the court nevertheless said: "Kase for years, from the inception of the enterprise to its close, performed most arduous duties and rendered the most drudging service to the company. He was, in one sense, the company, and without him there would have been no railroad. Some of his acts were reckless, and perhaps improvident. He was strong, energetic, and domineering. The only one who seemed to exercise any restraint upon him was Mr. Wolverton, the treasurer, and he often failed in holding him to anything like business methods. But immense work, whether good or ill, Kase performed; and if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price." A director who receives a salary for certain services cannot recover a further sum for other services, where he was not expressly employed to render the latter services and there was no promise to pay. Acceptance of the service is immaterial. Gill *v.* New York Cab Co., 48 Hun, 524 (1888). A vice-president cannot recover for extra services where there was no agreement to pay him. Gill *v.* New York Cab Co., 48 Hun, 524 (1888).

rendered cannot be enforced. It is invalid and voidable. It is the same as giving away the assets of the corporation.[1]

Where an illegal salary has been paid, with the consent, however of a majority of the stockholders, and a minority stock-

[1] Bennett *v.* St. Louis, etc. Co., 19 Mo. App. 349 (1885); Ogden *v.* Murray, 39 N. Y. 202 (1868); Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) 434 (1869); Jones *v.* Morrison, 31 Minn. 140 (1883); Maux Ferry, etc. Co. *v.* Branegan, 40 Ind. 361 (1872); Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858); Holder *v.* Lafayette, etc. R'y, 71 Ill. 106 (1873), where the director even acted as treasurer; Gridley *v.* Lafayette, etc. R'y, 71 Ill. 200 (1873), where the director was a member of the executive committee. Directors are not liable to account for extra pay voted to a director for his services as an agent. Godbold *v.* Mobile Branch Bank, 11 Ala. (N. S.) 191 (1847). The majority of the stockholders cannot, on the winding up, vote back pay to directors. Hutton *v.* West Cork R'y, L. R. 23 Ch. D. 654 (1883); Northeastern R'y *v.* Jackson, 19 W. R. 198 (1870), holding a director liable for back salary paid him by vote of the directors, when the statute required such vote to be by the stockholders. In Hall *v.* Vermont, etc. R. R., 28 Vt. 401 (1856), compensation for taking subscriptions had been voted by the stockholders. After the rescinding of that vote no compensation was allowed, and none was allowed for lobbying the charter through the legislature. A vote by the stockholders of free passes over the road to a director in consideration of his efforts as a promoter before incorporation may be repudiated at any time by the corporation. New York, etc. R. R. *v.* Ketchum, 27 Conn. 170 (1858). But see St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), where back pay to directors for services in promoting and launching the enterprise was voted and upheld. A director cannot collect pay from the company for his services on the executive committee and for his expenses in travel where there has been no resolution passed previous to the services, entitling him to the pay. Lafayette, etc. Ry. *v.* Cheeney, 87 Ill. 446 (1877). Directors cannot vote compensation to themselves after the services have been performed. Pfeiffer *v.* Lansberg Brake Co., 44 Mo. App. 59 (1891), reviewing at length the cases; Burns *v.* Commencement Bay, etc. Co., 4 Wash. St. 558 (1892). A director cannot recover pay for past services, even though he devoted considerable time to the affairs of the company and traveled on several occasions in its behalf, his expenses on such occasions having been paid by the company. The court held that the rule that the director was entitled to pay for services rendered clearly outside of his duties as director is subject to the condition "that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation." Brown *v.* Republican, etc. Mines, 17 Colo. 421 (1892). Where no salary is attached to the office none can be recovered. Field *v.* Union Box Co., 2 W. N. Cas. 426 (1876). Nor, when the salary is fixed, will extra compensation be allowed for extra services. Carr *v.* Chartiers Coal Co., 25 Pa. St. 337 (1855). And a resolution remunerating officers who have been elected to serve without compensation is merely voluntary and revocable. Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858). See also note 2, p. 1306.

holder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.[1]

There is authority to the effect that directors cannot vote a salary to themselves even in advance of their services as directors.[2] In a recent English case Judge Lindley said: "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting."[3] Nevertheless, even without any

[1] Brown *v.* De Young, 47 N. E. Rep. 863 (Ill., 1897). In Eaton *v.* Robinson, 32 Atl. Rep. 339 (R. I., 1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stockholder his proportionate part of the money.

[2] A resolution that directors shall receive pay for attendance in the future does not sustain an action therefor. It is a promise to give a gratuity, and is not enforceable compulsorily. Dunston *v.* Imperial Gas Light Co., 3 B. & Ad. 125 (1832). Directors voting stock to themselves in compensation for selling corporate stock are liable for the value of the stock upon corporate insolvency. Freeman *v.* Stine, 15 Phila. 37 (1881). Stock issued to directors, on a vote of themselves, in payment for extra services, will be ordered canceled by the court. Jones *v.* Johnson, 86 Ky. 530 (1888); Collins *v.* Godefroy, 1 B. & Ad. 956 (1831), where a director was not allowed to receive a reward offered for the recovery of stolen property; Kelsey *v.* Sargent, 40 Hun, 150 (1886), denying the right of the directors to vote salaries to themselves. See also cases in the following note.

[3] *Re* George Newman Co., [1895] 1 Ch. 674, 686. "The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing, and to make them out of capital or out of money borrowed by the company is a very different matter." The court held that even the fact that all the stockholders knew of the transaction and acquiesced therein was not sufficient. *Re* George Newman & Co., [1895] 1 Ch. 674, 686. *Cf. Re* Woods, etc. Co., 62 L. T. Rep. 760 (1890). Where directors are allowed a salary by the charter, it may be paid out of the capital if no profits are made. *Re* Lundy Granite Co., 26 L. T. Rep. 673 (1872). It is legal for a corporation to issue stock as full paid to a person in consideration of his leaving an employment in which he is engaged, and of assuming the presidency of the corporation. Shannon *v.* Stevenson, 173 Pa. St. 418 (1896). A resolution that the president shall receive $5,000 a year, which has been acted on for fifteen years, may be relied upon by a new president, even though he does not collect it for two and a half years. Farmers' L. & T.

vote, a director is entitled to pay for extra services which he performed as general manager with the consent of the board.[1] And where a reasonable salary was drawn by a managing director without the authority of any resolution, and without any specific notice to the shareholders, but the item appeared in the accounts, and every shareholder either knew or had the means of knowing the fact, it was held that the director was not liable to account to the company for the money.[2] It has been held also that he may recover reasonable compen-

Co. *v.* Housatonic R. R., 152 N. Y. 251 (1897); Starbuck *v.* Housatonic R. R., 83 Hun, 534 (1895). Where the board consists of the president, his son, and his clerk, and they vote five years' back pay to the president, the act is illegal, and notes issued therefor are illegal. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896), the court saying: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation." A resolution of the stockholders that a managing director should receive a certain salary up to a certain date does not entitle him to a salary beyond that date, and he may be compelled to repay it. *Re* Bolt and Iron Co., 14 Ont. Rep. (Can.) 211 (1887); aff'd, 16 App. Rep. 397. Where the salary of the president has been fixed for a year by resolution of the board of directors, the board cannot rescind the resolution. It is a contract. Kimball *v.* New England, etc. Co., 46 N. E. Rep. 432 (Mass., 1897). In *Re* New British Iron Co., 78 L. T. Rep. 155 (1898), the by-laws provided that £1,000 annually should be paid to the board of directors for fees, to be divided as the board might direct. The contract to pay the president may be oral and informal, and may consist of conversations. Bagley *v.* Carthage, etc. R. R., 25 N. Y. App. Div. 475 (1898).

[1] Eales *v.* Cumberland, etc. Co., 6 H. & N. 481 (1861). A salary voted to a director by the directors for services as manager is not legal where the charter requires a vote of the stockholders on contracts in which a director is interested. *Re* State F. Ins. Co., 36 L. J. (Ch.) 634 (1867). In Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), the court compelled a director to pay back a salary which he had received for acting as "ship's husband" for the company, whose business was the working of vessels. The president cannot bind the corporation by an agreement to pay a director extra compensation. Bailey *v.* Buffalo, etc. R'y, 14 Hun, 483 (1878); Hodges *v.* Rutland, etc. R. R., 29 Vt. 220 (1857). A salary voted by a board of three directors to one of their number as general manager is valid, at least so far as concerns a person who purchases the stock after the salary has been paid. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). A director who performs services as general manager may recover therefor. Kryger *v.* Railway, etc. Mfg. Co., 46 Minn. 500 (1891). A director may recover on a *quantum meruit* for services rendered outside of his duties as director. Ruby, etc. Co. *v.* Prentice, 52 Pac. Rep. 210 (Colo., 1898).

[2] Felix, etc., Ltd., *v.* Hadley, 77 L. T. Rep. 131 (1897).

sation for his services as superintendent,[1] or attorney in a suit;[2] or secretary and agent;[3] or cashier;[4] but not for services as a promoter;[5] nor for acting as president and master-builder;[6] but may recover for acting as agent of the company.[7]

[1] A director who, at the request of the president, superintends the construction of the road, may recover pay therefor. Henry *v.* Rutland, etc. R. R., 27 Vt. 435 (1855); Chandler *v.* Monmouth Bank, 13 N. J. L. 255 (1832), where there was even a charter prohibition. A director may recover for services rendered as superintendent. Severson *v.* Bimetallic, etc. Co., 18 Mont. 13 (1896).

[2] Jackson *v.* New York Cent. R. R., 2 Thomp. & C. (N. Y.) 653 (1874); Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878); Ten Eyck *v.* Pontiac, etc. R. R., 74 Mich. 226 (1889). An attorney may recover for services, even though he is a director, it being agreed that he should be paid as soon as the company was able, and an agreement prior to incorporation being ratified. Arapahoe Inv. Co. *v.* Platt, 5 Colo. App. 515 (1895). A director who acts as attorney for the company cannot collect fees therefor unless there was an express contract to that effect. *Re* Mimico, etc. Co., 26 Ont. Rep. 289 (1895).

[3] Rogers *v.* Hastings, etc. R'y, 22 Minn. 25 (1875). As to secretary, Talcott *v.* Olcott Mfg. Co., 11 N. Y. Week. Dig. 141 (1880). *Contra*, Fraylor *v.* Sonora Min. Co., 17 Cal. 594 (1861). Neither the president, treasurer, nor secretary can recover the value of their services, where they are also directors, unless there was an express contract to pay them or the by-laws so provide. The decisions in Pennsylvania to this effect control services there rendered, though suit is brought elsewhere. Crumlish *v.* Central Imp. Co., 38 W. Va. 390 (1893). A secretary may recover for real services, even though he is also a director. Chamberlain *v.* Detroit Stove Works, 103 Mich. 124 (1894).

[4] First Nat. Bank *v.* Drake, 29 Kan. 311 (1883).

[5] Rockford, etc. R. R. *v.* Sage, 65 Ill. 328 (1872). See Eakins *v.* American, etc. Co., 75 Mich. 568 (1889).

[6] Levisee *v.* Shreveport City R. R., 27 La. Ann. 641 (1875).

[7] A director and stockholder who, by contract with the company, is entitled to a certain salary, may, upon the insolvency of the company, prove his claim the same as other creditors. *Re* Dale, L. R. 43 Ch. D. 255 (1889). A director may collect a reasonable compensation for services and materials given to his company. Greensboro, etc. Co. *v.* Stratton, 120 Ind. 294 (1889). A *bona fide* holder of a street railway company's note is protected, even though it was given to a director in payment for services in procuring the franchise. Kneeland *v.* Braintree Street R'y, 167 Mass. 161 (1896). A director who performs extra services is entitled to pay therefor. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). The president may collect a salary legally voted to him, even though he failed to fulfill his promise to make the business a success. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky., 1893). The president may collect pay for his services if they were outside of his official duties, and he was actually employed by the corporation, and the services were rendered with the knowledge and consent of the corporation. Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Supp. 980 (1892). A director may recover for services rendered. McDowall *v.* Sheehan, 13 N. Y. Supp. 386 (1891) (rev'd on another point, 129

A salary which takes all the profits and part of the capital stock is unreasonable.[1] The voting of a salary or compensation must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only by including the vote of the director who receives the salary or pay.[2] A salary paid

N. Y. 200). A salary payable when bonds are sold is collectible in cash if they are not sold within a reasonable time. Indianapolis, etc. R. R. *v.* Hyde, 122 Ind. 188 (1890). In general, see also Cheeney *v.* Lafayette, etc. R'y, 68 Ill. 570 (1873); Shackelford *v.* New Orleans, etc. R. R., 37 Miss. 202 (1859); Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878), where a director obtained patents and negotiated their sale.

[1] Decatur, etc. Co. *v.* Palm, 21 S. Rep. 315 (Ala., 1896).

[2] Butts *v.* Wood, 37 N. Y. 317 (1867), where the vote was set aside, although the salary was for services by the director as secretary and treasurer; Ward *v.* Davidson, 89 Mo. 445 (1886), where increased pay was voted to the president of the corporation; Gardner *v.* Butler, 30 N. J. Eq. 702 (1879); Jones *v.* Morrison, 31 Minn. 140 (1883); Kelsey *v.* Sargent, 40 Hun, 150 (1886). The president, secretary, and treasurer cannot vote salaries to themselves, the company being in bad financial condition. Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893). Where the directors vote a salary to themselves, partly for services, but largely in fraud, the court will compel them to refund the whole salary. Eaton *v.* Robinson, 31 Atl. Rep. 1058 (R. I., 1895). In McNulta *v.* Corn Belt Bank, 45 N. E. Rep. 954 (Ill., 1897), the president sued to recover a two and a half per cent commission which had been voted by the directors to him on unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect. A salary voted to the president by a quorum of three directors, the two other directors being absent, and the president being one of the three, is not enforceable. Copeland *v.* Johnson Mfg. Co., 47 Hun, 235 (1888). MacNaughton *v.* Osgood, 41 Hun, 109 (1886), holds that a stockholder cannot cause the vote of salary to be set aside and repayment made merely by proving that the officers voted it to themselves. He must prove actual fraud. This decision, however, may well be doubted. Where the president presides over a meeting which votes a future salary to himself for life, the salary is illegal, although he did not vote. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for five years is fatal. U. S. Ice, etc. Co. *v.* Reed, 2 How. Pr. (N. S.) 253 (1885). A stockholder may compel the president to refund a salary voted to himself at an illegal meeting of a part of the directors. Back pay is illegal. Where the president takes part in the proceeding, or his vote is essential, the vote of salary to him is illegal. Wickersham *v.* Crittenden, 93 Cal. 17 (1892). A salary to the president, his own vote being necessary, is illegal. Wickersham *v.* Crittenden, 106 Cal. 327 (1895). A salary voted by the aid of the vote of an officer receiving the same may be validated by subsequent vote of the board. Wickersham *v.* Crittenden, 110 Cal. 332 (1895). A salary voted to the president at a

to a director for nominal services when the corporation was insolvent may be recovered back.[1]

Where the board of directors vote large pay to themselves, evidently in bad faith, and with a view to depriving the corporation of more than a reasonable proportion of its net earnings, a dissenting stockholder may file a bill in equity to have the amount recovered back.[2] And where the chief stockholder,

meeting at which he presides, the minutes showing no dissenting vote, is illegal where he had performed no substantial service, even though he swears that he did not vote. Ashley *v.* Kinnan, 2 N. Y. Supp. 574 (1888). A director cannot collect a salary voted to him as general manager, even in advance of the services, where there were only three directors, and the other two were voted salaries, one as vice-president and the other as assistant treasurer. Delay in objecting thereto for some months is no bar to this defense. Mallory *v.* Mallory-Wheeler Co., 61 Conn. 131 (1891). Where a company is prosperous, the directors may vote increased salaries to themselves, each one refraining from voting when the resolution affecting himself is voted upon. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891). In Bagaley *v.* Pittsburgh, etc. Iron Co., 146 Pa. St. 478 (1892), a salary to the president, fixed by the president and another director, was upheld where the company was a close corporation. Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyance and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougueray *v.* Cord, 50 N. J. Eq. 185. Where three out of five directors are present at a board meeting and vote one of themselves a salary as secretary, it is illegal. The action of the full board subsequently in increasing the salary does not validate the first vote. Martin *v.* Santa Cruz, etc. Co., 36 Pac. Rep. 36 (Ariz., 1894). Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them and two persons to be named by the others, and that one of them who had received a salary of $2,500 should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price. Elias *v.* Schweyer, 13 N. Y. App. Div. 336 (1897); S. C., 27 N. Y. App. Div. 69.

[1] Putnam *v.* Gunning, 162 Mass. 552 (1895).

[2] Where during eight years all

who is president, induces the directors, his "dummies," to vote a large salary to him, the corporation may defeat the officer's action at law to recover it.[1] It has been held also, where the majority of the stock of a corporation was held by one family, who voted away the corporate profits for salaries, that the minority might call upon a court of equity to remedy the fraud.[2]

Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company and caused the board to vote a large salary to himself as president and manager, and leased to the company his property at a large rental, the salary and rental are illegal and voidable.[3]

Where persons buying a majority of the stock thereupon take control and vote to the retiring president a large salary for past services, he being one of the persons selling the stock to them, and such salary so paid is credited to the vendees on the purchase price of the stock, the vendees are liable to re-

the profits of a turnpike company, amounting to $20,000, are used to pay exorbitant salaries to the treasurer and secretary, the court will order a repayment of the same with interest. Wayne Pike Co. *v.* Hammons, 129 Ind. 368 (1891); Blatchford *v.* Ross, 54 Barb. 42 (1869); Ziegler *v.* Hoagland, 52 Hun, 385 (1889), where $86,000 in salaries was voted to three persons. In Hedges *v.* Paquett, 3 Oreg. 77 (1869), the court refused to interfere, though fraud was charged, in that the directors credited large bills to themselves, and paid themselves large sums for services, had destroyed the business, and had wasted the funds and property. This case, however, has met with universal disapproval, and must be considered as contrary to law.

[1] Davis *v.* Memphis City R'y, 22 Fed. Rep. 883 (1885). In Hubbard *v.* New York, etc. Co., 14 Fed. Rep. 675 (1882), wherein a person contracted in advance to become a director and superintendent at a remuneration of one-third of the profits of the business, the court refused to uphold the agreement, and said the contract is to be "construed in the same manner as if he was actually a director at the time of its inception, and as if it was made with him while he was a director." The court will scrutinize carefully a salary voted by the board of directors to one of their number as superintendent, where such vote is by those representing him in the board, but if the salary is reasonable the court will sustain it. Harris *v.* Lemming, etc. Works, 43 S. W. Rep. 869 (Tenn., 1896).

[2] Sellers *v.* Phœnix Iron Co., 13 Fed. Rep. 20 (1881).

[3] Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892).

store the money so paid.[1] The president cannot claim a salary for his services where none was voted to him before the services were rendered.[2]

A person who is appointed and acts as secretary, and is

[1] Ellis *v.* Ward, 137 Ill. 509 (1890); S. C., 20 N. E. Rep. 671, holding the president not liable where he knew nothing of it.

[2] The president and directors who vote back pay to him and cause corporate notes to be issued therefor are liable to the company therefor, but directors not taking part in the issue of the notes are not liable. Metropolitan Elev. R'y *v.* Kneeland, 120 N. Y. 134 (1890); Merrick *v.* Peru Coal Co., 61 Ill. 472 (1871); Holland *v.* Lewiston Falls Bank, 52 Me. 564 (1864); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888); Commonwealth Ins. Co. *v.* Crane, 47 Mass. 64 (1843), where it was even proved that the former president had a salary; Kilpatrick *v.* Penrose, etc. Co., 49 Pa. St. 118 (1865), where both the president and treasurer sued. The salary of the president ceases upon the discontinuance of the corporate business by a sale of all its property. Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). The president is not entitled to a preference in payment under a statute giving to "laborers" of an insolvent corporation such a preference. England *v.* Beatty, etc. Co., 41 N. J. Eq. 470 (1886). A note is not collectible by a principal whose agent made the note as president of a corporation, where the consideration therefor was unpaid salary of the president, and the note was ratified by the corporation only by the casting vote of the president. Chamberlain *v.* Pacific, etc. Co., 54 Cal. 103 (1880). Under a peculiar charter provision it was held in Grundy *v.* Pine Hill Coal Co., 9 S. W. Rep. 414 (Ky., 1888), that there was an implied obligation of the corporation to pay its president a salary. A salary as fixed for a preceding year gives no right to a salary for prior years. Smith *v.* Woodville, etc. Co., 66 Cal. 398 (1885). Stock may be issued to the president in payment of past salary and debts. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659, holding also that though the president himself was one of the three directors voting for the same, yet that long acquiescence cures any right to object. A meeting of four legally-elected and three illegally-elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 658 (1892). In Bowen *v.* Carolina, etc. R'y, 34 S. C. 217 (1891), the president of a railroad company was allowed to recover from the company what the jury believed his services to have been worth. A president is not entitled to pay for his services unless an agreement in advance to that effect is made. Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348 (1890); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888). The president may be entitled to compensation for extra services performed with the knowledge of the directors, although a former resolution, of which he had no knowledge, prohibited pay, unless voted in advance. Bartlett *v.* Mystic River Corp., 151 Mass. 433 (1890). A mutual life insurance company having no capital stock cannot make a contract to pay its retiring president a future salary for life. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). The president cannot enforce the payment of a salary out of the assets of the insolvent cor-

neither a director nor a stockholder, is entitled to pay although the corporation never agreed to pay him.[1]

Even though a large stockholder of a corporation renders valuable services to it for several years, yet he is not entitled to pay therefor from the corporation unless there is a contract to that effect, especially where the circumstances showed that he expected his pay from the increased value of his investments.[2]

Although a treasurer is presumed to be entitled to compensation, yet if he is a stockholder and his firm have the banking business of the company, and nothing has ever been said about compensation, he cannot afterwards claim or obtain it.[3]

poration, even though the by-laws provided therefor and the salary had been voted to him, such vote having been after the services were rendered. Wood *v.* Lost Lake, etc. Co., 23 Oreg. 20 (1890). A salary voted to the president after the services were performed and the company has become insolvent is not collectible. McAvity *v.* Lincoln Pulp, etc. Co., 82 Me. 504 (1890). See also note 1, p. 1299.

[1] Smith *v.* Long Island R. R., 102 N. Y. 190 (1886); Edwards *v.* Fargo, etc. R'y, 4 Dak. 549 (1887); Greenleaf *v.* Norfolk Southern R. R., 91 N. C. 33 (1884); Missouri River R. R. *v.* Richards, 8 Kan. 101 (1871). The secretary and president cannot, by their own votes, cause the board to vote them a salary for past services. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A secretary is not entitled to pay for his services as secretary unless there is an express contract to that effect; but where he gives up his whole time to the company's business, one-half as secretary and one-half in doing engineering work, he is entitled to pay. Talcott *v.* Olcott, etc. Co., 11 N. Y. Week. Dig. 141 (1880). In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence a contract as to the secretary's salary is unenforceable. He can recover only on a *quantum meruit*. *Re* Dale, 61 L. T. Rep. 206 (1889). The salary of a secretary, where it consists of a fixed sum and also dividends on certain stock not owned by him, continues as to both until stopped on notice. Crane, etc. Co. *v.* Adams, 142 Ill. 125 (1892). A sale of all the corporate property stops the salary of the secretary where he was subject to removal at any time by the directors. Union Compress Co. *v.* Douglass, 60 Ark. 591 (1895).

[2] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897).

[3] Mather *v.* Eureka, etc. Co., 118 N. Y. 629 (1890), 44 Hun, 333 (1887). The question may be one for the jury. Pendleton *v.* Empire, etc. Co., 19 N. Y. 13 (1859). A director who is also treasurer and manager may recover compensation for his services although none has been agreed upon. It is for the jury to decide what is reasonable. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 111 (1890), quoting with approval Pew *v.* First Nat. Bank, 130 Mass. 391 (1881). "No duties, no pay." A treasurer's salary ceases upon the sale of all of its assets even though there is no dissolution; but if substantial duties con-

A contract of a director, officer, or president that he will not ask any compensation for his services cannot be insisted upon by the company if it was not a party to the contract.[1]

Various decisions in regard to other officers of the company are given in the notes below.[2]

§ 658. *Contracts between corporations having one or more directors in common.*— It has been difficult to determine whether a stockholder in one corporation could cause to be set aside a contract or agreement between two corporations having one or

tinue, the salary continues. Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886), distinguishing Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872).

[1] An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. Thompson Co. *v.* Brook, 14 N. Y. Supp. 370 (1891). An agreement of the president with certain creditors that he would not take a salary until other claims were paid cannot be enforced by the receiver. The president may come in as a creditor. Snow *v.* Russel Coe, etc. Co., 58 Hun, 134 (1890). Lambert *v.* Northern R'y, 18 W. R. 180 (1869), holds that a promise by directors to perform their duties gratuitously is *nudum pactum*, and does not prevent them from recovering upon a previous binding agreement for salaries. Where the vendor of property agrees by contract with the vendee and accepted by the company that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services. Wetmore *v.* Wetmore Co., 113 Cal. 321 (1896).

[2] The president may employ the vice-president, his brother, to do work for which the company will pay him. McDowell *v.* New York, etc. R. R., 12 N. Y. St. Rep. 877 (1887). When it is understood by the directors that the officers are to be paid for their services, and at the end of the year a note is given for services to the superintendent, who is also a director, he may collect it. Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887). Where the vice-president sues for services as general manager, he must prove services clearly outside of his duties as an officer, and that there was no contrary agreement (citing many cases). Toponce *v.* Corinne, etc. Co., 6 Utah, 439 (1890). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). The conduct of an officer may be such as to preclude the idea that he was to have a salary. Simonson *v.* New York City Ins. Co., 25 N. Y. Week. Dig. 90 (1886). A contract with directors for their services ceases upon the winding up of the company, Frames *v.* Bulfontein Min. Co., [1891] 1 Ch. 140. Where there are no duties, or the duties cease, there is no pay. Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). *Cf.* Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886). For the services of ordinary clerks, etc., the corporation is of course liable. Legrand *v.* Manhattan, etc. Assoc., 80 N. Y. 638 (1880); Pollok *v.* Shultze, 1 Hun, 320 (1874); Bard *v.* Banigan, 39 Fed. Rep. 13 (1889); Gowen Marble Co. *v.* Tarrant, 73 Ill. 608 (1874).

more directors in common. As a rule, even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage.[1] A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.[2] But a contract between corporations having directors in common must be "open and free from any suspicion of secret dealing in favor of one principal while acting as the representative of the other."[3] A mortgage by an insolvent corporation to a creditor corporation, the two corporations having a majority of their directors in common, has been declared to be illegal.[4] A guaranty where there are directors in common is voidable.[5] Such contracts as these certainly are not void, and they may be validated by a unanimous vote of the stockholders.[6] If, however, the minority stockhold-

[1] Smith *v.* Ferries, etc. R'y, 51 Pac. Rep. 710 (Cal., 1897).

[2] Evansville, etc. Co. *v.* Bank of Commerce, 144 Ind. 34 (1896).

[3] Mercantile, etc. Co. *v.* Pittsburgh, etc. Assoc., 173 Pa. St. 30 (1896).

[4] Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894).

[5] Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891); Metropolitan Elev. R'y *v.* Manhattan R'y, 15 Am. & Eng. R. R. Cas. 1 (1884). A contrary conclusion was reached by the federal court on the same facts. Flagg *v.* Manhattan R'y, 10 Fed. Rep. 413 (1881). For other cases connected with this litigation, see Metropolitan Elev. R'y *v.* Manhattan R'y, 14 Abb. N. Cas. 152, n. (1884); Manhattan R'y *v.* New York Elev. R'y, 29 Hun, 309 (1883), rev'g N. Y. D. Reg., Dec. 2, 1882; People *v.* Metropolitan Elev. R'y, 26 Hun, 82 (1881); Harkness *v.* Manhattan R'y, 54 N. Y. Super. Ct. 174 (1886). See also St. James's Church *v.* Church of Redeemer, 45 Barb. 356 (1865), where one religious corporation gratuitously conveyed property to another, the directors being common. A consolidation of two religious corporations having a director in common is illegal and may be set aside. Stokes *v.* Phelps Mission, 47 Hun, 570 (1888).

[6] If the stockholders unanimously ratify a contract between two corporations having directors in common, the contract is legal. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). A sale of property by one corporation to another, all of the directors except one being in common, is legal where such sale is subsequently ratified by a meeting of the stockholders. Grant *v.* United, etc. R'y, L. R. 40 Ch. D. 135 (1888). A sale of property by one corporation to another is not fraudulent merely because there was one director common to both, where the directors and stockholders assented thereto. Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A lease of one railroad to another, ratified by the stockholders as required by the statute, is legal, even though the same persons were directors in both companies. Jones *v.* Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892). Where a land company agreed to pay a railroad company a certain sum in instal-

ers object to the contract, the court will consider it, and will sustain it if fair, and set it aside if unfair.[1]

ments, if the railroad company would extend its road to the land company's land, it is immaterial that four of the five directors of the land company were also directors of the railroad company, it being shown that all acts of the directors were expressly ratified at a stockholders' meeting, and it being also shown that the railroad had been constructed and a part of the instalments paid. San Diego, etc. R. R. *v.* Pacific Beach Co., 112 Cal. 53 (1896).

[1] Where a rolling-stock company by its board of five directors makes a contract with a railroad company having thirteen directors, five of whom are the same as the directors of the rolling-stock company, and the railroad company makes the contract at a meeting of eight directors, two of whom are of the five, and for two years the railroad company lives up to the contract, it cannot then repudiate. The majority of its directors were not in common, and it should have objected before. U. S. Rolling-Stock Co. *v.* Atlantic, etc. R. R., 34 Ohio St. 450 (1878). *Cf.* Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 14 (1883), where the illegality was clear, since the directors common to both corporations constituted a majority of the directors of one of them. In Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), where the same persons formed a majority of the boards of directors of a construction company and also of a railroad company, to which latter company the construction company had agreed to turn over the stock of another railroad company; and where, by the contract between the two companies having a majority of the board of directors in common, the railroad company was to transport freight at a certain price, and to deliver to the construction company its bonds to a certain amount; and where subsequently this contract was changed so as to reduce the amount going to the construction company by upwards of $700,000,— it was held that the minority stockholders and directors of the construction company might file a bill on behalf of the construction company and compel the railroad company to pay to the construction company the amount mentioned above. It was also held that where these directors controlled both boards, and sold a part of the bonds going to the construction company to themselves at ninety cents on the dollar, when the bonds were worth par, the construction company could hold the railroad company liable for the loss. This decision was modified in 44 Neb. 463 (1895), reducing the decree to $300,906.33. An appeal to the supreme court of the United States was dismissed in Missouri Pac. R'y *v.* Fitzgerald, 160 U. S. 556 (1896). The fact that a minority of the directors are directors in another contracting company does not render a contract voidable at the instance of one of the companies or of a dissenting stockholder. Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the latter, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. Bridgens *v.* Dollar Sav. Bank, 66 Fed. Rep. 9 (1895). The fact that a railroad company and a construction company have mainly, though not entirely, the same officers and stockholders, does not render them

§ 659. *Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.*— This subject is considered elsewhere.[1]

legally identical, but merely requires a more careful scrutiny of their dealings with each other where the interests of outside parties are affected. Hence a contract by which the construction company takes stock and bonds and agrees to do certain work will be upheld if it is a reasonable and fair contract, and the construction company may enforce claims against the railroad company. Davidson *v.* Mexican Nat. R. R., 58 Fed. Rep. 653 (1893). A mortgage by one corporation to another is not void because they have the same president. Ray *v.* Scott, etc. Co., 11 Wash. 399 (1895). An insurance policy issued by an agent to a corporation in which he is an officer is not enforceable. Greenwood, etc. Co. *v.* Georgia, etc. Ins. Co., 72 Miss. 46 (1895). A sale of iron by one corporation to another which is fair is not illegal simply because the company has directors in common. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896). In Hart *v.* Ogdensburg, etc. R. R., 89 Hun, 316 (1895), where two railroads having directors in common were consolidated, the court held that the minority stockholders could not object, inasmuch as the act was not so clearly against the interest of the minority as to be a wanton and fraudulent destruction of their rights, nor a clear, substantial, flagrant violation thereof. Moreover the court held that six years' delay in suing was fatal. A city is liable on a gas contract although the same man is mayor and is also president of the gas company. Capital, etc. Co. *v.* Young, 109 Cal. 140 (1895). In Santa Fé Electric Co. *v.* Hitchcock, 50 Pac. Rep. 332 (N. M., 1897), the court held a lease to be void between two companies having the same directors, there being actual fraud. A note by one corporation to another is valid although the same person is president of both. St. Joe, etc. Co. *v.* First Nat. Bank, 50 Pac. Rep. 1055 (Colo., 1897). Where a town board of three are authorized to make a grant to a railroad, and two of them, one being a director of the railroad, made the grant, the court will set it aside. San Diego *v.* San Diego, etc. R. R., 44 Cal. 106 (1872). The fact that two directors out of eight of one packet company are also directors out of six directors of a competing packet company does not render them liable for fraud, although the former company loans the latter company much money and takes a chattel mortgage and closes out its property. Booth *v.* Robinson, 55 Md. 419 (1880). In England contracts between companies having directors in common are void by statute, unless they are ratified by vote of the stockholders, and may be so ratified, although the by-laws prohibit the directors from making contracts in which they are interested. Grant *v.* United, etc. R'y, L. R. 40 Ch. D. 135 (1888); Ernest *v.* Nicholls, 6 H. L. Cas. 401 (1857). *Cf.* Griffin *v.* Inman, 57 Ga. 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid. In Wallace *v.* Long Island R. R., 12 Hun, 460 (1877), *held*, that a dissenting stockholder could not sue to set aside a lease made between two railroads having directors in common, but that a majority of the stockholders might have objected. A conveyance of all the property of

[1] See § 848, ch. XLIX, *infra*.

§ 660. *Directors' purchases of property needed by the corporation, and purchases of outstanding debts or claims against the corporation.*— It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need, and then to sell the same to the corporation at an advanced price. This generally occurs where the director purchases in his own name land which the corporation must purchase for its enterprise, or over which it will need a right of way.[1]

an insolvent corporation to one of its creditors, a corporation having two directors in common with the insolvent corporation, such conveyance being to secure the latter corporation's debt, is *prima facie* fraudulent and voidable. If free from actual fraud, and if reasonable, it is sustained. Sweeny *v.* Sugar Ref. Co., 30 W. Va. 443 (1887). The fact of having stockholders in common is immaterial. Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). The fact that a construction contract is assigned by the contractor to a corporation having directors in common with the railroad does not render the contract fraudulent *per se.* Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883). A contract between two corporations having directors in common is voidable, but equity will cause such payments to be made for work done as are just, irrespective of the written contract. Thomas *v.* Peoria, etc. R'y, 36 Fed. Rep. 808 (1888). Where one director is a director also in another company with which a contract is being made, he cannot be counted in making up a quorum. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). A contract between corporations having common directors is voidable, not void. If it is fair it will not be disturbed. Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38 (1889); Alexander *v.* Williams, 14 Mo. App. 13 (1888). A lease of one railroad to another by directors who are directors in both companies is invalid. Thouron *v.* East, etc. R'y, 5 R'y & Corp. L. J. 77 (Tenn., 1888). In Pearson *v.* Concord R. R., 62 N. H. 537 (1883), the court, in setting aside a contract made by corporations having common directors, said: "Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

[1] Blake *v.* Buffalo Creek R. R., 56 N. Y. 485 (1874). See Buffalo, etc. R. R. *v.* Lampson, 47 Barb. 533 (1867); Blair, etc. Co. *v.* Walker, 50 Iowa, 376 (1879); Taylor *v.* Salmon, 4 Myl. & C. 134 (1838), where the corporate agent took in his own name a lease which the company desired and had instructed him to obtain for itself. See also Mitchell *v.* Reed, 61 N. Y. 123 (1874). The corporate treasurer cannot purchase stock at a discount and sell to the corporation at par, where such stock is needed by the corporation to fulfill its contracts. East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875). Where the president is directed to buy the boats of a rival company, and does so by buying them for another corporation which he controls, and credits himself with an advance, he may be made to refund. Ward *v.* Davidson, 89 Mo. 445 (1886). A treasurer is not liable for profits in coal sold by himself to the corporation, where he purchased the coal with no intent of selling to the company. Parker *v.* Nickerson, 137 Mass. 487 (1884). A

Where, however, the director offers the land to the corporation at the price which he paid for it, and the corporation refuses it, he cannot long subsequently be compelled to accept that price.[1] A director may construct works to compete with the works of the corporation in which he is a director. He is not disqualified from so doing.[2] Directors, who are also officers, of a manufacturing corporation, if acting in positive good faith towards the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business; and they do not stand, in respect to said works, in any trust relation to the corporation.[3] But where the president takes a renewal of a corporate lease in his own name, and admits that he takes it for his company, he cannot claim any of the profits arising from it, even though, in order to get the lease from him, a contract is made that he have a part of the profits.[4] A director cannot take a contract in his own name for himself, where such contract really should belong to the corporation.[5]

It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding general debts of the corporation, and compel it to pay them the

director who takes to himself an assignment of a patent that ought to have been assigned to his corporation must account for all profits that he has received. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). A director cannot take a contract in his own name for himself where such contract really should belong to the corporation. The president of a packet company may take a contract for carrying mails, and may have the service performed by the packet company, he paying it therefor. He is not liable to it for his profits, he having endeavored first to get the contract for the company. Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1888). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). See also p. 652, *supra*, on sales by directors to the corporation.

[1] Sandy River R. R. *v.* Stubbs, 77 Me. 594 (1885). A president and treasurer who purchase land as agents for a railroad company, and allow it to pay part of the purchase price, and obey its direction to sell part, whereby the purchase price is repaid, are liable to convey to the company the remainder, the title to which is in their names. Church *v.* Sterling, 16 Conn. 388 (1844).

[2] Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). See also Ward *v.* Davidson, 89 Mo. 445 (1886). *Cf.* Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1888).

[3] Barr *v.* Pittsburgh, etc. Co., 57 Fed. Rep. 86 (1893), aff'g 51 Fed. Rep. 33.

[4] Robinson *v.* Jewett, 116 N. Y. 40 (1889).

[5] Richardson *v.* Green, 133 U. S. 30 (1890).

full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.[1]

But directors may buy corporate bonds from third parties at a discount and enforce them at par, where there are no special equities against such a purchase, and no present duty in regard to them from him as a director. Moreover, the corporation must claim the benefit at once, if at all.[2]

[1] Quoted and approved in Bonney *v.* Tilley, 109 Cal. 346 (1895). A stockholder who is also a director cannot buy up claims against the insolvent company and offset them at their face value. Bulkley *v.* Whitcomb, 121 N. Y. 107 (1890); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 202 (1881); *Re* Imperial Land Co., L. R. 4 Ch. D. 566 (1877). See also Davis *v.* Rock Creek, etc. Co., 55 Cal. 359 (1880), where a mortgage given to a director to secure debts purchased by him at a discount was defeated in foreclosure. If the corporate managers buy up corporate debts with corporate funds, a corporate creditor may compel them to give up the claims so purchased. Thomas *v.* Sweet, 37 Kan. 183 (1887). Directors who authorize acts by the corporation infringing on a patent cannot afterwards buy the patent and enforce the right to damages. New York, etc. Co. *v.* Buffalo, etc. Co., 24 Fed. Rep. 604 (1885). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). Where an insurance company absorbs another company *ultra vires* and gives notes therefor, and the president acquires and collects the notes, he may be compelled to refund. McClure *v.* Levy, 147 N. Y. 215 (1895). Where a company has assigned, and its directors have bought claims at a discount, a suit to compel them to turn in the claims at cost should be instituted by the assignee. Moulton *v.* Connell, etc. Co., 93 Tenn. 377 (1894). Payment of corporate notes by a director may entitle him to preference in the distribution of the assets. Atkinson's Appeal, 11 Atl. Rep. 239 (Pa., 1887). Where the directors issued bonds as collateral to the company's note, and, upon the sale of the bonds by the pledgee for non-payment of the note, purchased the bonds at five cents on the dollar, a foreclosure based chiefly on such bonds will be set aside. James *v.* Railroad Co., 6 Wall. 752 (1867). English debentures may be issued to directors at a discount. Campbell's Case, L. R. 4 Ch. D. 470 (1876). Where a corporation is without funds, its president may purchase for himself its overdue bond, and may agree with the corporation that the rate of interest of the bond shall be increased. There was no proof that he purchased at a discount. Bradly *v.* Marine, etc. Co., 3 Hughes, 26 (1879); S. C., 3 Fed. Cas. 1172. The law is clear, however, that any device by which a director or officer of an insolvent corporation obtains a preference in the payment of his debt is illegal. See § 661, *infra*. Also Lingle *v.* National Ins. Co., 45 Mo. 109 (1869); Holland *v.* Heyman, 60 Ga. 174 (1878), holding that the purchased claims are good only for the amount paid. Officers, moreover, occupy a quasi-fiduciary relation to the corporation, and cannot profit by purchasing claims against it. Hill *v.* Frazier, 22 Pa. St. 320 (1853).

[2] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895). See also

An attachment and execution sale of railroad bonds on a judgment obtained by a director was disregarded and declared void, where the director himself purchased at the sale, and the whole transaction was tainted with a fraudulent control exercised by the director over the company.[1]

§ 661. *Loans by directors to the corporation; mortgages by the corporation to the directors, and the right of an insolvent corporation to give a mortgage or assignment of its property to a director in order to prefer the payment of his debt.*— These questions are considered elsewhere.[2]

§ 662. *Frauds by a majority of the stockholders on the minority — Directors owning stock in another corporation with which a contract is made — Stockholders' ratification of the voidable acts of directors — One corporation voting stock in another competing corporation.*— It often happens that a consolidation, lease, sale, or contract between two corporations is made

§ 655, *supra*. In Higgins *v.* Lansingh, 154 Ill. 301 (1895), the court said that if a director acts fairly and for the interest of the corporation, he may buy up at a discount a debt of the corporation and enforce such debt at its full face value, provided the corporation was given an opportunity itself to become the purchaser and could not or would not purchase. The court held, however, in the case before it that the purchase on the part of the director was fraudulent, and that the director could collect only the amount he paid. The fact that a director buys up the securities of an insolvent corporation for the purpose of using them in reorganization is not fraudulent or a breach of his duty, he having paid all that the securities were worth. Powell *v.* Willamette Valley R. R., 15 Oreg. 393 (1887). In Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888), 32 Hun, 377, the assignee of a judgment from a director who purchased it at a discount was allowed to enforce it for the full amount. After the corporation has assigned for the benefit of creditors, and all its property has been sold, a director may buy up claims against it, and participate in the distribution of assets. Hammond's Appeal, 123 Pa. St. 503 (1889); Craig's Appeal, 92 Pa. St. 396 (1880). The case of St. Louis, etc. R. R. *v.* Chenault, 36 Kan. 51 (1886), holds that a corporate treasurer may buy up outstanding notes against the corporation, and may then pay such notes out of the corporate funds in his possession. The complicated principles of law growing out of directors owning corporate debts are considered in §§ 692, 693, *infra*.

[1] Where the president of a coal company contracts in his own name to supply coal to parties, and the board of directors, a majority of whom are his relatives, contract to furnish the company's coal to him on a royalty, a stockholder may compel him to turn into the corporation the profits of his contract. An assignee of his interest who took with notice is not protected. Davis *v.* Gemmell, 70 Md. 356 (1889).

[2] See §§ 692, 693, *infra*.

where the directors of one of the corporations are largely interested in the stock of the other. There then is likely to arise a conflict between interest and duty. Such contracts as these are investigated very closely by the courts. They are not necessarily void, and are not constructively fraudulent. But if there is actual fraud, or if there has been an undue advantage taken or an unconscionable bargain made, the court will set it aside. If the transaction is fair the court will sustain it; if it is unfair the court will undo it.[1]

[1] Quoted and approved in Hill *v.* Gould, 129 Mo. 106 (1895), where a sale of coal was upheld, although at about cost, and a majority of the directors were elected by and represented the railroad company that bought the coal. The use of a "dummy" corporation does not change the law. Thus, where the directors let a contract, and then the contractor assigns his rights to a corporation the majority of whose stock is owned by the directors, the court will not aid the contractor as a stockholder in the second corporation. Wardell *v.* Union Pac. R. R., 103 U. S. 651 (1880). See § 649, *supra*. Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock *v.* Barrett, 50 Fed. Rep. 653 (1892). Although a lessee railroad company has directors, a minority of whom are largely interested in the stock and bonds of the lessor railroad, and such bonds and stock are largely "water," yet this does not necessarily vitiate the lease. The court will not set the lease aside if no undue advantage was taken and no actual fraud involved. Jesup *v.* Illinois Cent. R. R., 43 Fed. Rep. 483 (1890). Where a gas company is under contract to furnish gas to several concerns, and its business is so managed as to favor a concern in which the officers are interested, there being an insufficient supply of gas, a minority stockholder may complain. Clark *v.* Pittsburgh, etc. Co., 39 Atl. Rep. 86 (Pa., 1898). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426

Unless actual fraud is shown, a court of equity will not, at the instance of minority stockholders in a corporation, enjoin that corporation from taking a lease of another railroad, even though the same persons are the officers and majority stock-

(1875). Where the officers and owners of a majority of the stock of a company vote as stockholders and officers to lease its property to another corporation, all of whose stock they own, the minority stockholders in the first corporation may cause it to be set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883). See also Brewer *v.* Boston Theater, 104 Mass. 378 (1870): Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894). In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Lydney, etc. R'y, 69 L. T. Rep. 132 (1893). A contract of a corporation that a patentee shall have forty-eight per cent of an increase of stock does not apply to the capital stock of a consolidated company, although the former corporation is one of those entering into the consolidation. Einstein *v.* Rochester, etc. Co., 146 N. Y. 53 (1895).

Professor Edmund J. James, in his pamphlet on "The Railway Question," says in regard to this subject:

"It was found again that the directors of the railroads, even where they have been constructed with some reference to honesty and economy, had interests which were not necessarily the same as those of the rest of the corporation or of the public. For example, the directors were often interested in manufacturing or trading enterprises where it was necessary to resort to the railroads in the course of their business. By giving to themselves, as directors, special rates and privileges, it was possible to build up their own business at the expense of rivals, thereby practically depriving the public of free competition in the particular branches of industry on the one hand, and cheating their fellow-stockholders on the other hand, by lessening by so much the possibilities of income, and consequently the frequency or size of dividends.

"It was, moreover, possible for the directors to form companies of all kinds for the purpose of supplying the parent company with supplies, or of doing certain kinds of business for it, and, in their capacity as directors of the parent companies, awarding to themselves as directors of the barnacle companies fat contracts of all sorts, which increased the expenses of the road, raised the charges of service, thus cheating the public on the one hand, and the stockholders on the other.

"It was also found that directors could grant special rates to men who brought business to the railroad on condition that the latter would pay them handsomely as individuals for using their power as directors or officials for their benefit.

"This power of fixing the rates at pleasure led to all sorts of privileges to individuals, or families, or communities, which by the very fact of their existence produced an artificial state of industry in which it was absolutely impossible for an enterpriser to estimate the probable profits of a business until he had come to terms with the managers of one or more railroads to give him some special tariff. This system led to all sorts of

holders in both companies. Moreover, the court cannot prescribe the terms of a lease. It can merely enjoin a fraudulent or *ultra vires* one. The court held that no actual fraud was proven in this case.[1] Again, where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had no property at all at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie.[2] But where a lease is made, and the directors of the lessee railroad company are also directors of the lessor company, and own a majority of the stock of both companies, a stockholder of the lessee company alleging that the lease is at an exorbitant rent and unlawfully depletes the funds and earnings of the lessee company, and injures him as a stockholder, and alleging also that the directors have unlawfully paid large sums to themselves on account of alleged loans, may by a bill in equity compel them to account.[3]

Where the officers of a lessee corporation, which has leased the property of the lessor corporation, control a majority of the stock of the latter, and conspire to compel the minority to sell their stock by refusing to pay the rent due on the lease, a court of equity, on the application of the minority, will compel a payment of the rent.[4] The question as to the liability of a director

bargains, and put in the place of the skill or industry of the manager the grace of some railroad corporation as the deciding factor of industrial success or ruin. As examples of the deals within the railway itself, none were more common than for some of the directors of a railroad to build a branch railroad, and then, after stocking and bonding it heavily, sell it out to the parent road at a high valuation. Among the minor though most common forms of this kind of illegitimate manipulating should be mentioned that by which the directors of a road buy up real estate in a certain locality and then place a station there so as to enhance the value of their property; or where they charge more in the neighborhood of a large city for a fare to a near station where they do not own land than to a more distant one where they do own real estate which they are eager to sell."

[1] Shaw *v.* Davis, 78 Md. 308 (1894).

[2] Smith *v.* Ferries, etc. R'y, 51 Pac. Rep. 710 (Cal., 1897).

[3] Sage *v.* Culver, 147 N. Y. 241 (1895).

[4] Barr *v.* New York, etc. R. R., 96 N. Y. 444 (1884).

who is interested as a stockholder in a contracting construction company is considered elsewhere.[1]

A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease.[2]

Where a director has sold his property to the corporation, or has committed some other act which is voidable and not void, and where a majority of the stock can ratify and validate that act, it being not actually fraudulent, but merely voidable at the option of the stockholders, the important question arises whether, in taking the vote of the stockholders on such a question, the stock held by the director himself is to be counted. The well-settled rule is that his stock is to be counted, even though the vote would have failed if his stock had not been voted.[3]

[1] See § 649, *supra*.

[2] The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case of Nye *v.* Storer, 46 N. E. Rep. 402 (Mass., 1897).

[3] A director may sell property to the corporation where the purchase is adopted at a meeting of the stockholders. Such director may vote in favor of such purchase all the stock that he owns; but if the result is "so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority," then a court of equity will set the act aside. Gamble *v.* Queen's, etc. Co., 123 N. Y. 91 (1890). The court said: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders." And in Northwest Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887), in which the same thing was held, it was said, in effect, that in such case the ratification must not be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive toward those shareholders who oppose it. A rule excluding stockholders from the right to vote, merely because they might be personally interested to vote in a particular way, contrary to the interests of the other stockholders, would be likely to lead to great confusion. Beatty *v.* Northwest Transp. Co., 5 Can. L. T. 277 (1885) (rev'g S. C., 4 Can. L. T. 85), holding that a purchase by the directors of a vessel from one of the directors could not be set aside by a dissenting stockholder where a majority of the stock had ratified the purchase, even though the director himself held and voted that majority. A purchase of a steamboat from one who is a director and owns a majority of the stock is valid where ratified by a majority vote at a stockholders' meeting. The director may vote his

Another phase of this subject arises where the majority of the stockholders in a corporation are interested in another corporation with which a contract is being made. The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the

stock. Northwest Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887).

A stockholder may vote to ratify a purchase of property from a corporation by the directors, although such stockholder is a director himself. The court said: "The fact that he may have a personal interest separate from the others or from that of the corporation in the matter to be voted upon does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority." Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483 (1892); Foss *v.* Harbottle, 2 Hare, 461 (1843), where the directors sold their property to the corporation. Inasmuch as the majority of stockholders could ratify the purchase, the court refused to entertain a stockholders' suit until they had voted. Where a person fraudulently misrepresented a mine in its sale to the company for shares of stock, a suit by the company against him does not lie where a majority of the stock votes against the suit, although the shares obtained by the vendee were voted by him and were necessary to make the majority, and although he was a director of the company at the time. East, etc. Co. *v.* Merryweather, 2 Hem. & M. 254 (1854). This case goes much farther than the modern rule would uphold. See Mason *v.* Harris, L. R. 11 Ch. D. 97 (1879), holding explicitly that where a director is guilty of fraud as a promoter, a dissenting stockholder may bring him to an accounting, although the director controls the directorate and a majority of the shares of stock. Also Atwool *v.* Merryweather, L. R. 5 Eq. 464, note (1867), where a dissenting stockholder sued to set aside a sale of property to the company by the defendant, who divided the profits with one of the directors. Although a majority of the stockholders had voted not to bring the action, yet this majority was made up by counting the stock of the guilty parties, and hence was not binding. In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. Rittenhouse *v.* Winch, 11 N. Y. Supp. 122 (1890). Works built by a director in opposition to the corporation may be purchased by the latter and new stock issued therefor. Such a transaction is certainly legal where a majority of the minority stockholders, not including the parties interested, vote in favor of it. Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). In Cumberland Coal Co. *v.* Sherman, 30 Barb. 553 (1859), the court held that a unanimous vote of the stockholders was necessary to confirm. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891), holding also that the directors holding a majority of the stock cannot by its vote ratify a preference to them by the corporation, which is insolvent.

minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Hence, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter.[1]

The New York court of appeals has well said that where "a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders."[2]

The principle of law has been clearly laid down that "when a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."[3]

[1] Quoted and approved in the case of Farmers' L. & T. Co. *v.* New York, etc. R'y, 150 N. Y. 410, 430 (1896).

[2] Farmers' L. & T. Co. *v.* New York, etc. R'y, 150 N. Y. 410, 430 (1896). "There are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents." Farmers' L. & T. Co. *v.* New York, etc. R'y, 150 N. Y. 410, 434 (1896). This decision was followed in a stockholders' suit in the federal court to remedy the same wrong in De Neufville *v.* New York, etc. R'y, 81 Fed. Rep. 10 (1897). Where a person in control of a company obtains control of a rival company and allows judgments against the latter, and the sale of its bonds at execution on nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897).

[3] Ervin *v.* Oregon R. & Nav. Co., 27 Fed. Rep. 625 (1886); S. C., 20 Fed. Rep. 577. In Lowe *v.* Pioneer Threshing Co., 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. Where a majority of the stock of a railroad company is held by another company, and the

Thus, the majority of stockholders cannot cause the corporate property to be sold to them at private sale at a price agreed upon by them and the directors whom they placed in office. The minority are entitled to a public sale.[1]

Where two stockholders own two-thirds of the capital stock, and they cause the directors to sell all the corporate property to a person who buys for them, the owner of the other one-third may cause the sale to be set aside, even though a stockholders' meeting has authorized it.[2]

Where a stockholder is under contract to carry along the corporate debt, and instead of doing so obtains control of the board of directors, and causes a mortgage to be given to a confederate, and thereby causes the corporate property to be foreclosed and sold, and wrecks the corporation, he is liable in damages to other stockholders.[3]

Where the majority stockholders, through directors who are their tools, having sold property to the corporation and agreed to pay a mortgage on such property, afterwards cause the corporation to assume and pay the mortgage, the minority stockholders may have the transaction set aside.[4]

Where a person controls a majority of the stock of a ferry

latter company uses its control to acquire all the property of the former company fraudulently, a minority stockholder may bring the latter company to account therefor. Pondir *v.* New York, etc. R. R., 72 Hun, 384 (1893).

[1] Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). See also § 668, *infra*. A corporation owning a majority of the stock of another company may legally take the latter's bonds at a fair price, ninety cents on the dollar in this case. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891).

[2] Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320 (1892).

[3] Hanley *v.* Balch, 94 Mich. 315 (1892). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that, indirectly, it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

[4] Woodroof *v.* Howes, 88 Cal. 184 (1891), holding also that where the majority stockholders cause the directors to purchase stock of them for

and also a railroad company, and puts his "dummies" in as directors, and leases all the property of the former to the latter at an unfair price, the court will set the lease aside at the instance of a minority stockholder.[1]

the corporation at a price higher than the market price, the minority may cause the transaction to be set aside.

[1] Meyer *v.* Staten Island R'y, 7 N. Y. St. Rep. 245 (1887). Where a lessor and a lessee company are controlled by the same person, and the lessor company is insolvent, and the lessee company is advancing large sums of money to pay interest on the bonds of the lessor company, with no hope of repayment, the minority stockholders of the lessee company may enjoin such payments. Jeans *v.* Pittsburgh, etc. R'y (Com. Pl. Ohio, 1885), stated in Moran *v.* Pittsburgh, etc. R'y, 32 Fed. Rep. 882 (1885). See also Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350 (1874). See also Peabody *v.* Flint, 88 Mass. 52 (1863), where, however, laches barred the remedy; Gorham *v.* Gilson, 28 Cal. 479 (1865), where, however, the action failed because the stockholders sued to compel a conveyance to each of his proportionate part. Where the majority of the stockholders vote to make a lease of the whole corporate property to themselves, a dissenting stockholder may have the lease set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); Rice's Appeal, 79 Pa. St. 168, 204 (1875). Where, however, corporate property has been sold and the proceeds retained by one stockholder, another stockholder cannot sue him for money had and received. The action must be in equity and for the benefit of the corporation. Hodsdon *v.* Copeland, 16 Me. 314 (1839). Equity will set aside a lease which the directors make of a mine to the minority stockholders in order to take it from the control of incoming directors who were elected by the majority. Mahoney Min. Co. *v.* Bennett, 5 Sawyer, 141 (1878); S. C., 16 Fed. Cas. 497. The mere fact that a person owns a majority of the stock does not raise a legal inference that he dominates the board of directors. Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887). The sale of all corporate assets to the majority, where others offer a higher price, is fraudulent. Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Gregory *v.* Patchett, 33 Beav. 595 (1864), where a sale of all the corporate assets to two of the stockholders on the purchase of their stock by the company was set aside as a fraud on the remaining stockholders. Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of non-payment. Gillett *v.* Bowen, 23 Fed. Rep. 625 (1885). If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. Johnson *v.* Kirby, 65 Cal. 482 (1884). See also Cates *v.* Sparkman, 73 Tex. 619 (1889); §§ 334, 350, *supra*. Where a branch corporation faithfully performs its duty as agent, the contract of agency cannot be set aside on the ground that individuals supposed to be hostile to the principal own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. Brush Electric Co. *v.* Brush-Swan, etc. Co., 49 Fed. Rep. 8 (1892). Minority stockholders cannot

A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time should give him a salary and allow him to name one-half of the directors, is illegal, and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement.[1] Nevertheless, although a person holds a majority of the stock and causes his friends to be made directors, he may sell property to the corporation and take stock in payment, if the transaction is a fair one.[2] And the fact that the holders of a majority of the stock are stockholders in another contracting corporation does not render the contract voidable.[3] "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company."[4] Where a lease of its property is made by a corporation, it is legal for the lessee to pay secretly to one of the stockholders of the lessor a sum of money to induce such stockholder to favor the lease.[5] A stockholder has a right to sell his stock at any time unless he has specifically agreed otherwise.[6]

have an accounting on the ground that the company is managed in the interest of one stockholder, who owns a majority of the stock; also that the corporation is insolvent, and that under different management it would be profitable, no fraud being alleged. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). A majority of the members of a corporation organized not for profit cannot vote a part of the assets to themselves. Another member may prevent it. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891).

[1] Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). On this subject, see ch. XXXVII, *supra*.

[2] Russell *v.* Rock, etc. Co., 39 Atl. Rep. 21 (Pa., 1898).

[3] Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895).

[4] Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753, 767 (1893).

[5] But where subsequently the stockholder becomes a director and takes part in reducing the rent paid to the corporation, it was his duty to disclose the extra price which he was continually receiving, and for failure so to do he must account to the corporation and pay over an equal percentage of his secret profit subsequently received, it being presumed that a reduction on his secret profit would have been made to the benefit of the corporation. Bird, etc. Co. *v.* Humes, 157 Pa. St. 278 (1893).

[6] "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit

Where two companies in litigation pass under the same control, the court will no longer retain the case, inasmuch as the same parties control both sides, but, in order to protect the minority stockholders, the case will be left open.[1]

Where on a winding up the court decrees a sale of the corporate mining property at public sale, any one or more of the stockholders may bid, and the court will not readily set the sale aside on the ground that after the property was struck off some one offered a higher price.[2]

Sales of property by a corporation may be valid, although made at the instigation of stockholders whose stock really belongs to others.[3]

A corporate creditor cannot complain of the acts specified above to the same extent that a stockholder may complain.[4]

§ 663. *"Dummy" corporations — The courts will ignore the corporate existence where it is fraudulently used to do what the stockholders cannot legally do.*— A corporation is in law a person or entity entirely distinct from its stockholders and officers. It may become insolvent and yet not make them insolvent. It may commit fraudulent or *ultra vires* acts and yet they be not liable therefor. It may do acts which its stockholders as individuals may be under contract not to do, and the stockholders may do acts which the corporation cannot do. The disabilities

out of the negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers', etc. Co. *v.* Chicago, etc. R'y, 163 U. S. 31 (1896).

[1] South Spring, etc. Co. *v.* Amador, etc. Co., 145 U. S. 300 (1892).

[2] Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). A stockholder may bid for the property at a public sale, even though he owns a majority of the stock. Wilson *v.* Central Bridge, 9 R. I. 590 (1870). The person owning a majority of the stock of a failing corporation may at the *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves." Price *v.* Holcomb, 89 Iowa, 123 (1893).

[3] Gottfried *v.* Miller, 104 U. S. 521 (1881).

[4] See § 735, *infra*. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

of the corporation are not disabilities of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a "cloak" for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud.[1] Thus, it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act.[2] The mere fact, however, that a person has contracted to sell a patent-right does not affect the title of a corporation to whom he transfers such patent.[3] But where a patentee is under obligation to assign his patent, a corpora-

[1] See § 6, *supra*.

[2] Beal *v.* Chase, 31 Mich. 490 (1875). When a person sells a trade-mark and then sells an infringement upon it to a corporation organized and controlled by himself, the latter may be enjoined from using it. Le Page Co. *v.* Russia Cement Co., 51 Fed. Rep. 941 (1892). Unless there is a positive allegation and proof that the corporation was fraudulently formed to violate the individual contract, the suit will fail. Moore, etc. Co. *v.* Towers Hardware Co., 87 Ala. 206 (1888). A contract by a person to sell all lumber manufactured by him through certain agents cannot be evaded by his forming a corporation and manufacturing and selling through it. Hagy *v.* McGuire, 147 Pa. St. 187 (1892).

[3] Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884); Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). See also § 727, *infra*, on Notice. The vendor of a good-will who agrees not to engage in the same business again in a certain territory cannot evade his agreement by becoming a stockholder in, or organizing, or managing a competing corporation; but, there being other stockholders in the corporation, an injunction will not be granted against the corporation or such other stockholders. Kramer *v.* Old, 25 S. E. Rep. 813 (N. C., 1896). A foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892). In Gormully, etc. Co. *v.* Bretz, 64 Fed. Rep. 612 (1894), where a firm, being under contract to manufacture and sell only certain bicycle patents and machines, formed a corporation to manufacture and sell other machines, the court held that if the holdings of stock showed that the two concerns were practically one, then that the corporation would be enjoined. See also Pratt *v.* Wilcox Mfg. Co., 64 Fed. Rep. 589 (1894). Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company. Dennison *v.* Chapman, 105 Cal. 447 (1895). See also Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), to the effect that the corporation is liable for the fraud

tion wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.[1] Although a lessee corporation has a right to payment for improvements, if the lessor does not renew, such payment need not be made, if the new lease is to a new corporation organized by the same stockholders as are in the old.[2] Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.[3]

There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities, and frauds. A partnership cannot transfer all its property to a corporation for shares of stock and thereby defraud the creditors of the partnership.[4] The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded.[5] The stockholders and officers of a corporation which was not properly organized may be liable as partners for all of its debts,[6] but this liability is not based on fraud.

The lower English courts recently held that where a merchant transfers all his business to a corporation formed for that purpose, and continues to carry on the business in the name of the corporation, he being practically the only stockholder, he is liable for the corporate debts on the theory of principal and agent; but the House of Lords reversed all this and held that he is not liable.[7] A few cases hold that a corporation incorpo-

of its board of directors against another corporation which the same board controlled.

[1] National, etc. Co. *v.* Connecticut, etc. Co., 73 Fed. Rep. 491 (1896). Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement. Young, etc. Co. *v.* Young, etc. Co., 72 Fed. Rep. 62 (1896).

[2] New York, etc. Ferry Co. *v.* New York, 146 N. Y. 145 (1895).

[3] See ch. XXIX. *supra.*

[4] See § 675, *infra.*

[5] See § 48; also chs. IX and XX, and § 243, *supra.*

[6] See ch. XIII, *supra.*

[7] Salomon *v.* Salomon & Co., [1897] A. C. 22.

rated in one state for the purpose of doing all its business in another state is a fraud on the law, and is only a partnership; but the weight of authority holds otherwise.[1] If the promoters or officers or a majority of stockholders defraud the corporation itself or the minority stockholders, a court of equity will give full and ready relief.[2] Where persons in control of a corporation use that control to defraud persons with whom they have contracted in reference to stock, a court of equity will aid the persons so defrauded.[3] The stockholders of a corporation are distinct from the corporation itself,[4] and may of course transact business irrespective of its contracts or obligations; but an injunction against their doing a specified act is violated if they cause or aid the corporation to do that act.[5]

Where a corporation secures a rebate from a railroad company, not only on shipments made by the former, but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense."[6]

The subject of the personal liability of officers and directors of corporations is more fully considered elsewhere.[7]

§ 664. *"Dummy" corporations — An individual or corporation owning all the stock of another corporation is not ordinarily liable for the debts of the latter.*— The New York court of appeals has laid down the general rule as follows: "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest

[1] See §§ 237–239, *supra*.

[2] See the previous sections of this chapter for many instances of such frauds.

[3] See § 350, *supra*, and the notes thereto. A stockholder who desires to have the corporation purchase certain property may purchase a mortgage against that property and compel the owner to sell to the corporation under threat of foreclosure. Martin *v.* New Rochelle Water Co., 11 N. Y. App. Div. 177 (1896).

[4] See § 709, *infra*.

[5] See King *v.* Barnes, 113 N. Y. 476 (1889).

[6] Brundred *v.* Rice, 49 Ohio St. 640 (1892).

[7] See § 682, *infra*.

in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts, and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business."[1] This rule is fundamental. It is the explanation and cause of the marvelous increase of corporations in modern times. The stockholders are not liable on the contracts of the corporation. The separate existence and entity of the corporation is recognized and preserved. The courts will refuse to ignore the corporate existence, even though all the stock is owned by one person or by another corporation.[2]

[1] People *v.* American Bell Tel. Co., 117 N. Y. 241, 255 (1889). The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one so as to make a contract of one corporation binding upon the other. Such is the syllabus in Richmond, etc. Co. *v.* Richmond, etc. R. R., 68 Fed. Rep. 105 (1895).

[2] A railroad company owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter. Fitzgerald *v.* Missouri Pac. R'y, 45 Fed. Rep. 812 (1891). Although one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. Central Trust Co. *v.* Kneeland, 138 U. S. 414, 423 (1891); Toledo, etc. R. R. *v.* Hamilton, 134 U. S. 296, 304 (1890); National, etc. Co. *v.* Kansas City, 78 Fed. Rep. 428 (1896). *Cf.* Williamson *v.* New Jersey Southern R. R., 28 N. J. Eq. 277 (1877); aff'd, 29 N. J. Eq. 311 (1878).

A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation and the bridge itself leased to the latter. St. Louis, etc. R'y *v.* Williams, 53 Ark. 58 (1890). Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889); Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). The fact that one corporation owns a large amount of stock in another corporation does not affect the identity of the two. *Ex parte* Fisher, 20 S. C. 179 (1883). The fact that two irrigation companies have the same officers and the same stockholders and the same purposes, except that

This principle of law is particularly applicable to the plan of a parent company owning all or a majority of the shares of stock of numerous subsidiary companies, such subsidiary companies being local in their operations for the purpose of dividing the responsibilities, liabilities, and scope of the business,[1] or for the purpose of regulating taxes,[2] or for the purpose of exercising the power of eminent domain.[3]

one operates in one state and the other in another state, does not make one of them liable for the debts of the other. White *v.* Pecos, etc. Co., 45 S. W. Rep. 207 (Tex., 1898). A statutory lien which is good against a lessee mining company is not good against a lessor mining company, even though the stockholders are substantially the same. United Mines Co. *v.* Hatcher, 79 Fed. Rep. 517 (1897), rev'g Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368. A deed of corporate property by a person who owns all the stock does not convey good title, especially where he has pledged some of the stock. Parker *v.* Bethel, etc. Co., 96 Tenn. 252 (1896). Even though one corporation is a stockholder in another, yet a debt due from the latter to the former may be enforced, although one company is practically a branch of the other. Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn., 1896). Although a construction company owns all the stock of a railroad company, and a bank has loaned large sums of money to the construction company, yet mortgage bonds issued by the railroad company have priority over the claims of the bank. Exchange Bank *v.* Macon Const. Co., 97 Ga. 1 (1895). Where a failing bank organizes a trust company and owns all its stock, the stock standing in the names of "dummies," and uses the funds of the trust company, it is a debtor of the trust company. Fisher *v.* Adams, 63 Fed. Rep. 674 (1894). See also the cases in the preceding section 663. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). Where the president owns nearly all of the stock, and keeps no proper accounts, and mingles the business with his own business, and the corporation is insolvent, a creditor of the corporation may attach its property on the ground that it is being fraudulently disposed of. Senour Mfg. Co. *v.* Clarke, 71 N. W. Rep. 883 (Wis., 1897).

[1] Such is the case of the Bell Telephone Company.

[2] Such was the original purpose of the Standard Oil Companies.

[3] Such is the case with telegraph companies, inasmuch as generally only a domestic corporation is allowed to exercise that power. For a careful and clear statement of the plan of having a parent company own stock in subsidiary companies, see People *v.* American Bell Telephone Co., 117 N. Y. 241, 244, 255 (1889). A receiver of the parent company will not necessarily be appointed receiver of the branch companies. Evans *v.* Union Pac. R'y, 58 Fed. Rep. 497 (1893). As to the power of one company to acquire the stock of another company, see ch. XIX, *supra*. Where

This general rule, however, like all general rules, has exceptions, and the New York court of appeals stated the exception forcibly as follows: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."[1]

The chief application of this statement of law is in cases of fraud,[2] but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns all the stock of the corporation. Thus, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock, and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to someone else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of a principal being liable on the contracts of its agent.[3] It has also been held that where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.[4] And there are other decisions to practically the same effect.[5]

a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. Phinizi *v.* Augusta, etc. R. R., 62 Fed. Rep. 771 (1894).

[1] Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895).

[2] See § 663, *supra*.

[3] Interstate Tel. Co. *v.* Baltimore, etc. Tel. Co., 51 Fed. Rep. 49 (1892).

[4] Day *v.* Postal Tel. Co., 66 Md. 354 (1887).

[5] Where a company leases all its property to another, the stockholders in both companies being the same, a mechanic's lien good against the latter is good also against the former. Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368 (1896). In Nebraska a "dummy" domestic corporation cannot condemn land for a foreign corporation. Koenig *v.* Chicago, etc. R. R., 27 Neb. 699 (1889). A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. Chicago, etc. R'y *v.* Union Pac. R'y, 47 Fed. Rep. 15 (1891). Where a bank buys wall paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the

These decisions, however, being contrary to the well-established rule, are of doubtful value as precedents, and cannot be commended, except for application in cases of unusual equitable considerations.

The liability of a corporation on the obligations of another

bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. Rep. 85 (1896). Where the contractor to construct the road is merely a "dummy" for the officers and stockholders, and there is evidence that the company's name and credit were used to construct the road, it is for the jury to say whether the company is liable for the debts incurred by the contractor in construction. Hirschmann *v.* Iron Range, etc. R. R., 97 Mich. 384 (1893). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893). A firm, one of the members of which owns all the stock of a corporation which owes money to such firm, cannot participate with other creditors of the corporation in the distribution of the latter's assets, where the firm have treated the debt as the individual debt of that member of the firm. Pott *v.* Schmucker, 84 Md. 535 (1897). A contract between three local companies, by which one runs over the tracks of another for a consideration paid to the third, is legal as to the second corporation where such second corporation is a mere dummy of the third corporation and the earnings of both corporations went together. Union, etc. R'y *v.* Chicago, etc. R'y, 163 U. S. 564, 592 (1896). Under the usual contract, by which a construction company takes all the stock and bonds and does all the work, and the railroad company is dormant until the road is finished, a creditor of the construction company may file a lien, under the statute, the same as though he furnished the labor and materials to the railroad company itself. McDonald *v.* Charleston, etc. R. R., 93 Tenn. 281 (1893). If one person buys all the stock of another company, it thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which were incurred on the credit of the company only. Louisville Banking Co. *v.* Eisenman, 94 Ky. 83 (1893). Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. State *v.* Hudson Land Co., 52 Pac. Rep. 574 (Wash., 1898). A domestic corporation cannot obtain a patent to a mining claim under the federal statutes unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). As to the power of one corporation to buy the stock of other corporations, see §§ 315–317, *supra*. On this general subject see also § 709, *infra*.

corporation whose entire assets it purchases at private sale,[1] or at judicial sale,[2] is considered elsewhere, such a purchase being different from a purchase of the stock of such other corporation.

§ 665. *Participation, ratification, and laches as a bar to stockholders' complaints.*— This subject is considered elsewhere.[3]

§ 666. *Parties, pleadings, etc.*— This subject also is considered elsewhere.[4]

[1] See § 672, *infra.*
[2] See § 890, *infra.*
[3] See ch. XLIV, *infra.*
[4] See ch. XLV, *infra.*

CHAPTER XL.

ULTRA VIRES ACTS AND CONTRACTS—IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS.

§ 667. Meaning of the term *ultra vires*.
668. Method of treatment of the subject.
669. A stockholder may object to an *ultra vires* act.
670. Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.
671. Sale of corporate property to another corporation in exchange for stock and bonds of the latter—Distribution of such stock and bonds.
672. Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter.
673. A corporation taking over all the property of another corporation may be liable for the debts of the latter.
§ 674. Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.
675. Sale of partnership or individual property to a corporation for stock of the latter.
676, 677. Consolidations, leases, and sales of railroads.
678. A corporation cannot be a partner in a partnership, unless specially authorized by statute.
679. A corporation cannot be an executor or administrator.
680. Stockholder's right to prevent the corporation from undertaking a new business.
681. Miscellaneous *ultra vires* acts—Enforcement of *ultra vires* contracts.
682. Personal liability of the directors and officers for *ultra vires* acts.

§ 667. *Meaning of the term ultra vires.*— The term *ultra vires*, as used in this treatise, means any act of a corporation which the corporation is not authorized to do, either by its express or implied powers. This term has been objected to as having no fixed and clear meaning, and to some extent the objection is reasonable. There is no other term, however, that has acquired the significance, general use, and peculiar meaning that are attached to the words *ultra vires;* and consequently the term probably has acquired a permanent place in the vocabulary of corporation law.[1]

[1] "The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action." Leslie *v.* Lorillard, 110

§ 668. *Method of treatment of the subject.*— There has been extreme difficulty and confusion in defining the validity, effect, rights, and remedies of an *ultra vires* act. The attempt to formulate general rules on this subject has only added to the confusion.[1] Accordingly, the plan of explanation pursued in

N. Y. 519 (1888). For various definitions of the words *ultra vires*, see Pierce, Railroads (2d ed.), p. 516; Taylor *v.* Chichester, etc. R'y, L. R. 2 Exch. 356, 378 (1867); Bissell *v.* Michigan, etc. R. R. Cos., 22 N. Y. 258, 293 (1860); National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Shrewsbury *v.* North Staffordshire R'y, 35 L. J. (Ch.) 166 (1865); Nassau Bank *v.* Jones, 95 N. Y. 115 (1884); Green's Brice, Ultra Vires (2d ed.), 35; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 579 (1869); McPherson *v.* Foster, 43 Iowa, 48, 64, 65 (1876); Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653, 672 (1875); 2 Kent's Com. *300 (12th ed.), note. Two difficulties have arisen in agreeing upon a definition of this term. First, the term *ultra vires* was often used to designate not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy, and are void whether done by corporations or individuals. Such acts when done by corporations are now termed "illegal" acts, and the term *ultra vires* is not used so as to include them. Second, the term *ultra vires* has been applied to acts which are beyond the powers of the directors, but within the powers of the majority of the stockholders. This use of the term, however, is now discarded, and it is used to designate acts which are beyond the powers of a majority of the stockholders as against a minority; or are beyond the powers of the stockholders acting unanimously as against the state. In Taylor *v.* Chichester, etc. R'y, L. R. 2 Exch. 356, 378 (1867), Blackburn, J., said: "I think it very unfortunate that the same phrase of *ultra vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum;* for the two things are substantially different; and I think the use of the same phrase for both has produced confusion."

[1] For instance, the general rule that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law," etc. (Perrine *v.* Chesapeake, etc. Co., 9 How. 172 — 1850), is sound law, and has been enounced in many cases; but, as a matter of fact, this principle gives little light or satisfaction to the bench, bar, or layman. Each case turns largely on its own facts. Moreover, the decision turns largely on who sues, who is sued, what relief is sought, and whether the act has been performed by one side or not. General rules cannot clearly make the distinctions. The old ideas have been changed. Indeed, it is refreshing to hear from that great judge, Mr. Justice Miller, such sound sense as this: "The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers."

this work is to state those acts which have been adjudged *ultra vires*,[1] and also those acts which have been adjudged to be *intra vires*.[2] It must be borne in mind that nearly every corporate act is *ultra vires* or *intra vires* in a broad sense. It was from this standpoint that Professor Brice's work on Ultra Vires was written. The plan of this book, however, has been to divide the subject into other and more practical headings, such as "preferred stock" and the various chapter headings, rather than to group everything under the heading of *ultra vires* or *intra vires*. Most corporate acts, whether *ultra vires* or *intra vires*, have been or will be considered in other parts of this book. Hence only such subjects are treated here as are not extensive enough or important enough for separate chapters.

In general, it remains to add that at common law an *ultra vires* act might be objected to by the state, a stockholder, the corporation, or the person contracting with the corporation; and since often one of these parties may still sustain the objection, where the others would not be allowed so to do, it is necessary to consider always the four questions: Who brings the suit; who is sued; what act is complained of; and what performance has already been had. It rarely happens that the state objects to an *ultra vires* act. That it has a right to object by *quo warranto* is undoubted.[3] The question of when and whether the stockholder must first apply to the directors or stockholders to remedy the wrong before he brings suit, and also the question of when a ratification of the act by the other stockholders is a bar, is considered elsewhere.[4]

The tendency is to limit the application of the doctrine of *ultra vires*, especially in regard to partially executed contracts. In this respect the New York court of appeals is in conflict with the supreme court of the United States.[5]

§ 669. *A stockholder may object to an ultra vires act.*— That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly im-

Salt Lake City *v.* Hollister, 118 U. S. 256 (1886). See also Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889); Stourbridge Canal *v.* Wheeley, 2 Barn. & Ad. 792 (1831).

[1] This is the subject of this chapter.

[2] This is the subject of the following chapter, XLI.

[3] See § 635, *supra*.

[4] See § 740, *infra*.

[5] See § 681, *infra*.

bedded in the jurisprudence of modern times. Upon this principle of law rest the stability, permanence, and honesty of management of many corporations, particularly those of railroads, and from it arises much of the confidence, safety, and protection of the stockholder himself. It was first promulgated in America, in 1820, in Livingston *v.* Lynch,[1] and was applied to corporations in Hartford & New Haven Railroad Company *v.* Croswell,[2] and in England, in 1824, in Natusch *v.* Irving.[3] These cases have beeen followed by a long list of supporting decisions. They were the first to establish clearly the doctrine that any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied powers of the charter of incorporation or of association — in other words, any *ultra vires* act — is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto and compel the corporation to observe the terms of the contract as set forth in the charter.[4]

§ 670. *Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.*— Ever since the case of Abbot *v.* American

[1] 4 Johns. Ch. 573.

[2] 5 Hill, 383 (1843).

[3] 2 Cooper's Ch. 358, by Lord Eldon; also reported in Gow on Partnership, 398. Thus, Lord Chancellor Campbell, in Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860), said: "I bow to the authority of Natusch *v.* Irving. . . . The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires;* and, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction." In Pickering *v.* Stephenson, L. R. 14 Eq. 322 (1872), the court said: "It is difficult to conceive any system of jurisprudence in which Natusch *v.* Irving would have been differently decided."

[4] A stockholder may file a bill to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. Hoole *v.* Great Western R'y, L. R. 3 Ch. App. 262 (1867); Beeman *v.* Rufford, 1 Sim. N. S. 550 (1851), where a majority of the stockholders had even voted to ratify the illegal act; Bagshaw *v.* Eastern Union R'y, 19 L. J. (Ch.) 410 (1850); Hare *v.* London, etc. R'y, 30 L. J. (Ch.) 817, 829 (1861); Winch *v.* Birkenhead, etc. R'y, 16 Jur. 1035 (1852). A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895).

Hard Rubber Company[1] the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern.[2] And even where a dissolution is the purpose

[1] 33 Barb. 578 (1861). See also Abbot *v.* American Hard Rubber Co., 4 Blatchf. 489 (1861); S. C., 1 Fed. Cas. 13.

[2] People *v.* Ballard, 134 N. Y. 269 (1892), reviewing the cases (rehearing denied, 136 N. Y. 639); *Re* Sovereign L. Ass. Co., L. R. 42 Ch. D. 540 (1889). See also Smith *v.* New York, etc. Co., 18 Abb. Pr. 419, 435 (1865); Rollins *v.* Clay, 33 Me. 132 (1851); Sheldon, etc. Co. *v.* Eickmeyer, etc. Co., 56 How. Pr. 70 (1878); Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr. (N. S.) 283 (1870); Copeland *v.* Citizens' Gas Light Co., 61 Barb. 60 (1871); Conro *v.* Port Henry Iron Co., 12 Barb. 27 (1851); Astor *v.* Westchester Gas Light Co., 33 Hun, 333 (1884); Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874); Adriance *v.* Roome, 52 Barb. 399 (1868); Brady *v.* New York, 16 How. Pr. 432 (1857); Middlesex R. R. *v.* Boston, etc. R. R., 115 Mass. 347 (1874). *Cf.* Dana *v.* Bank of U. S., 5 Watts & S. (Pa.) 223, 247 (1843); Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363 (1834). See also Sheldon, etc. Co. *v.* Eickmeyer, etc. Co., 90 N. Y. 607 (1882); Balliet *v.* Brown, 103 Pa. St. 546 (1883); Gray *v.* New York, etc. Steamship Co., 5 Thomp. & C. 224 (1875). But see Hutchinson *v.* Green, 1 R'y & Corp. L. J. 18 (Mo., 1886), and Mills *v.* Hurd, 29 Fed. Rep. 410 (1887), relative to unincorporated associations. A stockholder of a manufacturing company may enjoin a lease of all its property and business to another corporation for twenty-five years at a rental equal to one-half of the profits of the business. Small *v.* Minneapolis, etc. Co., 45 Minn. 264 (1891) A sale of all the corporate property to an individual who purchases in good faith cannot be set aside by the corporation as *ultra vires*. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869). An injunction against transferring all the property to another corporation will not be granted where only a leasing of part of the property is contemplated. Small *v.* Minneapolis, etc. Co., 10 N. Y. Supp. 456 (1890). A vendee of all the property of a corporation cannot avoid the purchase on the ground that the stockholders had not assented thereto. Stokes *v.* Detrick, 75 Md. 256 (1892). A charter cannot be assigned. Only the shares of stock can be assigned. Welch *v.* Old Dominion, etc. Co., 10 N. Y. Supp. 174 (1890). Directors who are merely vested with the ordinary powers of executive management cannot radically affect the chartered rights of stockholders (Baker's Appeal, 109 Pa. St. 461 (1885), 42 Leg. Int. 226); and hence have no authority to dispose of the corporate plant by lease, sale, or otherwise. Martin *v.* Continental, etc. R'y, 14 Phila. 10 (1880). A secession of the majority, carrying corporate funds to a new corporation, is a fraud on the old corporation. Tomlinson *v.* Bricklayers' Union, 87 Ind. 308 (1882). Where all the property of the corporation is sold, together with the stock of the company, the directors cannot subsequently act as a board, they no longer being stockholders, as required by the statute. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). In Citizens' Street R. R. *v.* Robbins, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property

in view, yet, if the corporation is a prosperous one, such a sale cannot be made.[1] Indeed it is very doubtful whether a dissolution can ever be had by a majority of the stockholders where the corporation is a going, prosperous concern.[2] And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well-considered case of Kean *v.* Johnson.[3] Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly.[4]

If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made.[5]

to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, as the purchasing corporation had expressly assumed the liabilities of the vendor corporation, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer. It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897). The case of Hirsch *v.* Burns, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business to another company without protecting such option.

[1] People *v.* Ballard, 134 N. Y. 269; 136 N. Y. 639 (1892).

[2] See § 629, *supra*.

[3] 9 N. J. Eq. 401 (1853); Ervin *v.* Oregon, etc. Nav. Co., 27 Fed. Rep. 625 (1886). Where before the dissolution of an insurance company all of its assets were transferred to another responsible company which contracted to meet all obligations, the court will not necessarily set the transfer aside and appoint a receiver, but will allow the transfer to stand, if fair and best. The minority are not absolutely entitled to a receivership and sale. Baltimore, etc. R. R. *v.* Cannon, 72 Md. 493 (1890).

[4] Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881). See §§ 629, 630, *supra*.

[5] Quoted and approved in Price *v.* Holcomb, 89 Iowa, 123 (1893). To same effect, Doyle *v.* Leitelt, 97 Mich. 298 (1893); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). Where the business was a losing one, a lease of all the property by the stockholders, having wide powers by the charter, was upheld. Featherstonhaugh *v.* Lee, etc. Co., L. R. 1 Eq. 318 (1865). A dissenting stockholder cannot enjoin the corporation from selling all its property where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company, and there is no fraud involved, and a large majority of the stockholders are in favor of the sale, and the company will

Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.[1] Where a sale of all the corporate assets is set aside, and a receiver is authorized to borrow money to repay the money received on the sale, the loan made by him is legal.[2]

By the unanimous consent of the stockholders it is always legal to sell all the property of a private corporation,[3] proper

have the proceeds of the sale in its treasury to continue business. Sewell *v.* East, etc. Co., 50 N. J. Eq. 717 (1893). A manufacturing corporation may, for the purpose of protecting its shareholders from further loss, discontinue its operations when unprofitable, and may sell or lease the property. Skinner *v.* Smith, 134 N. Y. 240 (1892). To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. Rothwell *v.* Robinson, 44 Minn. 538 (1890). A sale, however, of all the corporate assets for stock in another company is not legal, even though the vendor corporation is insolvent, where the intent is, not to wind up the insolvent company, but to hold the stock indefinitely in the names of trustees. Byrne *v.* Schuyler, etc. Co., 65 Conn. 336 (1895). By a vote of the board of directors and a majority of the stockholders, in a meeting assembled, a rubber-manufacturing company may lease its entire business to another rubber-manufacturing company, the financial condition of the leasing company being depressed and its business not profitable for want of capital, and the lease being the best, if not the only, means of preventing insolvency, and there being no fraud in the case. Bartholomew *v.* Derby R. Co., 38 Atl. Rep. 45 (Conn., 1897). In New Jersey a failing corporation cannot sell out all its assets to another corporation, inasmuch as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. Hunt *v.* American, etc. Co., 81 Fed. Rep. 532 (1897). If the corporation is financially embarrassed, a majority of the stockholders may authorize the directors to sell all its property at public auction, and a reorganization committee representing a part of the stockholders may buy it in, the price paid being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). See 30 S. E. Rep. 567.

[1] Dougan's Case, 28 L. T. Rep. 60 (1873).

[2] St. Paul Trust Co. *v.* St. Paul Globe Pub. Co., 60 Minn. 105 (1895).

[3] A corporation may convey its property with the consent of stockholders. State *v.* Western, etc. Co., 40 Kan. 96 (1888). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets; and the fact that the authority was not given at a regular directors' meeting is immaterial. Jordan *v.* Collins, 107 Ala. 572 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662

provision being made for the protection of corporate creditors.[1] This rule does not apply, however, to railroads and certain other quasi-public corporations. The state has an interest in their continuance, and they cannot sell their property except upon the express consent of the state.[2]

Where the by-laws of a private corporation authorize a sale of all its property, such sale may be made even against the wishes of a minority of the stockholders.[3] So also, where the charter expressly authorizes such a sale, it is legal.[4] A hotel company may sell its hotel and with the proceeds purchase an-

(Cal., 1896). The new company may enforce the right of the old one to indemnity. Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514 (1868). Or may settle a suit against the old one. Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869). In general, see Slattery *v.* St. Louis, etc. Co., 91 Mo. 217 (1886). The incorporation of a reorganized company, giving it all the rights, etc., of the old company, does not give it title to a judgment obtained by the old company. Wilmington, etc. R. R. *v.* Downward, 14 Atl. Rep. 720 (Del., 1888). Sometimes the stock as well as the property is delivered. Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898).

[1] See § 672, *infra*.

[2] See ch. LIII, *infra*.

[3] It is legal for the by-laws to provide that the company may sell out all of its property at any time. Cotton *v.* Imperial, etc. Corp., [1892] 3 Ch. 454. The by-laws may provide that the company may sell out its entire business. Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893), reversing Brown *v.* Republican, etc. Mines. 55 Fed. Rep. 7.

[4] See § 892, notes, *infra*. The principle that the board of directors has no power to sell out the entire property does not apply where the statute under which it was incorporated authorized such a sale. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 98 (1879). Under the English statutes authorizing the holders of the securities to reorganize or modify the original plan, provided the court approves the same, the plan may be amended so that dissenting security-holders be paid in cash their proportion of the assets as they then exist. Foreign, etc. Trust Co. *v.* Sloper, [1894] 3 Ch. 716, rev'g [1893] 2 Ch. 96. Where a waterworks company has power to sell its entire property, and the sale has been authorized by a vote of 1,100 shares out of 1,350 shares, the court will not enjoin the sale at the instance of the minority stockholders, on the ground that the price is inadequate. Peabody *v.* Westerly Waterworks, 37 Atl. Rep. 807 (R. I., 1897). In *Re* Buenos Ayres, etc. Co., 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders, was sustained. Power to sell to a company does not authorize a sale to an individual. Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874). In Clinch *v.* Financial Corp., L. R. 5 Eq. 450 (1868), the company had power to consolidate with another company if the liabilities of the stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased.

other hotel.[1] And in any case the right of a dissenting stockholder to object may be lost by laches or ratification.[2]

The subject of the reorganization of corporations upon foreclosure is considered elsewhere.[3]

§ 671. *Sale of corporate property to another corporation in exchange for stock and bonds of the latter — Distribution of such stock and bonds.*— In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be for the bonds and stock of the vendee company. In these days of consolidations, reorganizations, and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and whether it may compel its stockholders to accept such stock and bonds upon a distribution of the assets of such selling company. The law seems to be settled that the stock of the vendee company received by the vendor company in payment for the property cannot be forced upon dissenting stockholders of the vendor company in a distribution of its assets. They are entitled to money. Such of them as do not voluntarily join the new corporation are entitled to the value of their shares in the old corporation in cash, and may have an injunction until they are secured.[4] To compel the stockholders of the old corporation

[1] Freeman *v.* Sea View Hotel Co., 40 Atl. Rep. 219 (N. J., 1898).

[2] See ch. XLIV, *infra;* Banks *v.* Judah, 8 Conn. 145 (1830), holding that long delay of a dissenting stockholder in bringing suit will bar his remedy. This, perhaps, is the first reorganization case that is to be found in the books. The whole business of the corporation cannot be sold out except by unanimous consent of the stockholders, but a stockholder who acquiesces in it cannot afterwards complain. Feld *v.* Roanoke Inv. Co., 123 Mo. 609 (1894). Where a part of a charter is illegal, and a new corporation is formed to take over the property and debts and issue share for share of stock in the old, a stockholder who assented cannot now refuse to take the new stock. Glymont Imp. etc. Co. *v.* Toller, 80 Md. 278 (1894).

[3] See ch. LII, *infra.*

[4] State *v.* Bailey, 16 Ind. 46 (1861); Kelly *v.* Mariposa Land, etc. Co., 4 Hun, 632 (1875). *Cf.* New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322 (1861); S. C., 15 N. J. Eq. 418 (1862). *Contra*, Sawyer *v.* Dubuque Printing Co., 77 Iowa, 242 (1889). Where a corporation sells its business for stock in another company, it may distribute the stock among those of its stockholders who are willing to take it; but any stock-

to accept the stock of the new corporation in payment for their interest in the old would be in effect to compel them to join the new corporation, or, what is the same thing, compel them to consent to a consolidation.[1] At this point another serious difficulty arises if payment is in stock. The only way to ascertain the real value of the property, if the sale is to a new corporation in which the majority of the old stockholders are interested, is by a public sale of the property. The dissenting stockholders may insist upon this, in such a case. The supreme court of the United States have so decided. The majority of stockholders have no right, upon dissolution, to sell the corporate property to a new corporation for stock in the latter, and then say to the minority, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one."[2] At the

holder may demand money instead. If he accepts the stock, however, he cannot afterwards complain. Feld *v.* Roanoke Inv. Co., 123 Mo. 603 (1894). In Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893), the court held that where one railroad company is authorized by statute to sell its railway property and franchises to another company, it may receive in payment therefor shares of stock in the vendee company, and its stockholders are obliged to accept payment in stock. Judge Taft dissented from this conclusion. Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889), holds that laches may bar the stockholders' right to object. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. Elyton Land Co. *v.* Dowdell, 113 Ala. 177 (1896).

[1] *Ex parte* Bagshaw, L. R. 4 Eq. 341 (1867); McCurdy *v.* Myers, 44 Pa. St. 535 (1863); Frothingham *v.* Barney, 6 Hun, 366 (1876); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). A single stockholder may enjoin his company from selling substantially all its property to another company for shares of stock in the latter. Carter *v.* Producers', etc. Co., 164 Pa. St. 463 (1894).

[2] Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). The result of this Pewabic Mining Company litigation was that the original sale of the property for $50,000 was set aside, and the property then sold for $710,000. See Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). *Cf.* Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856). See also Buford *v.* Keokuk, etc. Co., 3 Mo. App. 159 (1876); Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 130, 415 (1871); S. C., 24 N. J. Eq. 455 (1873); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1853).

public sale the majority stockholders may buy in the property;[1] but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale.[2] As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will of course always invalidate such a sale.[3] Frequently the statutes provide for buying out dissenting minority stockholders at the appraised value of their stock.[4] Such a statute exists in New York.[5] Sometimes a more formal condemnation is authorized.[6]

[1] A reorganization committee representing a part of the stockholders may buy in the property at a public sale by the directors, the business being financially embarrassed, and the price being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). See also ch. LII, *infra*.

[2] See § 662, *supra*, and § 892, *infra*.

[3] See § 884, *infra*.

[4] Under the English Companies Act all the property of a company may be sold to another company, but provision is made for the protection of the minority by paying him the value of his shares. *Re* London, etc. Bread Co., 62 L. T. Rep. 224 (1890). In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Lydney, etc. R'y, 69 L. T. Rep. 132 (1893). Where, upon the voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares, and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. Postlethwaite *v.* Port Phillip, etc. Co., L. R. 43 Ch. D. 452 (1889); Weston *v.* New Guston Co., 62 L. T. Rep. 275 (1889); S. C., 60 L. T. Rep. 805; aff'd, 64 L. T. Rep. 815. Where an appraisal of the stock of a dissenting stockholder is made under a statute authorizing a consolidation, and there is no market value for the stock, the award is like an unliquidated account and bears interest only after the appraisers report. Trask *v.* Peekskill Plow Works, 6 Hun, 236 (1875). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 49 N. E. Rep. 640 (Mass., 1898).

[5] See Laws 1893, ch. 638.

[6] See § 896, *infra*.

A question may also arise as to whether the selling corporation has power to acquire the stock and bonds of another corporation; but it seems that where all the stockholders of the company accepting the stock assent, no one else can object.[1]

[1] Although a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do, yet it may take stock in payment for a debt. And where all the stockholders of a manufacturing corporation consent to the sale of all its property to another corporation in exchange for stock in the latter, even though the former corporation was forbidden by statute to purchase the stock of other corporations, the corporation may then sell the stock, and the vendee cannot set up *ultra vires* on the part of the vendor. Holmes, etc. Co. *v.* Holmes, etc. Co., 127 N. Y. 252 (1891). A contract whereby a corporation agrees to sell all its property to another corporation for bonds and stock of the latter company cannot be enforced, nor be the basis of damages for breach, inasmuch as one corporation has no power to buy the stock of another corporation. Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156 (1892). An offer of a corporation to sell out, in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company, where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc. Co. *v.* Acme Mfg. Co., 153 Mass. 404 (1891). The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo the sale or hold the latter corporation liable. His remedy is against the pledgor and the first corporation. Leathers *v.* Janney, 41 La. Ann. 1120 (1889), holding also that a purchasing corporation is not bound to see that the selling corporation distributes the stock of the former legally among the stockholders of the latter corporation. Where a consolidation is effected by one company buying all the stock of another company, and, just before the transaction is completed, the company whose stock is thus sold issues a dividend of interest-bearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. Bailey *v.* Citizens' Gaslight Co., 27 N. J. Eq. 196 (1876). A corporation organized to deal in the stock of a stockyard corporation and hold personal and real estate may buy competing stockyards; and may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891). A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company — a combination company — in exchange for or payment of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it.

By unanimous consent it is legal for two companies to sell all their property to a third company, take its stock in payment, and divide the stock among the stockholders, all creditors being paid.[1]

Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414 (1895). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 50 Pac. Rep. 611 (Utah, 1897).

[1] Kohl *v.* Lilienthal, 81 Cal. 378 (1889). See also § 548, *supra*, and § 763, *infra*. Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock. The common-law liability for so doing remains of course. People *v.* Barker, 141 N. Y. 251 (1894). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R. R., 179 Pa. St. 414 (1897). Practically, there was a division of the corporate assets among the stockholders in the case of Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company, and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders who under protest subscribe for the new stock, and then wait eighteen months before commencing legal proceedings, are estopped from objecting. Post *v.* Beacon, etc. Co., 84 Fed. Rep. 371 (1898). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment, and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895).

Where one corporation sells out to another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.[1]

§ 672. *Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter.*— Where a corporation sells all its property for cash there is no difficulty in regard to creditors, the sale being an honest one, inasmuch as the cash must be applied to the corporate debts before any distribution is made among the stockholders. But where the property is sold for stock a more difficult question arises. A creditor of the corporation then has several remedies open to him. He may subject the stock to the payment of his debt;[2] and if the stockholders have distributed the stock

[1] The court said: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth." Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895). Where one company is sold out to another company on the basis of the latter company issuing its stock share for share for the stock of the former company, a stockholder of the former company may sue the latter company for his stock without joining the old company or any of the old stockholders. Fletcher *v.* Newark, etc. Co., 35 Atl. Rep. 903 (N. J., 1896). Although a new company with the same name and capital stock buys out the old, yet a stockholder in the old cannot compel a transfer of his stock on the books of the new. Huggins *v.* Milwaukee B. Co., 10 Wash. 579 (1895). Where the sale of one company to another was induced by fraud, the vendor may rescind, even though the stock of the vendor was canceled as a part of the sale. Texas, etc. Assoc. *v.* Dublin, etc. Co., 38 S. W. Rep. 404 (Tex., 1896). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. R'y *v.* Hoyt, 89 Wis. 314 (1895). Where the assets of a corporation are turned over to a new corporation and all the stockholders exchange their stock for new stock, they cannot afterwards claim that a surplus of the old corporation should have been divided. Boynton *v.* Roe, 72 N. W. Rep. 257 (Mich., 1897).

[2] Corporate creditors may object to the company selling out all its property to another corporation and receiving pay in the stock of the latter corporation. Such stock may be subjected by the creditors to their debts, or the conveyance may be set aside and the company wound up as insolvent. Vance *v.* McNab, etc. Co., 92 Tenn. 47 (1892); Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894). Where the corporation sells all its assets, and the purchasing corporation gives its bonds to the stockholders of the former, such bonds be-

among themselves without paying the corporate debts, he may compel them to return the stock and apply it to his debt;[1] or he may levy an attachment or execution upon the property which was transferred;[2] or, after obtaining an unsatisfied judg-

long to the corporate creditors. Peters *v.* Fort Madison Const. Co., 72 Iowa, 405 (1887). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where the stockholders distribute the assets of the corporation among themselves, leaving enough, as they suppose, to pay the debts of the company, and it turns out that the amount left is not sufficient, the stockholders must pay back enough to liquidate such debts. Grant *v.* Ross, 37 S. W. Rep. 263 (Ky., 1896). A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890). Where the officers of a bank use its funds to buy property, which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. Farmers', etc. Bank *v.* Kimball Milling Co., 1 S. D. 388 (1890). Where a mortgagee in possession of the property leases it with other property and takes stock in payment, he must account to the mortgagor for the dividends received on the stock representing the mortgaged property. The stock is impressed with a trust character. Entries on the stock ledger and corporate books are competent evidence of the issue. Chapman *v.* Porter, 69 N. Y. 276 (1877).

[1] Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). Creditors may reach stock which the corporation, which becomes insolvent, has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). Where a company is reorganized by a new company buying the property of the old, and giving the stock of the new company to the old company in payment therefor, the transaction being carried out by 160,165 shares out of 164,211 shares, over 4,000 shares not being represented, the old company cannot distribute the stock among the stockholders unless the company is dissolved. Kohl *v.* Lilienthal, 81 Cal. 378 (1889). The company may distribute the assets, provided all creditors are paid. Rorke *v.* Thomas, 56 N. Y. 559 (1874). See, to same effect, cases in § 671, *supra*. A corporate creditor cannot maintain a bill to enjoin the declaration of a dividend out of the capital stock. Mills *v.* Northern R'y, L. R. 5 Ch. App. 621 (1870). *Cf.* ch. XXXII, *supra*.

[2] A creditor of an insolvent corporation may attach its property which has been transferred by it to another corporation in payment for the whole capital stock of the latter corporation. McVicker *v.* American Opera Co., 40 Fed. Rep. 861 (1889). A judgment creditor of an insolvent corporation may levy on and sell under execution the property of the corporation which has been conveyed to a

ment against the corporation,[1] he may file a bill in equity to set aside the sale as being in fraud of creditors;[2] or under some circumstances he may hold liable the corporation that purchased

new company, under a reorganization plan to which all of the old stockholders and most of the creditors have assented. Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585 (1890). A creditor of the corporation that sells out all its property to another corporation for stock in the latter may levy an execution on the property on the ground that it is conveyed in fraud of creditors. Couse *v.* Columbia, etc. Co., 33 Atl. Rep. 297 (N. J., 1895).

[1] A corporate creditor seeking to reach the assets of the company which have been distributed among the stockholders, upon a sale of all the property of the company, cannot file a bill in equity for that purpose until he has first obtained judgment against the company. Swan, etc. Co. *v.* Frank, 148 U. S. 603 (1893); Central R. R. *v.* Pettus, 113 U. S. 116 (1885). A creditor of a stockholder cannot complain that all the corporate property was sold to the stockholders for their stock. Wagner *v.* Marple, 10 Tex. Civ. App. 505 (1895).

[2] Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. Farmers', etc. Co. *v.* Missouri, etc. R'y, 21 Fed. Rep. 264 (1884). Where a brewery company is dissolved in order that its assets may be sold and consolidated with other breweries, a person who had a bottling contract with it may follow its assets and subject them to his claim. Schleider *v.* Dielman, 44 La. Ann. 462 (1892). Where a creditor of a corporation seeks to reach property which has been fraudulently conveyed away by the company, he need not make the corporation a party defendant to the suit which he brings against the party who received the property. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). The formation of a new corporation and a transfer to it of all the assets of the old one may be a fraud on the creditors of the old corporation. San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all of the facts cannot complain. Parke, etc. Co. *v.* Terre Haute, etc. Co., 129 Ind. 73 (1891). A creditor whose claim for $1,000 is contested cannot have a conveyance of all the corporate property to another corporation set aside. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). Contract creditors cannot cause a *bona fide* sale of all the property of a corporation to be set aside merely because the corporation — a going concern — is insolvent. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). The Tennessee statute against liens prior to labor and damage claims does not give such claims a lien ahead of an out-and-out *bona fide* sale of the property. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where all the stock of a corporation is sold to a vendee, who then takes possession of the cor-

the property from the corporation that is indebted to him.[1] But any unreasonable delay on the part of the creditor in applying for relief will be fatal to his application.[2] Where all the property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may, by a bill in equity, compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund.[3] Although a corporation sells all its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors.[4] Even though a sale of all the corpo-

porate assets and ignores the corporate existence, the court may construe this as a sale of the corporate assets. Cusick *v.* Bartlett, 39 Atl. Rep. 497 (Me., 1898). An insolvent Ohio corporation may transfer all its assets to a New Jersey corporation which assumes all the debts. The bondholders of the Ohio corporation cannot object. Such bondholders become creditors of the New Jersey corporation. Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J., 1897). Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent. Guilmartin *v.* Middle G. & A. R'y, 29 S. E. Rep. 189 (Ga., 1897).

[1] See § 673, *infra*.

[2] Seven years' delay on the part of an alleged creditor of the old company is fatal to any relief. Townsend *v.* St. Louis, Sandoval, etc. Co., 159 U. S. 21 (1895). Where the corporate creditor delays and allows the corporation taking over the property to incur debts, he cannot then complain. Vaughn *v.* Comet, etc. Co., 21 Colo. 54 (1895). Corporate creditors of an insolvent corporation may set aside a sale of all its property to another corporation for bonds of the latter, the bonds being then distributed among stockholders of the former, even though such creditors knew of and acquiesced in the sale at the time. Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894). Creditors who assent to a corporation turning over all its assets to a partnership and agree to accept the partnership as their debtor cannot afterwards complain of the transaction. Tenney *v.* Ballard, etc. Co., 43 S. W. Rep. 296 (Tex., 1897).

[3] Baltimore, etc. Tel. Co. *v.* Interstate, etc. Tel. Co., 54 Fed. Rep. 50 (1893).

[4] A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Fort Payne Bank, 22 S. Rep. 75 (Ala., 1897). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured

rate property to an individual may be invalid as to corporate creditors, yet a purchaser cannot defend against the price on the ground of such invalidity.[1]

Where the officers of the corporation have aided in transferring its assets to another corporation, a civil action for damages for a conspiracy to defraud may lie.[2] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[3] Where the purchasing company is a mere "dummy" for the selling company, a creditor of the latter may sometimes disregard the identity of the purchasing company.[4] An insolvent corporation cannot transfer all its assets to one of its directors upon his guarantee to pay all the debts. A creditor may file a bill to set aside a sale by such director of part of the assets to one of the creditors in discharge of a debt.[5] The agreement of a creditor of a corporation to take stock in a proposed reorganized company may be revoked by the creditor at any time before actual performance.[6] The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation.[7]

§ 673. *A corporation taking over all the property of another corporation may be liable for the debts of the latter.*— The general rule undoubtedly is that a corporation which purchases all the property of another corporation is not liable for the debts of the latter.[8] Nevertheless there are circumstances under which

by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank, etc. *v.* Sprague, 21 N. J. Eq. 530 (1870). See also §§ 674, 675, *infra*.

[1] Clapp *v.* Allen, 50 N. E. Rep. 587 (Ind., 1898).

[2] Russell *v.* Post, 138 U. S. 423 (1891).

[3] Mason *v.* Henry, 152 N. Y. 529 (1897).

[4] See §§ 6, 663*a*, *supra*, and § 709, *infra*.

[5] Berney Nat. Bank *v.* Guyon, 111 Ala. 491 (1896). As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company. Levins *v.* Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn., 1896).

[6] Providence, etc. Co. *v.* Kent, etc. Co., 35 Atl. Rep. 152 (R. I., 1896).

[7] Prentice *v.* United States, etc. Co., 78 Fed. Rep. 106 (1897).

[8] Gray *v.* National Steamship Co., 115 U. S. 116 (1885). A railroad corporation which purchases the prop-

the purchasing corporation is liable for the debts of the old company. Thus, where the purchasing corporation assumes all liabilities, a creditor of the vendor corporation may sue the vendee corporation on his claim.[1]

erty of another railroad corporation is not liable, upon the dissolution of the latter, for a tort committed by it. Chesapeake, etc. R. R. *v.* Griest, 85 Ky. 619 (1887). *Cf.* Batterson *v.* Chicago, etc. R'y, 53 Mich. 125 (1884). See also § 890, *infra*. And, in general, that the new corporation is not liable for the debts of the old, see Port Gibson *v.* Moore, 21 Miss. 157 (1849); Shaw *v.* Norfolk County R. R., 82 Mass. 407 (1860); Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576 (1882); Smith *v.* Chicago, etc. R'y, 18 Wis. 17 (1864); Neff *v.* Wolf River Boom Co., 50 Wis. 585 (1880); Houston, etc. R. R. *v.* Shirley, 54 Tex. 125 (1880); Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8 (1835); Menasha *v.* Milwaukee, etc. R. R., 52 Wis. 414 (1881); Lake Erie, etc. R'y *v.* Griffin, 92 Ind. 487 (1883); Gilman *v.* Sheboygan, etc. R. R., 37 Wis. 317 (1875); Sappington *v.* Little Rock, etc. R. R., 37 Ark. 23 (1881); Cook *v.* Detroit, etc. R'y, 43 Mich. 349 (1880). Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it. Rathbun *v.* Snow, 123 N. Y. 343 (1890). See also, on this subject, ch. LII, *infra*, as to the liability of a purchaser of a railroad at foreclosure sale. Where two banks are consolidated into a third bank, the stock of the new bank being issued in exchange for stock of the old, the new bank is not liable on the debts of either of the old banks. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). A new bank which takes over a part of the assets of another bank is not liable for the debts of the latter, even though the individuals interested in both banks are practically the same. Campbell *v.* Farmers', etc. Bank, 49 Neb. 143 (1896). A purchasing corporation is not liable unless it has expressly assumed such liability. Fernschild *v.* Yuengling Brewing Co., 15 N. Y. App. Div. 29 (1897); aff'd, 154 N. Y. 667.

[1] Tecumseh Nat. Bank *v.* Best, 70 N. W. Rep. 41 (Neb., 1897). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security; but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896). A purchasing company may be held liable on the debts of the vendor company where the former expressly agrees in the contract of purchase to pay said debts. Noll *v.* Chattanooga Co., 38 S. W. Rep. 287 (Tenn., 1896). Where a *de facto* corporation incurs debts, and subsequently a new corporation legally organized takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895). Where a corporation sells all its property to another corporation in payment for stock of the latter, and the new corporation assumes all the liabilities of the old corporation, a creditor of the old corporation may sue the new corporation on his claim. Friedenwald Co. *v.* Asheville Tobacco Works, 117 N. C. 544 (1895). Where an insolvent corporation transfers its assets to a

It is also a principle of law that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation or have the property sold to pay such obligations.[1] A creditor of the old company may sue the new company to charge the assets taken over by it with payment of the old company's debts, and may recover his *pro rata* share of the value thereof.[2] A mere device by which corporate property is

new corporation, which agrees to pay the debts of the former, the liability of the latter may be enforced by creditors of the former corporation. Island City Sav. Bank *v.* Sachtleben, 3 S. W. Rep. 733 (Tex., 1887). Where a reorganized company continues and assumes payment of a liability of the old company, and new advances are made thereunder, the new company is liable thereon. Baker *v.* Harpster, 42 Kan. 511 (1889). Where the assets of a corporation are transferred to a party who agrees to pay the debts, the creditors may enforce the agreement and collect from him. Dimmick *v.* Register, 92 Ala. 458 (1891). In Long *v.* Evening News Assoc., 71 N. W. Rep. 492 (Mich., 1897), a judgment creditor of the corporation that had sold all its assets to another corporation in payment of a debt garnished the latter for his debt. Where a corporation is formed to take over the business of a loaning agent, and does so, and carries on the business for five years without any new agreement, it is bound by the terms of the agreement between the agent and his principal. North Am. etc. T. Co. *v.* Colonial, etc. Co., 83 Fed. Rep. 796 (1897). A corporation may give a mortgage to raise an attachment which was levied on land prior to its purchase by the corporation. Leonard, etc. Co. *v.* Bank of America, 86 Fed. Rep. 502 (1898).

[1] Grenell *v.* Detroit, etc. Co., 70 N. W. Rep. 413 (Mich., 1897). In Massachusetts the remedy of a creditor of a corporation which has sold its assets to another corporation for stock is at law and not in equity. The new corporation is not liable on the debt. Ewing *v.* Composite B. S. Co., 47 N. E. Rep. 241 (Mass., 1897).

[2] First Nat. Bank *v* Chattanooga, etc. Co., 37 S. W. Rep. 8 (Tenn., 1896). Where an insolvent corporation causes land owned by it to be conveyed to a new corporation formed by its directors, and in which its directors subscribed for stock, and both corporations pass into the hands of receivers, the subscriptions for stock in the new corporation may be collected for the benefit of creditors of the old corporation. Butler *v.* Cockrill, 73 Fed. Rep. 945 (1896). A corporation may be liable for the debts of another corporation whose property it takes, to the extent that such property is impressed with a trust. In this case all the property of an insolvent company was leased to another company. Chicago, etc. R'y *v.* Third Nat. Bank, 134 U. S. 276 (1890). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals held that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors." Vilas *v.* Page, 106 N. Y. 439, 465 (1887). In some cases the creditors of the

sold under an execution, is purchased by a person interested in the corporation, and then transferred to a new corporation having the same stockholders as the old one, is void as against creditors of the first corporation. They may hold the new corporation liable to the extent of the value of the property so conveyed.[1] The subject of "dummy" corporations is considered elsewhere.[2]

old company may follow its property into the hands of a new company to which the property is sold by an ordinary sale. Marshall *v.* Western, etc. R. R., 92 N. C. 322 (1885); Western N. C. R. R. *v.* Rollins, 82 N. C. 523 (1880); Young *v.* Rollins, 85 N. C. 485 (1881), involving a receiver. A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations, and also claim that the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets,—all in one bill brought to collect the debt. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). Where a company leases all its property to another, the stockholders in both companies being the same, a mechanic's lien good against the latter is good also against the former. Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368 (1896). A new corporation taking the assets of an old corporation is liable to creditors of the latter to the extent of the property so taken. Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. Rep. 140 (1883); Hibernia Ins. Co. *v.* New Orleans Transp. Co., 13 Fed. Rep. 516 (1882); Hibernia Ins. Co. *v.* St. Louis, etc. Co., 10 Fed. Rep. 596 (1882). For a case where the stockholders of the new corporation gave a bond to pay the debts of the old one, see Planters' Ins. Co. *v.* Wicks, 4 S. W. Rep. 172 (Tenn., 1887).

[1] Hancock *v.* Holbrook, 40 La. Ann. 53 (1888). See also Railroad *v.* Howard, 7 Wall. 392 (1868). Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter corporation will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. Houston, etc. R'y *v.* Shirley, 24 S. W. Rep. 809 (Tex., 1894). In Angle *v.* Chicago, etc. R'y, 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company, which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. See also §§ 675, 890, *infra*.

[2] See §§ 663, 664, *supra*.

Sometimes the statutes of the state make the purchasing corporation liable, and in cases of consolidation such a statute is vital to the protection of creditors of the consolidating corporations.[1]

§ 674. *Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.*— Where a corporation transfers all its property to another corporation, and the latter company immediately gives a mortgage on all the property, a judgment creditor of the former company may cause the sale and the mortgage to be set aside as a fraud upon his rights, and the property may be subjected to the payment of his debt.[2]

[1] See cases in § 897, *infra;* also relative to consolidation, Indianola R. R. *v.* Fryer, 56 Tex. 609 (1882); Louisville, etc. R'y *v.* Boney, 117 Ind. 501 (1888); Indianapolis, etc. R. R. *v.* Jones, 29 Ind. 465 (1868); Columbus, etc. R'y *v.* Powell, 40 Ind. 37 (1872); Montgomery, etc. R. R. *v.* Boring, 51 Ga. 582 (1874); Thompson *v.* Abbott, 61 Mo. 176 (1875), where the property of the old was given by the legislature to the new corporation — a municipal case. See also Rome, etc. R. R. *v.* Ontario, etc. R. R., 16 Hun, 445 (1879). Where the consolidated company is by statute liable for the debts of the old company, a creditor of one of the latter who has the right to demand stock in exchange may demand the same of the consolidated company and hold it liable in damages if it refuses. John Hancock, etc. Co. *v.* Worcester, etc. R. R., 149 Mass. 214 (1889). A creditor of an old corporation may follow its property into the hands of a consolidated company to which it was transferred, stock being therefor issued to the old stockholders. Martin *v.* Zellerbach, 38 Cal. 300 (1869).

[2] A receiver will be appointed. Cole *v.* Millerton Iron Co., 133 N. Y. 164 (1892). A corporate creditor may attack a transfer of all the corporate property to another corporation, even though the latter agrees to pay the debts of the former. A trustee of a mortgage given by the vendee company on the property is not *bona fide* when the officers of the two companies are the same and the trustee knew thereof. The bondholders are chargeable with notice of facts known to the trustee. Cole *v.* Millerton Iron Co., 59 Hun, 217 (1891). Bondholders who took with notice that the property was received by the corporation from another corporation in payment for stock, and that the latter corporation was in debt, cannot hold as against such creditors. Blair *v.* St. Louis, etc. R. R., 22 Fed. Rep. 36 (1884). Where a corporation conveys all its property to another corporation in payment for its stock, the latter corporation agreeing to pay all the debts of the former, a mortgagee of the latter company takes precedence over the judgment of a creditor of the former company, such judgment being subsequent to the mortgage. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885). But *contra*, if the mortgagee took with actual knowledge. Blair *v.* St. Louis, etc. R. R., 24 Fed. Rep. 148 (1885). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corpora-

Where a corporation issues stock for property it is not a *bona fide* purchaser of that property.[1] But a claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property.[2]

Where property is sold to the corporation for shares of stock, and the corporation issues a mortgage on the property and refuses to deliver the stock, the claim of the vendor for damages does not have priority over the mortgage.[3]

Where a stockholder of a vendor corporation sets aside the sale of the railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee.[4]

A mortgage by a consolidated railroad may not take precedence over the unsecured debts of the constituent companies, and by statute the consolidated company may be liable for those debts, unless the articles of consolidation provide otherwise.[5]

§ 675. *Sale of partnership or individual property to a corporation for stock of the latter.*— The rules laid down in the preceding sections are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange

tion which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. Blair *v.* St. Louis, etc. R. R., 27 Fed. Rep. 176 (1886). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. Houston, etc. R'y *v.* Shirley, 24 S. W. Rep. 809 (Tex., 1894). *Cf.* § 672, *supra*, and § 675, *infra*.

[1] Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). *Cf.* § 727, *infra*, on notice, and § 675, *infra*.

[2] Fogg *v.* Blair, 133 U. S. 534 (1890).

[3] Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893).

[4] Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884).

[5] Compton *v.* Jesup, 167 U. S. 1 (1897). *Cf.* Tysen *v.* Wabash R'y, 15 Fed. Rep. 763 (1883); but see Wabash, etc. R'y *v.* Ham, 114 U. S. 587 (1885). The case of Compton *v.* Wabash, etc. R'y, 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the consolidated company; refusing to follow Wabash, etc. R'y *v.* Ham, 114 U. S. 587 (1885). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey *v.* Illinois Mid. R'y, 28 Fed. Rep. 169 (1884).

for stock. Such sales often are made in order to merge a solvent copartnership into a corporation. They are also made sometimes by an embarrassed or insolvent firm. In such a case the creditors of the firm may object. They may levy an attachment or execution on the property,[1] or reach the stock,[2] or file a bill in equity to set the sale aside,[3] or in certain cases

[1] Booth *v.* Bunce, 33 N. Y. 139 (1865); San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). Creditors of an insolvent individual who transfers his property to a corporation for stock may attach the property on the ground that the act hindered and delayed creditors. Dolan *v.* Wilkerson, 48 Pac. Rep. 23 (Kan., 1897).

[2] Where a firm turns all its property into a corporation for stock, a firm creditor cannot reach the stock of one member of the firm in preference to other creditors of that member. Singer, etc. Co. *v.* Carpenter, 125 Ill. 117 (1888). If the partnership is insolvent, then the stock issued is "watered," and the subscribers are liable as though no payment was attempted. Sayler *v.* Simpson, 45 Ohio St. 141 (1888).

[3] The creditors of a person may, by bill in equity, set aside a transfer of all his property to a corporation in exchange for shares of stock. Strieby *v.* Clinton, etc. Co., 29 Atl. Rep. 589 (N. J., 1894). Judgment creditors of an individual may file a bill to set aside a transfer of his property to a corporation for stock, the stock having been distributed among his relatives. Metcalf *v.* Arnold, 110 Ala. 180 (1896). A judgment creditor of a partnership may set aside a transfer of its property to a corporation in exchange for stock of that corporation. Buell *v.* Rope, 6 App. Div. N. Y. 113 (1896). In Tradesmen's Nat. Bank *v.* Young, 15 N. Y. App. Div. 109 (1897), the court refused to set aside a transfer of all the assets of an insolvent partnership to a corporation for stock, inasmuch as the creditors of the partnership would secure more by having the transaction stand than set aside. Where one member of a firm buys out the other member and gives his note, and then forms a corporation and turns in the property for stock, and the corporation becomes insolvent, the property cannot be turned over to the retiring partner in payment of such note. Hall *v.* Goodnight, 37 S. W. Rep. 916 (Mo., 1896). Where an insolvent person transfers his property to a corporation for all of the stock of the corporation, and the corporation assumes a certain debt of such person, and subsequently conveys its property to such creditor, the whole plan being in order to make payment that way, other creditors of the corporation may object. Folsom *v.* Detrick, etc. Co., 85 Md. 52 (1897). Where an insolvent individual transfers all his property to a corporation for stock, and his principal creditor acquiesces and loans money to the corporation, and then takes the notes of the corporation for the old debt which such creditor had against the insolvent individual, the transaction is illegal as against other creditors of the corporation. Craig *v.* California, etc. Co., 46 Pac. Rep. 421 (Oreg., 1896). A transfer of a business by an insolvent person to a corporation for stock is void under the statute of Elizabeth as defeating and delaying creditors. *Re* Carey, Sol. Jour., June 8, 1895, p. 541. A receiver of the corporation was appointed in Bonner *v.* Villaume, etc. Co., N. Y. L. J., Feb. 14, 1895 (Com. Pl.). A conveyance of real estate to a corporation for

hold the purchasing company liable for the debt.[1] But a corporation that has taken over the property of a partnership is not liable for the debts of the latter unless it is shown that the sale was fraudulent as to creditors of the latter, or that there

all its shares of stock is fraudulent as against a mechanic's lien. Gross *v.* Daly, 5 Daly, 540 (1875). Creditors of an insolvent individual who has transferred his property to a corporation may file a bill to set aside the sale and to have the property sold. Cass *v.* Sutherland, 74 N. W. Rep. 337 (Wis., 1898). A creditor of an insolvent individual may cause to be set aside a transfer of all his property to a corporation formed for that purpose in exchange for stock. Rielle *v.* Reid, 28 Ont. Rep. 497 (1897). In *Ex parte* Kenmore, etc. Co., 27 S. E. Rep. 682 (S. C., 1897), the court allowed the corporate creditors to participate with the creditors of the insolvent debtor in the assets that had been turned over to the corporation for stock. A creditor of an insolvent person may treat as void a conveyance of all his property to a corporation in exchange for its shares of stock. He may file a bill to set aside the conveyance. Terhune *v.* Skinner, 45 N. J. Eq. 344 (1889). In an action by a judgment creditor of a partnership to set aside a conveyance of all its property to a corporation in consideration of its stock, the corporation, its mortgagee, the copartners, and creditors assenting to the transfer are all necessary parties. National Broadway Bank *v.* Yuengling, 58 Hun, 474 (1890). A judgment creditor of a failing firm may set aside an assignment of their property to a corporation formed to take over the property, even though the shares of stock have been sold. Gardner *v.* Keogh Mfg. Co., 63 Hun, 519 (1892). Creditors of a firm that is transformed into a corporation may pursue the firm's assets so transferred. Williams *v.* Colby, 6 N. Y. Supp. 459 (1889). Where partnership assets are transferred to a corporation in payment for its stock, and the corporation pays part of the debts of the partnership and becomes insolvent, a member of the partnership who individually gave security for some of the partnership debts cannot claim a lien on the corporate assets in priority to corporate creditors. *Re* Warner, 82 Mich. 624 (1890). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870). See also §§ 672, 674, *supra*.

[1] Under the facts in Breman, etc. Bank *v.* Branch, etc. Co., 104 Mo. 425 (1891), it was held that a corporation organized by a business man, and to which he had conveyed all his property, was liable on his note, although it had not assumed any of his debts. See also Fort Worth Pub. Co. *v.* Hitson, 80 Tex. 216 (1891). Where a partnership turns itself into a corporation, the latter is not a *bona fide* holder of notes owned by the former. McElwee Mfg. Co. *v.* Trowbridge, 62 Hun, 471 (1891). A corporation taking all the assets of a partnership under an agreement with the partners that it would pay the liabilities to the extent of the assets cannot be made liable on a debt due one of the part-

was an express contract assuming such liability, or that the transaction was a mere continuation of the partnership.[1] A corporation taking over the business of a partnership may assume any contract of the latter, but the assumption of one contract does not prove the assumption of other contracts. The assumption of such contract may arise by the corporation proceeding to live up to it and carry it out.[2] Even though an insolvent partnership is turned into a corporation, and bonds of the corporation are given to a creditor of the partnership for his debt, yet such bonds may be legal.[3]

A solvent copartnership may, by consent of the whole firm, merge itself into a corporation, proper provision being made for the payment of creditors.[4]

ners until it is ascertained that the assets exceed the liabilities and until it has agreed to pay the liabilities. Adams *v.* Empire, etc. Co., 4 N. Y. Supp. 738 (1889). As regards the power of the corporation to assume the obligations of the copartnership, see McLellan *v.* Detroit File Works, 56 Mich. 579 (1885). A corporation may be liable for the debts of the partnership where it has placed such liabilities on its books as a part of the corporate liabilities, and upon becoming insolvent the corporation may give a preference to such liabilities. Shufeldt *v.* Smith, 40 S. W. Rep. 887 (Mo., 1897). See also § 673, *supra*.

[1] Austin *v.* Tecumseh Nat. Bank, 49 Neb. 412 (1896). *Cf.* Reed Bros. Co. *v.* First Nat. Bank, 46 Neb. 168 (1895). See § 890, *infra*.

[2] Hall *v.* Herter, 83 Hun, 19 (1894). A corporation succeeding a firm may, by carrying out a contract of the firm, assume the obligation thereof. Hall *v.* Herter, 90 Hun, 280 (1895). Where a firm is turned into a corporation, the latter may assume a contract of the former for the purchase of lumber, by adopting it through its manager. Pratt *v.* Oshkosh Match Co., 89 Wis. 406 (1895). Where the corporation assumes the debts of the partnership which it buys out, its liability is not released by the fact that the partnership subsequently gives notes for such debts. Johnston *v.* Gumbel, 19 S. Rep. 100 (Miss., 1895).

[3] Seligman *v.* Prince, [1895] 2 Ch. 617. Where a corporation is in debt, and in order to enable it to borrow money the chief stockholder, who is also in debt, transfers valuable property to the corporation, and then the corporation gives a mortgage upon all its property, including the property so transferred, a *bona fide* holder of the bonds is protected as against a creditor of the stockholder. King *v.* Holland T. Co., 8 N. Y. App. Div. 112 (1896). *Cf.* §§ 672, 674, *supra*.

[4] Partners who merge their partnership into a corporation and take stock in payment thereby waive liens which existed in the partnership. Francklyn *v.* Sprague, 121 U. S. 215 (1887). A solvent mercantile firm may transfer all their assets to a new corporation in payment for stock, and then pledge the stock to certain of their creditors. Coaldale Coal Co. *v.* State Bank, 142 Pa. St. 288 (1891). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey *v.* Augusta, etc. R. R., 83 Ga. 757 (1889). Where two members of a firm give notice of a dissolution of

Where a person who holds property which belongs to another person sells the property for stock in a corporation, the latter person may claim the stock.[1]

§§ 676, 677. *Consolidations, leases, and sales of railroads.*— This subject is considered elsewhere.[2]

§ 678. *A corporation cannot be a partner in a partnership.*— This is an old principle of law, but it is subject to exceptions. It is held to be an *ultra vires* act, because the stockholders are entitled to have their directors conduct the business without sharing that power with a partner.[3] But if a partnership has been formed with an individual, the latter cannot throw the business into statutory insolvent proceedings;[4] and the corporation cannot avoid the payment of a liability which the partnership has incurred;[5] nor can an obligation to the corporation

the firm, and then transfer all the assets to a newly-formed corporation, the court will place all the property in the hands of the third member of the firm for the purpose of winding it up. Macdonald *v.* Trojan, etc. Co., 10 N. Y. Supp. 91 (1890). Where by agreement a partnership is merged into a corporation, and then one partner is refused his part of the stock, he may sue for an accounting and payment in cash. Crosby Lumber Co. *v.* Smith, 51 Fed. Rep. 63 (1892). Under a partnership agreement providing for incorporation, part of the partners may incorporate, transfer the property to the corporation, and compel the other partners to pay in to the corporation the amounts of money contemplated by the partnership agreement before the stock is issued to them. Hennessy *v.* Griggs, 1 N. D. 52 (1890). A corporation formed to purchase the assets of a firm may sue on claims of such firm which have been assigned to it, and the firm are not proper parties to the suit. Lottman, etc. Co. *v.* Houston, etc. Co., 38 S. W. Rep. 357 (Tex., 1896). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

[1] Chapman *v.* Porter, 69 N. Y. 276 (1877); *Re* Gilbert, 104 N. Y. 212 (1887).

[2] See §§ 892–896, *infra*.

[3] "It is a violation of law for corporations to enter into a partnership," and their charters may be forfeited for the offense. People *v.* North River, etc. Co., 121 N. Y. 582, 623 (1890). A contract between two companies, by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock), is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

[4] Whittenton Mills *v.* Upton, 76 Mass. 582 (1858).

[5] Catskill Bank *v.* Gray, 14 Barb. 471 (1852). *Contra*, Gunn *v.* Central R. R. etc. Co., 74 Ga. 509 (1885), where a railroad was held not liable for injuries to a passenger sustained while traveling upon a boat operated by

be repudiated on that ground.[1] And if the corporation has but one stockholder, he may make it a partner in a partnership.[2] Sometimes the relationship is held to be that of principal and agent instead of partnership. Where a corporation has been a partner in a partnership, it must account to the other partners, even though such partnership was illegal.[4] A corporation that has entered into a partnership for a certain period of time cannot recover damages for the failure of the other party to continue the partnership during that time.[5] There have been many dicta to the effect that a corporation cannot be a partner;[6] and the question has arisen indirectly in many cases involving railroad traffic and pooling contracts,[7] and in still other cases where illegal combinations in restraint of trade have been made;[8] but there are few authorities bearing directly on the subject.[9]

the road and an individual as partners. But see Block *v.* Fitchburg R. R., 139 Mass. 308 (1885). A corporation and a person to whom it has agreed to sell its property may be liable as partners to creditors of the former. Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152 (1887).

[1] French *v.* Donohue, 29 Minn. 111 (1882). A corporation cannot avoid liability for the debt of a firm, in which firm it is a member, on the ground that it had no power to become a partner. Cameron *v.* First, etc. Bank, 34 S. W. Rep. 178 (Tex., 1896). A corporation may enforce an accounting in a partnership of which it is a member. Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. 372 (1885). Where in an *ultra vires* contract two railroads are operated as one, and more of the income is used to repair one railroad than the other, the latter may sue the former for reimbursement. Nashua, etc. R. R. *v.* Boston, etc. R. R., 164 Mass. 222 (1895). Where a national bank forms a partnership to operate a mill, it may recover moneys loaned by the bank to the partnership. Although the manager of the mill is vice-president of the bank, yet the bank is not liable for his mismanagement. The bank as a partner is, however, chargeable with notice of a rule of its other partner, a joint-stock association, that no money should be borrowed except by the board of directors of the latter. Cameron *v.* First Nat. Bank, 4 Tex. Civ. App. 309 (1893).

[2] Allen *v.* Woonsocket Co., 11 R. I. 288 (1876).

[3] Marine Bank *v.* Ogden, 29 Ill. 248 (1862). In Holmes *v.* Old Colony R. R., 71 Mass. 58 (1855), where the corporation shared in the profits only, no partnership was held to exist.

[4] Boyd *v.* American, etc. Co., 37 Atl. Rep. 937 (Pa., 1897).

[5] Sabine, etc. Co. *v.* Bancroft, 40 S. W. Rep. 837 (Tex., 1897). A mere allegation that one company is liable for the debts of another on the ground that they are partners is an insufficient allegation. White *v.* Pecos, etc. Co., 45 S. W. Rep. 207 (Tex., 1898).

[6] New York, etc. Canal Co. *v.* Fulton Bank, 7 Wend. 412 (1831). *Cf.* 1 Lindley, Partn., p. 86.

[7] See ch. LIII, *infra*.

[8] Ch. XXIX, *supra*.

[9] A stage company may be a co-

§ 679. *A corporation cannot be an executor or an administrator unless specially authorized by statute.*— The duties of the office are personal and incapable of being delegated to an agent. Since a corporation acts only through agents, it cannot assume the duties of an executor.[1] The charter of the corporation may, however, expressly authorize it to act as executor or trustee.

The old rule that corporations could not take property in trust for the use of others is now obsolete.[2] A corporation may be a trustee to hold property in trust for purposes within the corporate power.[3] Corporations cannot, however, take property in trust where they could not take the same property absolutely.

If a corporation be incompetent to act as trustee, the devise

owner of a stage line with an individual. Calvert *v.* Idaho Stage Co., 25 Oreg. 412 (1894). In State *v.* Port Royal, etc. R'y, 79 Fed. Rep. 397 (1897), a lease of a railroad seems to have been owned by a corporation and an individual as partners. A corporation owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one, and the profits to be divided equally. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). A corporation may enter into a land speculation with an individual, the profits and losses to be divided equally, if the corporation is to have entire control of the business. Bates *v.* Coronado Beach Co., 109 Cal. 160 (1895). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893).

[1] Georgetown College *v.* Browne, 34 Md. 450 (1871), where it was also held that a corporation will not be allowed, as in England, to designate a person to administer with the will annexed. See also *Re* Thompson, 33 Barb. 334 (1861).

[2] Vidal *v.* Girard, 2 How. 127, 187 (1844), where Mr. Justice Story said: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do;" Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857), holding that a corporation may be trustee of a charity if consistent with the object of its creation. See also § 694, *infra;* Phillips Academy *v.* King, 12 Mass. 546 (1815), holding that a corporation aggregate may be a trustee; Perry, Trusts, § 42 *et seq.;* Robertson *v.* Bullions, 11 N. Y. 243 (1854), a religious society. *Re* Howe, 1 Paige, 214 (1828), holds that, while corporations cannot be trustees in matters in which they have no interest, yet if property be devised or granted to a corporation upon trust, partly for itself and partly for another, it may execute the trust. One mission society corporation may take property in trust for another mission society corporation. Sheldon *v.* Chappell, 47 Hun, 59 (1888).

[3] White *v.* Rice, 70 N. W. Rep. 1024 (Mich., 1897).

or grant will not thereby become void; a court of equity will appoint a proper trustee to carry out and execute the trust.[1]

§ 680. *Stockholder's right to prevent the corporation from undertaking a new business.*— It is *ultra vires* of a corporation to undertake to carry on a business which is not fairly within the scope of the business described in its charter. When such an attempt is made on the part of the directors or a majority of the stockholders, a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter; and he may enjoin or set aside any acts which do not conform to those limits. Thus, a corporation formed to manufacture iron cannot go into the flour and mill business.[2]

§ 681. *Miscellaneous ultra vires acts — Enforcement of ultra vires contracts.*— It has been held that a stockholder in a hotel company cannot enjoin the managers from leasing a part of the property for other purposes, there being sufficient accommodation left for the hotel.[3] And it has been held that a stockholder cannot enjoin his corporation from paying money to a rival company to induce the latter to discontinue business.[4] But any misapplication or waste of the property of a corporation may be remedied by a member thereof.[5] It is illegal for the directors or a majority of the stockholders to give away the assets of the corporation for the promotion of other enterprises.[6] Neverthe-

[1] Vidal *v.* Girard, 2 How. 127, 187 (1844); Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857).

[2] Cherokee Iron Co. *v.* Jones, 52 Ga. 276 (1874). See also § 681, *infra*.

[3] Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860).

[4] Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

[5] Armstrong *v.* Church Soc., 13 Grant Ch. (U. C.) 552 (1867).

[6] See § 64, *supra*, and §§ 775, 909, *infra*. Back pay cannot be voted to the directors. It is an illegal gift. See § 657, *supra*. But an educational institution may donate money to the construction of a railroad. Louisville, etc. R. R. *v.* St. Rose Literary Soc., 91 Ky. 395 (1891). A town-site corporation may give away certain lots and give a sum of money to a party who in consideration thereof agrees to remove a barn, etc., to another location. Sherman, etc. Co. *v.* Russell, 46 Kan. 382 (1891); Sherman, etc. Co. *v.* Fletcher, 46 Kan. 524 (1891). A railroad cannot be held liable on its contract to pay for the examination of mines of which the railroad is the outlet. George *v.* Nevada Cent. R. R., 22 Nev. 228 (1894). But directors may compromise corporate claims. Frankfort Bank *v.* Johnson, 24 Me. 490 (1844), and ch. XLV, *infra*. Directors cannot legally pay out money which is not owed. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 30 (1820). Directors should not use corporate funds to sue for a libel on themselves as directors; but where the stockholders were informed of the payment it will not be disturbed.

less a note given by an improvement company to adjust a contract by which it had agreed to give a right of way, terminals, and a bonus to a street railway may be enforced.[1] An improvement company having wide powers may give a part of its stock to a railway company, in order to have the road built to the property of the improvement company. A stockholder who has voted therefor cannot afterwards complain.[2] A street railroad may donate money to a baseball park.[3] And a land-improvement company may agree to pay one-third of the expense of a bridge in the public highway.[4] A bank has no power to make a donation to a paper mill.[5] The stockholder may enjoin any act on the part of the state which is in violation of the charter which it granted to the corporation. It was to enjoin a tax by the state under such circumstances that the case of Dodge *v.* Woolsey[6] arose.

Although a national bank buys bonds which it has no power

Studdert *v.* Grosvenor, L. R. 33 Ch. D. 528 (1886). The money of a city cannot be used to buy a gold chain for the mayor. Attorney-General *v.* Batley, 26 L. T. Rep. 392 (1872). Nor to give extra pay to a clerk. *Ex parte* Mellish, 8 L. T. Rep. 47 (1863). Nor can lodge funds be given to outside charitable purposes. Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861). Where a stockholders' meeting has recommended that a week's extra pay, as a gratuity to the workmen of a manufacturing corporation, be given, and the directors give it, a dissenting stockholder cannot hold the directors liable therefor. Hampson *v.* Price's, etc. Co., 45 L. J. (Ch.) 437 (1876); Clarke *v.* Imperial Gas Light & C. Co., 4 B. & Ad. 315 (1832), upholding a grant of an annuity to a disabled clerk. A bank may make a gift to the children of a deceased superintendent. Henderson *v.* Bank of Australasia, L. R. 40 Ch. D. 170 (1888). As against its creditors, a corporation cannot give away any part of its assets. Mason *v.* Fischer, etc. Co., 21 S. Rep. 5 (Miss., 1896).

[1] Llano Imp. etc. Co. *v.* Pacific Imp. Co., 66 Fed. Rep. 526 (1895).

[2] McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). A business corporation may donate money to secure the location of a postoffice near its place of business. B. S. Green Co. *v.* Blodgett, 159 Ill. 169 (1895).

[3] Temple, etc. R'y *v.* Hellman, 103 Cal. 634 (1894).

[4] Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294 (1894). The directors may regulate the rates and may give away free passes within reasonable limits. Hasson *v.* Venango Bridge Co., 1 Pa. Dist. 521 (1892).

[5] Robertson *v.* Buffalo, etc. Bank, 40 Neb. 235 (1894).

[6] 18 How. 331 (1855). Stockholders may enjoin the company from discounting paper usuriously and in a manner contrary to its charter, *i. e.*, without the paper being passed on by the directors. The injunction lies on the ground that the charter is endangered. Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857).

to buy, and agrees to sell them back to the vendor at a certain price, yet it cannot set up the plea of *ultra vires* when it is sued by the vendor for refusal to so resell.[1]

A corporation is liable on its agreement to give a percentage of its profits to a manufacturer of certain machinery, even though other corporations have also agreed to do the same.[2]

A savings bank and trust company cannot be held liable for losses on speculations in cotton, although it represented that its orders were for responsible customers.[3]

The contract of a railroad company not to oppose the passage of a law giving land to another corporation, the land to be divided subsequently, is illegal and not enforceable.[4]

After a land company has purchased a stock of goods and sold them, it cannot defeat an action for the price of the sale to it by the defense of *ultra vires*. The contract has been executed.[5]

A manufacturing corporation cannot enforce a contract of sale of oil to it, which it bought to resell.[6]

Where a manufacturing corporation enters into a contract with a municipality to build conduits, such contract is *ultra vires*, and for a breach thereof by the municipality before the contract is carried out the company cannot collect damages.[7]

Although an educational institution is operating a ferry without power so to do, yet, if a person is injured by the ferry, the institution is liable in damages.[8]

Where the lessee of a car-company plant repudiates the lease on the ground of *ultra vires* and refuses to pay rent, and the court holds that it cannot be compelled to pay rent, the lessor company may compel the lessee to pay for the property so taken, including the value of the contracts taken over.[9]

[1] Logan County Bank *v.* Townsend, 139 U. S. 67 (1891); S. C., 3 S. W. Rep. 122 (Ky., 1887).

[2] Good *v.* Daland, 121 N. Y. 1 (1890).

[3] Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135 (1890); S. C., 44 Hun, 412.

[4] Chippewa, etc. R'y *v.* Chicago, etc. R'y, 75 Wis. 224 (1889).

[5] Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890).

[6] Bosshardt, etc. Co. *v.* Crescent Oil Co., 171 Pa. St. 109 (1895).

[7] Safety, etc. Co. *v.* Baltimore, 74 Fed. Rep. 363 (1896).

[8] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893).

[9] In Pullman's P. C. Co. *v.* Central Transp. Co., 171 U. S. 138 (1898), the court held that, where a lease of property was *ultra vires* and void, the only compensation for the actual use would be for the tangible property, and not for the good-will, patents, and contracts which expired

A corporation receiving goods *ultra vires* to sell on commission is nevertheless liable for breach of contract as to the price of the sale.[1]

An iron and steel manufacturing company has no power to operate a public or private warehouse. Hence warehouse receipts issued by the corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.[2]

Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires*.[3]

A bank sued as bailee for a loss of a special deposit cannot set up *ultra vires*.[4]

A bank cashier cannot buy boots and shoes for another person in the name of the bank.[5]

A party with whom an iron company contracts to deliver ice cannot recover damages for a breach of the contract.[6]

A warehouse company will not be allowed to set up *ultra vires* as a defense to notes given by it in payment for grain, the articles of incorporation having provided therefor, although probably illegally so.[7]

A land company must pay for services rendered in organizing other companies to rent and locate on the land of the former.[8]

during the lease. Accordingly, where the stipulated rental was $264,000 a year, the lower court allowed for use the value of the capital stock of the lessor, inasmuch as such value had been consumed in connection with the lease, and such value was fixed at upwards of $2,500,000 and interest, but the supreme court reduced the compensation to $727,000 and interest, being the actual value of the tangible property.

[1] Union Hardware Co. *v.* Plume, etc. Co., 58 Conn. 219 (1889).

[2] Franklin Nat. Bank *v.* Whitehead, 49 N. E. Rep. 592 (Ind., 1898).

[3] Alexandria, etc. R. R. *v.* Johnson, 48 Pac. Rep. 847 (Kan., 1897).

[4] First Nat. Bank *v.* Strang, 138 Ill. 347 (1891).

[5] North Star, etc. Co. *v.* Stebbins, 2 S. D. 74 (1891).

[6] Simmons *v.* Troy Ironworks, 92 Ala. 427 (1890).

[7] Carson City Sav. Bank *v.* Carson City Elev. Co., 90 Mich. 550 (1892).

[8] Schurr *v.* New York, etc. Co., 18 N. Y. Supp. 454 (1892).

Many other examples and illustrations of *ultra vires* acts and *intra vires* acts are given in the notes hereto.[1]

Out of the various cases set forth in this chapter a few general rules may be clearly drawn and stated. First, there is no

[1] In Safety, etc. Co. *v.* Mayor, 74 Fed. Rep. 363, 370 (1896), the court said in regard to *ultra vires* acts: "It is evident that no general principle can be laid down whereby, with absolute certainty, it can be determined that many transactions are or are not among the incidents to the business of a corporation, authorized by its charter. The answer to the question must depend upon the facts of each particular case." See cases in § 909.

Federal Courts: See the cases at the end of this section. A national bank owning stock in a savings bank may defeat the statutory liability attached thereto by the plea of *ultra vires*. California Bank *v.* Kennedy, 167 U. S. 362 (1897). *Cf.* Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369 (1896), and Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 (1896). Notes given by a lumber manufacturing corporation to pay for stock in a bank cannot be enforced. Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); S. C., 23 Fed. Cas. 384. A corporation is presumed to have power to purchase a patent whose use pertains to the business indicated by the name of the corporation. Dorsey, etc. Co. *v.* Marsh, 6 Fish. Pat. Cas. 387 (1873); S. C., 7 Fed. Cas. 939. In Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. A national bank may agree that a person going security on an attachment bond will be protected by the bank, although the bond is not given for the benefit of the bank. Seeber *v.* Commercial Nat. Bank, 77 Fed. Rep. 957 (1897).

Alabama: A mining company is not liable for the price of goods which it purchases to carry on an *ultra vires* mercantile business. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889). Where a lime and limestone corporation engages in the mercantile business, it is not liable for the price of goods sold and delivered to it. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889).

California: Vandall *v.* South San Francisco Dock Co., 40 Cal. 83 (1870), holding that a corporation empowered to buy, *improve*, etc., real estate may appropriate a portion of its funds to a railroad in consideration of lower rates and more frequent trains. Where an improvement company engages in the hotel business, it cannot repudiate the liabilities of an innkeeper on the ground that the hotel business was beyond its powers. Magee *v.* Pacific Imp. Co., 98 Cal. 678 (1893).

Colorado: Minority stockholders may complain when the majority hold stockholders' meetings out of the state, keep no office or books in the state, appropriate treasury stock, etc. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894).

Dakota: A party who loans money to a corporation, knowing that the money is to be used by the company to buy shares of its own capital stock, cannot collect his debt, the act being *ultra vires*. Adams, etc. Co. *v.* Deyette, 8 S. D. 119 (1895).

Georgia: A bank which buys in a manufactory on an execution sale, in order to protect itself, may carry on the business and is liable for debts

clearly-defined principle of law that determines whether a particular act is *ultra vires* or *intra vires*. The courts are becoming more liberal, and many acts which fifty years ago would have been held to be *ultra vires* would now be held to

incurred thereby. Reynolds *v.* Simpson, 74 Ga. 454 (1885). A cotton ginning company cannot defend a note in *bona fide* hands, given by the company to purchase an ice machine, especially where there is no attempt to rescind. Towers, etc. Co. *v.* Inman, 96 Ga. 506 (1895). Where one corporation sells its property to another, and, after part payment is made, the president of the vendee turns back the property, but the vendee corporation sues for the return of the property, such vendee corporation cannot afterwards claim that the transaction was *ultra vires*. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329 (1896).

Illinois: A building corporation being sued for breach of its contract to keep property insured cannot set up that it had no power to insure. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453 (1872). A bank may establish a savings department and may pay interest on the savings deposits, and may assign in trust certain securities to secure such deposits. Ward *v.* Johnson, 95 Ill. 215 (1880). Having enjoyed the benefits of a contract, a corporation cannot refuse payment of the amount due on the plea of *ultra vires*. So held where a brewing company took a lease of a saloon. Heims Brewing Co. *v.* Flannery, 137 Ill. 309 (1891). Inasmuch as a national bank cannot transact business until authorized so to do by the comptroller of the currency, a lease made before such consent is void, and the only recovery can be for use and occupation. McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896).

Indiana: Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same. Wright *v.* Hughes, 119 Ind. 324 (1889).

Iowa: When the corporation sues on a contract assigned to it, its want of power to take the assignment must be proved by the defendant. Wardner, etc. Co. *v.* Jack, 82 Iowa, 435 (1891). Where the statute requires gas and electric-light franchises to be voted on by the people, an electric-light company is not liable in damages for failure to supply the number of lights called for by its contract with the city, where the people had not voted on the franchise. Even though the city had paid for lights furnished, this is the rule. Keokuk *v.* Ft. Wayne Elec. Co., 90 Iowa, 67 (1894).

Kansas: A town-site company may be liable for the contract of its general agent with a store-keeper guaranteeing that a railroad would be constructed to the town site within a certain time. Arkansas Valley, etc. Co. *v.* Lincoln, 56 Kan. 145 (1895).

Maryland: A contract by a packet company to pay for harbor improvements is *ultra vires* and not enforceable. Abbott *v.* Baltimore, etc. Co., 1 Md. Ch. 542 (1850).

Massachusetts: City Hotel *v.* Dickinson, 72 Mass. 586 (1856), holds that a hotel company may let a part of its building for shops. A ferry company having a surplus boat may rent it. Brown *v.* Winnisimmet Co., 93 Mass. 326 (1865). A company engaged in manufacturing and selling glass may purchase glass in order to keep up its stock. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass.

be *intra vires*. The courts have gradually enlarged the *implied* powers of ordinary corporations, until now such corporations may do almost anything that an individual may do, provided the state and the stockholders and creditors do not object.

315 (1873). In Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873), the sale by the company of surplus land, receiving in payment stock of the corporation itself, was upheld as against a dissenting stockholder's action. A bank which has bought in property on a foreclosure sale, with a secret agreement that it will hold the property in trust for certain purposes, cannot repudiate the trust on the ground that it is *ultra vires*. Whitney *v.* Leominster Sav. Bank, 141 Mass. 85 (1886). A manufacturing corporation which runs a store and sells goods may collect for goods thus sold, though the sales were made by its undisclosed agent. Slater Woollen Co. *v.* Lamb, 143 Mass. 420 (1887); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819). Stockholders cannot enjoin an *intra vires* act on the ground that it was promised that the corporation would not enter into that act. Converse *v.* Hood, 149 Mass. 471 (1889). Although the charter of a waterworks company limits the amount of property which it may hold, yet, if it holds a greater amount, a municipality cannot condemn the property on the basis of the charter limit. Only the state can object that the company holds more property than is allowed by law. West Springfield *v.* West Springfield Aqueduct Co., 167 Mass. 128 (1896).

Michigan: A person who has taken from a corporation an exclusive right to manufacture under a patent, and has so manufactured, cannot defeat an action for the royalties agreed upon for the goods already manufactured by alleging that the contract was *ultra vires*. Hall Mfg. Co. *v.* American, etc. Co., 48 Mich. 331 (1882). A person having sold and partly delivered an article to a corporation which the corporation had no right to purchase may refuse to complete delivery, and may sue for the part delivered. Day *v.* Spiral, etc. Co., 57 Mich. 146 (1885). A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres *v.* Dutton, 87 Mich. 528 (1891). A corporation that has purchased a judgment and collected it cannot refuse to pay the vendor of the judgment on the ground of *ultra vires*. Clement, etc. Co. *v.* Michigan, etc. Co., 68 N. W. Rep. 224 (Mich., 1896).

Minnesota: The admission that a contract was executed by a corporation is an admission that the corporation had power to make it, and the officer had power to sign it. Bausman *v.* Credit Guarantee Co., 47 Minn. 377 (1891).

Mississippi: A corporation may offer a reward for the detection of criminals who have committed a crime against it. Norwood, etc. Co. *v.* Andrews, 71 Miss. 641 (1894). Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires*. Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893).

Missouri: A coal mining and transporting corporation may purchase and use a steamboat for transporting coal. Callaway, etc. Co. *v.* Clark, 32 Mo. 305 (1862). A contract to convey land for purposes of speculation to a company in consideration of a cer-

In the case of railroads the courts are more strict. The public are interested in the acts and operations of railroads. Hence, ordinarily, the courts will not sustain the acts of railroads in selling, leasing, or mortgaging their property, or engaging in any

tain location of a railroad was held unenforceable as against public policy. Pacific R. R. *v.* Seely, 45 Mo. 212 (1870). See also § 650, *supra*. A private party seeking to enjoin a corporation from using public property which the city has leased to such corporation cannot set up that the lessee corporation is acting *ultra vires*. Only the state or the stockholders can raise that objection. Belcher, etc. Co. *v.* St. Louis, etc. Co., 101 Mo. 192 (1890). It is *ultra vires* for a bank to allow an overdraft. Market Street Bank *v.* Stump, 2 Mo. App. 545 (1876). A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person. McClintock *v.* Central Bank, etc., 24 S. W. Rep. 1052 (Mo., 1894). See, in general, 46 S. W. Rep. 593.

Montana: A corporation having a claim against another corporation may purchase a lien on the property of the latter corporation in order to protect its claim. Mahoney *v.* Butte Hardware Co., 48 Pac. Rep. 545 (Mont., 1897).

New Jersey: While it is true that a stockholder may enjoin his company from proceeding with its business, if the objects thereof have become unattainable or illegal, yet an unconstitutional statute in Indiana forbidding the piping of natural gas to places outside of the state does not justify the suit of a stockholder in a New Jersey construction company to enjoin his company from proceeding to construct a pipe line from Indiana to Chicago. Benedict *v.* Columbus Const. Co., 49 N. J. Eq. 23 (1891). A stockholder may enjoin the company from removing the plant from the state, where the charter provides for the manufacturing to be done in the state. Stickle *v.* Liberty, etc. Co., 32 Atl. Rep. 708 (N. J., 1895).

New York: It is within the power of a bank to receive special deposits of bonds, etc., for safe-keeping, gratuitously and for mere accommodation, and the bank is liable for their loss by gross negligence. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880). A corporation and stockholders agreed to turn over to defendant and others the control, but the latter were to account for rafts built. *Held*, they could not set up *ultra vires*. Each of the defendants is liable for all as to accounting. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884). A lock company sued for the price of locks sold to it by a company incorporated to manufacture fire-arms cannot defeat the suit by setting up that the latter corporation had no power to manufacture such articles. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875). One director may enjoin other directors from using corporate funds to buy liabilities of an insolvent competing concern for the purpose of suing thereon, and from paying money to prevent the rival concern getting its work done. Colles *v.* Trow, etc. Co., 11 Hun, 397 (1877). A manufacturing corporation selling a store with a guaranty of the continued patronage of its employees, or else a fixed sum as indemnity, is liable thereon. De Groff *v.* American Linen T. Co., 21 N. Y. 124 (1860). A smelting corporation may purchase smelting works. Moss *v.* Averell, 10 N. Y. 449 (1853). Persons who with a corporation jointly purchase property cannot defend against the price by alleging that it was *ultra vires* of the corpo-

outside business, unless the public assent through the legislature. But as to the ordinary private corporation the rules of *ultra vires* have been greatly relaxed.

Second, the decision in any particular case turns largely on

ration to purchase. State *v.* Woram, 6 Hill, 33 (1843). In Lafond *v.* Deems, 81 N. Y. 507 (1880), a voluntary benevolent association, having been compelled to hire more room than it needed, was held to have power to fit up and let the portion not required. Temple Grove Seminary *v.* Cramer, 98 N. Y. 131 (1885), holds that a seminary of learning may let its building as a boarding-house during the summer vacation. A rural cemetery company may sell a large number of its lots, although the vendee intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). Power to manufacture and sell goods does not give power to buy and sell goods. People *v.* Campbell, 144 N. Y. 166 (1894), a taxation case. A receiver of a savings bank may enforce a bond given to it by an individual agreeing to pay to the bank a certain sum if it would continue business, which the bank did. Hurd *v.* Green, 17 Hun, 327 (1879). A manufacturing corporation borrowing bonds in order to use them as collateral to a loan is liable to the owner for their return. Beckwith *v.* Rochester Iron, etc. Co., 12 N. Y. Week. Dig. 528 (1881). A brewing company may guarantee the rent of a saloon which uses its beer. Holm *v.* Claus, etc. Co., 21 N. Y. App. Div. 204 (1897). See also p. 1373, *sub.*

North Carolina: Gruber *v.* Washington, etc. R. R., 92 N. C. 1 (1885), holds that a lumber company, in providing transportation for its product, could, as incidental to its own business, carry the goods of others and also passengers.

Oregon: A hardware company is liable for lime purchased, even though it was not organized for the purpose of dealing in that commodity. *Re* Pendleton, etc. Co., 24 Oreg. 330 (1893).

Pennsylvania: A stockholder may enjoin his company from doing acts forbidden by statute. Sparhawk *v.* Union Pass. R'y, 54 Pa. St. 401, 452 (1867). A corporation with power to own land and promote settlement may build saw-mills and erect a hotel. Watts's Appeal, 78 Pa. St. 370 (1875). A corporation with power to manufacture and supply gas may deal in gas appliances. Malone *v.* Lancaster, etc. Co., 37 Atl. Rep. 932 (Pa., 1897).

Tennessee: A manufacturing company is liable for goods purchased by a store owned by it. Searight *v.* Payne, 6 Lea (Tenn.), 283 (1880), where an iron furnace company ran a store. Where an insurance company has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court said in a dictum that his remedy is a suit in disaffirmance and for an accounting. Miller *v.* Insurance Co., 92 Tenn. 167 (1893).

Texas: The maker of a note cannot set up that the payee corporation discounted it *ultra vires.* Logan *v.* Texas, etc. Assoc., 8 Tex. Civ. App. 490 (1894). Where a corporation has taken a lease of a wharf from a city, it cannot avoid the payment of rental, after using the premises, on the ground of *ultra vires.* Corpus Christi *v.* Central, etc. Co., 8 Tex. Civ. App. 94 (1894).

Vermont: A manufacturing company is liable for goods purchased

the questions of who is complaining; against whom the complaint is made; and what relief is sought. The stockholder's action is looked upon most favorably if he is not guilty of delay. But an action by the state to enjoin the act or to forfeit franchises is an unusual, extraordinary, and somewhat harsh remedy, and is not favored by the courts. So, also, an action by the corporation itself, or by the party contracted with, to repudiate an *ultra vires* act is not favored by the courts. Such an action is an attempt by a party to evade the contract by

by a store owned by it. Dauchy *v.* Brown, 24 Vt. 197 (1852). As regards the charter or corporate power to confer a degree, see Townshend *v.* Gray, 62 Vt. 373 (1890).

Washington: A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to obtain business. Wheeler, etc. Co. *v.* Everett Land Co., 14 Wash. 630 (1896).

Wisconsin: Where a river packet company purchases grain and pays partly therefor, it may recover back the money paid, but not damages for refusal of vendor to deliver. Northwestern, etc. Co. *v.* Shaw, 37 Wis. 655 (1875). A corporation formed to make and sell beer may guarantee the rent of a customer. Winterfield *v.* Cream City B. Co., 71 N. W. Rep. 101 (Wis., 1897).

England: A suit by a copper trading company for damages against a person who had refused to accept iron which he had agreed to purchase of the plaintiff fails. Copper Miners *v.* Fox, 16 Q. B. 229 (1851). In Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860), a lease by a hotel company of part of its building during its completion was held valid. A company formed to work a patent may purchase it. Leifchild's Case, L. R. 1 Eq. 231 (1865). Brokers employed by directors to sell property of the corporation cannot recover damages from the directors for a failure of sale, due to the vendee alleging that the directors had no power to sell, it being proved by the directors that they did have such power. Wilson *v.* Miers, 10 C. B. (N. S.) 348 (1861). Where a stockholder institutes a suit to remedy a wrong to the corporation, and while it is pending new directors are elected and they proceed to carry on the suit at the corporate expense, any dissenting stockholder may enjoin such use of the corporate funds. To allow it would be to prejudge the suit. Kernaghan *v.* Williams, L. R. 6 Eq. 228 (1868). The organization of a company to carry on the lottery business in foreign countries was held legal in Macnee *v.* Persian Corp., L. R. 44 Ch. D. 306 (1890). A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires.* Thomson *v.* Trustees, etc. Corp., [1895] 2 Ch. 454. Where a company has to give a bond, and the bond is given by a director, the company is liable to him. Southern Counties Dep. Bank *v.* Boaler, 73 L. T. Rep. 155 (1895).

Canada: A company receiving a deposit *ultra vires* is nevertheless bound to repay it. Walmsley *v.* Rent Guarantee Co., 29 Grant Ch. (Can.) 484 (1881).

means of principles of law which both parties have violated. The court is not swift to grant relief in such cases.

Third, if a contract or act is *ultra vires*, and has not yet been performed, either the corporation or the party contracted with may refuse to complete the contract. No damages can be collected for such refusal. So, also, if the contract has been partly performed, and the unperformed part is separable from the rest, either party may refuse to complete. But where one party has completely performed and carried out its part of the contract, the other party cannot retain the benefits of such performance and refuse to perform also.[1]

The courts differ widely in their decisions on the legality and enforceability of *ultra vires* contracts. The New York court of appeals, in a series of consistent and ably-reasoned decisions, has established the rule in that state that an *ultra vires* contract is enforceable if the stockholders have not objected and the creditors have not been injured.[2] The New York court says that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."[3]

[1] Speaking of *ultra vires* acts, the New York court of appeals said: "As artificial creations, they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, Is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong." Leslie *v.* Lorillard, 110 N. Y. 519 (1888). See also discussion in Camden, etc. R. R. *v.* May's Landing, etc. R. R., 48 N. J. L. 530 (1886); Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890); Oregon R'y, etc. Co. *v.* Oregonian R'y, 130 U. S. 1 (1889); Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889). "Every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 49 (1891).

[2] Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890); Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24, 29–34, 37 (1896), per Andrews, Ch. J., reviewing many cases, discussing the subject in an able and exhaustive manner, and holding that past-due rent may be recovered on an *ultra vires* lease.

[3] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333, 341 (1895).

Practically the same conclusion has been reached in Massachusetts[1] and Wisconsin.[2]

In the federal courts, on the contrary, the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurisprudence to relax on that subject finds no favor in the federal courts.[3]

§ 682. *Personal liability of the directors and officers for ultra vires acts.*— There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay

[1] Chief Justice Bigelow, in Brown *v.* Winnisimmet Co., 93 Mass. 326, 334 (1865), said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated." In Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893), the court said that an *ultra vires* contract not yet executed will not be enforced by the courts; but, "on the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong." The court, however, declined to pass upon this principle of law.

[2] The old rule of *ultra vires* has been changed so that now only the state or a party interested in the corporation can complain. Farwell Co. *v.* Wolf, 70 N. W. Rep. 289 (Wis., 1897).

[3] "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law." McCormick *v.* Market Bank, 165 U. S. 538, 549 (1897). See also the cases in the notes *supra*. In a dictum in Jacksonville, etc. R'y *v.* Hooper, 160 U. S. 514, 524 (1896), the court emphasized the statement that no estoppel or part performance can sustain a contract that is forbidden by a charter or is contrary to public policy. The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893).

away its money without authority, they will be required to make good the loss out of their private estates.[1] Directors and officers have been held personally liable for libel committed by the company;[2] for infringement of trade-mark;[3] for loaning money in violation of the charter;[4] for exacting illegal rebates from a railroad;[5] for false representations;[6] for borrowing in

[1] North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892), citing Thompson, Liab. Off. 375, § 16; Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381 (1869); *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882); Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829). See also the cases in § 702, *infra*.

[2] See § 15*b*, *supra*.

[3] The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark. They may be held liable so far as they took part in the infringement. Armstrong *v.* Savannah Soap Works, 53 Fed. Rep. 124 (1892); St. Louis Stamping Co. *v.* Quinby, 5 Ban. & Ard. 275 (1880); Goodyear *v.* Phelps, 3 Blatchf. 91 (1853); S. C., 10 Fed. Cas. 711; Smith *v.* Standard, etc. Co., 19 Fed. Rep. 826 (1883); Nichols *v.* Pearce, 7 Blatchf. 5 (1869); S. C., 18 Fed. Cas. 204. The directors and officers of a corporation which has infringed upon a patent cannot be held personally liable for the profits of such infringement. Mergenthaler, etc. Co. *v.* Ridder, 65 Fed. Rep. 853 (1895), reviewing the cases. A general agent of an infringing company is personally liable. Cramer *v.* Fry, 68 Fed. Rep. 201 (1895). A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified. Wilgus *v.* Germain, 72 Fed. Rep. 773 (1896). The officers, stockholders, and agents of a corporation may be enjoined from infringing a patent, even though the corporation itself is not within the jurisdiction of the court. Edison, etc. Co. *v.* Packard Elec. Co., 61 Fed. Rep. 1002 (1893), holding also that they are liable personally.

[4] See § 690, *infra*. A national bank may hold its officers liable for making loans to an individual in excess of ten per cent of the capital stock and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897). A stockholder in a bank may sue to compel the president to restore $45,000 which he caused the bank to loan without security, the money being used to pay a debt due to the president himself. Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

[5] Where a corporation secures a rebate from a railroad company, not only on shipments made by it, but on shipments made by other parties, the active agents of such corporation receiving such moneys may be held personally liable to other shippers for such money. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." Brundred *v.* Rice, 49 Ohio St. 640 (1892).

[6] See chs. IX and XX, *supra*. A

excess of the company's power;[1] for accepting bills without authority;[2] or contracting for the corporation when he had no authority so to do.[3] They are liable for maintaining a nuisance,[4] and for commencing business before being authorized so to do.[5] In an early and important case Chancellor Walworth sustained a stockholder's action to hold the corporate directors liable for corporate funds lost by speculation in the stocks of other corporations.[6] The directors may be liable for causing the railroad company to purchase the stock of another railroad company,

stockholder may hold the directors liable for false representations inducing him to loan money to the company where they told him that the company was solvent when in fact it was insolvent, and they knew it so to be. Kinkler *v.* Junica, 84 Tex. 116 (1892). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. Crowell *v.* Jackson, 53 N. J. L. 656 (1891). A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the Cotton Seed Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote as allowed by statute, although the director as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). For a complaint seeking to hold national-bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see Prescott *v.* Haughey, 65 Fed. Rep. 653 (1895). A depositor, suing the directors of a bank for false statements inducing him to deposit in a bank, must allege that but for such statements he would have withdrawn his deposit before the failure. Brady *v.* Evans, 78 Fed. Rep. 558 (1897). Where a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages. Rothmiller *v.* Stein, 143 N. Y. 581 (1894).

[1] See ch. XLVI, *infra*.

[2] See ch. XLVI, *infra*.

[3] An officer who signs the corporate name to a contract to bear part of the expense of a suit is personally liable therefor if he had no authority so to do. Solomon *v.* Penoyar, 89 Mich. 11 (1891). Officers incur no personal liability when avowedly contracting on behalf of the company. Beeson *v.* Lang, 85 Pa. St. 197 (1877).

[4] See § 15*b*, *supra*.

[5] Where the directors commence business before ten per cent of the capital is paid in, as required by statute, the directors are personally liable as agents transacting business without authority from the principal. Trust Co. *v.* Floyd, 47 Ohio St. 525 (1890). *Cf.* § 180, *supra*.

[6] Robinson *v.* Smith, 3 Paige, Ch. 222 (1832). See also Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Hardon *v.* Newton, 14 Blatchf. 376 (1878); S. C., 11 Fed. Cas. 500; Smith *v.* Rathbun, 22 Hun, 150 (1880); Land Credit Co. *v.* Fermoy, 17 W. R. 562 (1869), where the directors used corporate funds to "rig the market," *i. e.*, to purchase and thereby sustain the market price of the stock.

but the six years' statute of limitations is a bar to a stockholder's suit to hold them liable, no fraud being alleged.[1] The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable him to purchase the stock.[2]

Directors who knowingly authorize the issue of watered stock are liable therefor to the company.[3] Directors are not personally liable for damages due to negligence on the part of the corporation.[4] A director is not liable for failure to institute legal proceedings to set aside the *ultra vires* acts of other directors.[5] The directors of a national bank may be liable for money spent by the bank in operating a mill in which the bank had an interest.[6] Where the directors, upon an increase of the capital stock, issue a part of the stock for worthless notes, the directors, upon the bank becoming insolvent, are liable to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold.[7]

[1] Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

[2] Green *v.* Hedenberg, 159 Ill. 489 (1896). Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re* Brockway Mfg. Co., 89 Me. 121 (1896).

[3] London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893), the court saying, however, "If, acting fairly, honestly, and reasonably, directors mistake the legal powers of the company, they may not be made answerable; but if they in fact know, or with due care ought to have known, that the acts done are beyond the powers of the company, then, if they do those acts even in the honest belief of necessity in the interests of the company, they take the risk of the consequences." Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. Hirsche *v.* Sims, [1894] A. C. 654.

[4] Demarest *v.* Flack, 128 N. Y. 205 (1891). A director is not personally liable for the negligence of the corporation in the construction of a building where he did not personally take part, even though it is alleged that an incompetent man was put in charge. Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950 (1896). See also ch. XLIII, *infra*. The directors of an amusement company are not personally liable, although they are a committee having charge of the construction of a general stand that falls and injures a person. Van Antwerp *v.* Linton, 89 Hun, 417 (1895).

[5] *Re* Lands Allotment Co., [1894] 1 Ch. 616.

[6] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

[7] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

Where the directors of a business corporation accept paper for accommodation, they are personally liable for payments made or liabilities incurred on such paper.[1] Where an officer causes a manufacturing company to indorse, for accommodation, the note of a party, all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.[2] The directors are not personally liable for errors of judgment.[3] But the stockholders may sue the directors for gross mismanagement and for damages where fraudulent mortgages have been placed by them on the corporate property.[4] The president executing an ordinary guarantee in the name of the corporation without authority is personally liable thereon.[5] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[6] A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant.[7]

Various instances of the liability of directors and stockholders are given in the notes below.[8]

[1] Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893).

[2] Willard *v.* Holmes, 142 N. Y. 492 (1894).

[3] Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

[4] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[5] Nelligan *v.* Campbell, 20 N. Y. Supp. 234 (1892).

[6] Drew *v.* Longwell, 81 Hun, 144 (1894).

[7] Lamming *v.* Galusha, 81 Hun, 247 (1894), where it was also claimed that the incorporation had been insufficient.

[8] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. R'y, 151 U. S. 1 (1894). Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance $100,000 to the company as needed is *ultra vires* and unenforceable. Goss *v.* Peters, 98 Mich. 112 (1893). In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business — that being *ultra vires*. Lehman *v.* Knapp, 48 La. Ann. 1148 (1896). In Powell *v.* Murray, 3 N. Y. App. Div. 273 (1896), where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon, under the New York statute, as not being paid-up stock, such contract

But directors are not liable for honest mistakes as to the legal extent of their authority;[1] nor are they liable to the company for an *ultra vires* act which the company has ratified.[2] They may be liable where the corporation is but a "dummy," organized for a fraudulent purpose.[3] But one director is not liable for the others.[4]

being *ultra vires*. An officer of a construction company who induces a party to buy stock owned by the company is not personally liable on the contract of the company to allow interest on instalments paid on such stock in advance. Hetfield *v.* Addicks, 154 Pa. St. 1 (1893). Where the statute renders the officers and stockholders of a foreign corporation liable for doing business in the state without filing a certificate, this does not prevent the company from suing on contracts. The courts will not extend the penalty. Kindel *v.* Beck, etc. Co., 19 Colo. 310 (1893), stating also that a statute which should restrict the right of a foreign corporation to deliver in the state goods manufactured by the company out of the state would be unconstitutional. Where an insolvent corporation turns over all its property to a new corporation formed for that purpose, and the new corporation turns over a portion of its assets to one of the directors of the old corporation without consideration, a creditor of the old corporation may hold the directors personally liable. South Bend, etc. Co. *v.* George, etc. Co., 72 N. W. Rep. 749 (Wis., 1897).

[1] Beattie *v.* Ebury, L. R. 7 Ch. 777 (1872), and L. R. 7 H. L. 102. See also § 702, *infra*.

[2] "When the directors and officers of a corporation engage in *ultra vires* transactions, and thus cause damage to the corporation, they may be jointly and severally liable for such damage; and when sued for such damage, a subordinate officer cannot establish an absolute defense by showing that his transactions were assented to or even directed by the directors. Directors and officers of corporations are agents of the corporation for which they act, and for their unauthorized transactions they may be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts. But . . . when the officers of a corporation engage in an *ultra vires* business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, though illegally, becomes the business of the corporation, it cannot maintain an action against such officers for any damages it has suffered in such business. In other words, a corporation engaged in an *ultra vires* business cannot sue, for damages suffered therein, the agents it employs to carry on the business. The agent of the corporation in such a case would be protected just as the agent of a copartnership would be protected who did business with the express or implied consent of the copartners, which was not authorized by the articles of copartnership." Holmes *v.* Willard, 125 N. Y. 75, 79, 81 (1890).

[3] See §§ 663, 664, *supra*.

[4] Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something

A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation, and the company becomes insolvent.[1]

When a contract is made for the corporation, and this fact appears in the contract, but the officer or agent signs the contract, not in the corporate name, but in his own name, he is generally not liable on such contract; but in some instances he has been held liable.[2] Where an officer or agent of a corporation has been instrumental in causing the corporation to commit trespass or any other tort, then such director or officer is personally liable therefor.[3] The president of an insurance company which has not complied with the law authorizing its organization is liable to policy-holders for false representations to them by the insurance agents that the company had so complied.[4] The president of a corporation obtaining credit for the corporation by false representations is liable personally therefor, and is liable to arrest.[5] A stockholder who is also general manager of a newspaper corporation is not liable criminally for its criminal advertisement of an illegal lottery, unless he had actual knowledge or notice thereof.[6] An officer is liable who directs a negro to be excluded from the company's omni-

to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other shareholder. In this respect directors are like promoters, each being answerable for his own acts, and for the acts of the others so far as he has made them his agents, but no further. Brown *v.* Byers, 16 M. & W. 252 (1847); Heraud *v.* Leaf, 5 C. B. 157 (1847); Bramah *v.* Roberts, 3 Bing. N. Cas. 963 (1837); Londesborough's Case, 4 De G., M. & G. 411 (1854); Walker's Case, 8 De G., M. & G. 607 (1856). See also Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877); Weir *v.* Bell, L. R. 3 Exch. 238 (1878); Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878).

[1] Pierson *v.* Cronk, 13 N. Y. Supp. 845 (1890). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason *v.* Cronk, 125 N. Y. 496 (1891).

[2] See ch. XLIII, § 724, *infra*.

[3] This subject belongs more properly to treatises on agency and on torts. An agent is liable for aiding the corporation in perpetrating a breach of trust. Attorney-General *v.* Leicester, 7 Beav. 176 (1844).

[4] Belding *v.* Floyd, 17 Hun, 208 (1879).

[5] Phillips *v.* Wortendyke, 31 Hun, 192 (1883).

[6] People *v.* England, 27 Hun, 139 (1882). See also Green's Brice's Ultra Vires, p. 765.

bus;[1] or who takes part in an assault;[2] or who carries on a malicious prosecution.[3]

Where the corporation has power to do a certain act, but does not authorize a person or officer to do that act, then the person or officer doing such act is liable personally therefor. He is liable as an unauthorized agent.[4]

If the corporation had no charter power to do the act in question, a more difficult question arises. In England it seems that the officer or agent is not liable to the third person.[5] In America he is liable to the company for money so lost.[6] Although the certificate of incorporation fixes the amount of debts which the corporation may incur, yet the directors are not liable for an excess of that amount.[7]

[1] Peck *v.* Cooper, 112 Ill. 192 (1884); 54 Am. Rep. 231.

[2] Brokaw *v.* New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867); Hewett *v.* Swift, 85 Mass. 420 (1862); Moore *v.* Fitchburg R. R., 70 Mass. 465 (1855).

[3] Hussey *v.* Norfolk Southern R. R., 98 N. C. 34 (1887).

[4] If two directors without authority order a bank to honor the checks of the manager of their corporation and he overdraws, they are personally liable for the overdrafts. Cherry *v.* Colonial Bank, L. R. 3 P. C. 24 (1869). But see Beattie *v.* Ebury, L. R. 7 H. L. 102 (1874), aff'g L. R. 7 Ch. App. 777, and rev'g L. R. 7 Ch. App. 788, n. When the president of the bank, without authority from the directors, sells $6,000 of the bank's paper for $5,500, he is liable to the bank for $500 — the real loss. First Nat. Bank *v.* Lucas, 21 Neb. 280 (1887). But a corporate agent executing a security in the corporate name without authority is not guilty of forgery under the New York statute. Mann *v.* People, 15 Hun, 155 (1878); aff'd, People *v.* Mann, 75 N. Y. 484. He is liable, however, in a civil action. See also Underhill *v.* Gibson, 2 N. H. 352 (1821); Weare *v.* Gove, 44 N. H. 196 (1862). As to the liability of officers for trespass, etc., see Thompson, Liab. Officers, p. 489.

[5] Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876). But see West, etc. Bank *v.* Kitson, L. R. 13 Q. B. D. 360 (1884), where a note was issued; Nicholls *v.* Diamond, 9 Exch. 154 (1853), where an acceptance was made. The secretary is not liable for a representation as to the power of the company to issue debentures which had been issued. Rashdall *v.* Ford, L. R. 2 Eq. 750 (1866). Directors issuing debentures in excess of the amount allowed by statute are personally liable thereon. Weeks *v.* Propert, L. R. 8 C. P. 427 (1873). As to liability of directors to the company for losses due to their *ultra vires* acts, see *Re* Faure, etc. Co., L. R. 40 Ch. D. 141 (1888). See 6 R'y & Corp. L. J. 78.

[6] Austin *v.* Daniels, 4 Denio, 299 (1847), where stock was purchased by the company. See also Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829), and cases in chs. XXXIX, XL, *supra*, and ch. XLII, *infra*. A director is liable for money used, *ultra vires*, to buy land. Grimes *v.* Harrison, 26 Beav. 435 (1859).

[7] Frost Mfg. Co. *v.* Foster, 76 Iowa, 535 (1889). *Cf.* §§ 685–688, *infra*.

CHAPTER XLI.

INTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS.

§ 683. *Intra vires* acts as distinguished from *ultra vires* acts.

684. The discretion of the directors or the majority of the stockholders as to acts *intra vires* cannot be questioned by single stockholders unless fraud is involved.

685-689. Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.

690. Loans generally cannot be made by corporations—Statutes — Mortgages — Usury.

691. Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments — Preferences by way of mortgages, etc.

§ 692. Preferences and assignments by insolvent corporations to directors, officers, or stockholders—Loans by directors to the corporation — Mortgages by corporations to directors.

693. Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.

694. Land may be purchased by a domestic corporation.

695. Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.

696. Foreign corporations — Their right to do business in the various states.

697-700. Foreign corporations — Restrictions upon their right to do business.

§ 683. *Intra vires acts as distinguished from ultra vires acts.*— An *ultra vires* act, as already explained, is an act beyond the express and implied powers of the corporation. An *intra vires* act, on the contrary, is one which is within the express or implied powers either of the board of directors or of the majority of the stockholders in meeting assembled. *Intra vires* acts are frequently spoken of as matters concerning the "internal management" of the corporation. Much confusion has arisen concerning these acts, owing to a failure to recognize clearly the fact that an act is *intra vires* of a corporation if it can be legally carried out *either* by the directors or by the majority of the stockholders. Thus, a stockholder frequently brings suit to enjoin or set aside an act which the majority have power to do, but which the directors have done without power. It is clear that a dissenting stockholder has

no right to carry such a matter into the courts unless the majority are with him, since, if the majority approve of the directors' acts, this amounts to a ratification of the same.

In short, there are three classes of corporate acts herein. First, the stockholder may bring suit to remedy an act which is *ultra vires*, or beyond the powers of both the majority of the stockholders and of the directors.[1] Second, as to acts within the power of the majority, but beyond the power of the directors, a stockholder may sue to enjoin or set them aside when the directors have performed them, and the majority refuse to confirm their action.[2] As to such acts the stockholder cannot sue if the majority confirm the directors in their performance. Third, as to acts within the powers of the directors and performed by them, or within the powers of the majority and performed by the majority, the stockholders cannot complain that they are *ultra vires*. The second and third classes of acts are *intra vires* of the corporation. They are matters of internal arrangement or management, and cannot be controlled or objected to by a minority stockholder, except as stated above.[3] The question of what *intra vires* acts are to be performed by the directors, and what ones can be exercised only by the majority of the stockholders in meeting assembled, is considered elsewhere.[4]

§ 684. *The discretion of the directors or the majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved.*[5]— This proposition of law is clearly, firmly, and very properly established beyond

[1] Chapter XL, *supra*, treats of this subject. See also § 740, *infra*.

[2] Exeter, etc. R'y *v.* Buller, 11 Jur., Part I, 527, 532 (1847), holding also that where such an action has been instituted it will not be defeated by the fact that subsequently the directors obtain control of a majority of the votes. But there must be clear proof that the majority refuse to confirm. Thus, in Bagshaw *v.* Eastern Union R'y, 7 Hare, 114 (1849), the court says that Foss *v.* Harbottle, 2 Hare, 461 (1843), decides "that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), and § 662, *supra*.

[3] See note 5 below.

[4] See ch. XLIII, *infra*.

[5] Quoted and approved in McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). "Questions of policy of management,

any question. Were the rule otherwise there would be no safety or possibility of carrying on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of business. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. Such also is the rule with the majority of

of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891). Thus, in Bloxam *v.* Metropolitan R'y, L. R. 3 Ch. App. 337 (1868), the court said: "The matters of internal arrangement which are beyond the province of the court were properly admitted to be such as are within the scope of the company's powers." And in Camblos *v.* Philadelphia, etc. R. R., 4 Brewst. 563, 591 (1873); S. C., 4 Fed. Cas. 1089, the court said: "So long as those who manage the corporation keep within the limits of its charter, and commit or propose to commit no breach of their trust, he has no right to complain." In Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880), it was said: "A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires*." In Bach *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 373 (1872), the court said: "No case can be found where the general management of corporate property has been subject to the restrictions of judicial power, unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers." In this case the stockholder objected to the securities in which the corporate funds were being invested. In Walker *v.* Mad River, etc. R. R., 8 Ohio, 38 (1837), it was said by the court: "When acts requiring judgment, science, and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed." See also Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71 (1880). In Ramsey *v.* Erie R'y, 7 Abb. Pr. (N. S.) 156 (1869), it is said: "When directors are only unwise, or merely extravagant or improvident, or slightly negligent, or merely misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places." In Bailey *v.* Birkenhead, etc. R'y, 12 Beav. 433 (1850), where a stockholder sought to restrain a call as being unnecessary, the court refused to entertain the suit, and said that it was not for the court "to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings." See also Edwards *v.* Shrewsbury, etc. R'y, 2 De G. & Sm. 537 (1849); also § 750, *infra*.

the stockholders in meeting assembled. An act *intra vires* and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act.[1] Thus, a stockholder has no remedy for the mere inefficiency of a director, except to turn him out at the next election of the corporation. Having once been elected, a director is entitled to retain his position, even though he is grossly inefficient. He cannot be removed from his position.[2] But where there are violent internal dissensions in a corporation, and two sets of officers are attempting to act, and the corporate property is endangered, a court of equity will interfere to the extent of preserving the corporate property by a temporary receiver.[3] A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders can show that sound business discretion and judgment would dictate a different policy.[4] The question of whether a suit by a corporation shall be brought or not is entirely within the discretion of the directors, in the absence of fraud.[5]

§§ 685–689. *Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.*—These subjects are fully considered elsewhere.[6]

§ 690. *Loans by a corporation, and statutes forbidding loans or forbidding the taking of notes or mortgages—Usury.*—A corporation cannot make loans of money unless its regular

[1] Quoted and approved in Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

[2] See § 711, *infra*.

[3] Trade Auxiliary Co. *v.* Vickers, L. R. 16 Eq. 303 (1873); Featherstone *v.* Cooke, L. R. 16 Eq. 298, 303 (1873), the court saying: "The court will not interfere with the internal affairs of joint-stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." See also Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829); and § 746, *infra*.

[4] Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848), the court saying: "The question of expediency, of practicability, of extravagance, or of prudent economy, must be left to be decided by the managers and the corporators." A stockholder may object to corporate acts and contracts which are fraudulent or *ultra vires* or *mala in se*. But all other acts he can correct only by the election of new directors. Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

[5] See § 750, *infra*.

[6] See ch. XLVI, *infra*.

business ordinarily involves loaning. In most cases the business of a corporation is to invest and use its capital, and not to loan it out. Accordingly, it is well settled that only where the business of the corporation is such as usually involves loaning does the corporation have the right to loan its funds.[1] If not prohibited by statute, a corporation may receive and sell notes or acceptances, if this is naturally connected with its business.[2]

[1] 1 Daniel, Neg. Inst., § 384. It is legal, however, for a loan and trust company to loan money and take a mortgage as security. Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339 (1846); Farmers' L. & T. Co. *v.* Clowes, 3 N. Y. 470 (1850). A plank-road company may loan its funds to a contractor who is constructing the road. Dictum in Madison, etc. Co. *v.* Watertown, etc. Co., 5 Wis. 173 (1856). A benevolent association may loan its funds. Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37 (1871). A national bank may purchase notes as well as discount them. National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Attleborough Nat. Bank *v.* Rogers, 125 Mass. 339 (1878). The discounting of a note by a cement corporation contrary to law, done through the president, is presumed to have been his act and not that of the corporation. Lawrenceville Cement Co. *v.* Parker, 10 N. Y. Supp. 831 (1890). The fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891). A deposit by a bank in a bank renders the latter liable therefor, though the deposit is made to enable the president of the latter to use it. Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. Rep. 186 (1884).

[2] White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601 (1861); Western Cottage Organ Co. *v.* Reddish, 51 Iowa, 55 (1879); Pratt *v.* Short, 79 N. Y. 437 (1880); Clark *v.* Titcomb, 42 Barb. 122 (1864); Buckley *v.* Briggs, 30 Mo. 452 (1860), where it was held that a corporation, though prohibited from dealing in commercial paper, could receive and sell notes given for the sale of its lands; McIntire *v.* Preston, 10 Ill. 48 (1848). And a note received by a corporation will be presumed to have been taken in the course of business. Lucas *v.* Pitney, 27 N. J. L. 221 (1858); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Frye *v.* Tucker, 24 Ill. 180 (1860); Potter *v.* Bank of Ithaca, 5 Hill, 490, 7 Hill, 530 (1844); Suydam *v.* Morris Canal, etc. Co., 6 Hill, 217 (1843); Talman *v.* Rochester City Bank, 18 Barb. 123 (1854); Gee *v.* Alabama, etc. Co., 13 Ala. (N. S.) 579 (1848); Bates *v.* Bank of State, 2 Ala. (N. S.) 451 (1841); Smith *v.* Mississippi, etc. R. R., 14 Miss. 179 (1846); Portland Bank *v.* Storer, 7 Mass. 433 (1811); Northampton Bank *v.* Allen, 10 Mass. 284 (1813); Fleckner *v.* Bank of U. S., 8 Wheat. 338 (1823); Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326 (1827); Payne *v.* Baldwin, 11 Miss. 661 (1844); rev'd, Baldwin *v.* Payne, 6 How. 332 (1848); Akin *v.* Blanchard, 32 Barb. 527 (1860). An insurance company cannot purchase a note for purposes of a set-off. Set-off defeated. Straus *v.* Eagle Ins. Co., 5 Ohio St. 59 (1855).

But unless specially authorized they cannot make a business of discounting,[1] nor engage in a banking business.[2]

A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no authority to make the loan. He must pay back the money borrowed.[3]

Although a statute or charter forbids a corporation from loaning more than a certain amount of money, yet although it actually has loaned more than that amount the borrower cannot avoid payment of any part of the loan.[4] Although a statute re-

[1] New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824). In Mitchell *v.* Rome R. R., 17 Ga. 574 (1855), it was held that where power is given to "make contracts," a note taken by a corporation is *prima facie* evidence of an authorized contract.

[2] State *v.* Granville, etc. Soc., 11 Ohio, 1 (1841); State *v.* Washington Social Lib. Co., 11 Ohio, 96 (1841); *Re* Ohio Life, etc. Co., 9 Ohio, 291 (1839); Blair *v.* Perpetual Ins. Co., 10 Mo. 559 (1847); Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); S. C., 23 Fed. Cas. 384. See also Central R. R. *v.* Collins, 40 Ga. 582 (1869), and Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299 (1838).

[3] Gorrell *v.* Home Life Ins. Co., 63 Fed. Rep. 371 (1894); Head *v.* Cleburne, etc. Assoc., 25 S. W. Rep. 810 (Tex., 1893); Steam Nav. Co. *v.* Weed, 17 Barb. 378, 382, 384 (1853); Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620 (1863); Mott *v.* U. S. Trust Co., 19 Barb. 568 (1855); Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357 (1880), the court saying: "The law may have its reproaches, but this is not one of them." A person making a note to a corporation cannot defeat it by the defense that the company had no power to loan money. Bond *v.* Terrell, etc. Co., 82 Tex. 309 (1891). In Alabama the borrower of the money from the corporation may escape payment. Alabama Grand Lodge *v.* Waddill, 36 Ala. 313 (1860); Chambers *v.* Falkner, 65 Ala. 443 (1880), where Masonic lodges had loaned money. See also dictum in Beach *v.* Fulton Bank, 3 Wend. 573 (1829), where an insurance company made a loan; also the decision in Life & F. Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. 31 (1831), denying the right of an insurance company to recover an unsecured loan where its charter authorized loans on bond and mortgage. See also New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560 (1825), where, however, the loan was expressly prohibited. In Waddill *v.* Alabama, etc. R. R., 35 Ala. 323 (1859), an unauthorized loan by a railroad was enforced on the ground that the railroad president made the loan without authority from the directors.

[4] Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). See also Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); National Bank *v.* Matthews, 98 U. S. 621 (1878); Bly *v.* Second Nat. Bank, 79 Pa. St. 453 (1875); Allen *v.* First Nat. Bank, 23 Ohio St. 97 (1872); Stewart *v.* National Union Bank, 2 Abb. (U. S.) 424 (1869); S. C., 23 Fed. Cas. 68, holding that though the loan may be recovered the franchise of the bank may be forfeited. To same effect, Shoemaker *v.* National Mechanics' Bank, 2 Abb. (U. S.) 416 (1869); S. C., 21 Fed. Cas. 1331; and Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531 (1872); Elder *v.* First Nat. Bank, 12 Kan. 238 (1873), holding that a bor-

quires a bank to loan on bond and mortgage, yet it may recover loans made on drafts or notes.[1] Where directors loan money in violation of the statute, they are liable personally therefor.[2]

A statute which prohibits corporations from discounting notes or bills unless expressly authorized so to do prevents the corporation from collecting a note taken in violation thereof;[3]

rower cannot restrain a national bank from negotiating such securities nor compel their return; O'Hare *v.* Second Nat. Bank, 77 Pa. St. 96 (1874), holding that an accidental excess does not make the loan void. Although the statute forbids loans to directors, yet a loan so made is collectible, and securities pledged by the director are subject to the loan, though they were fraudulently obtained by him from others. Bowditch *v.* New England, etc. Ins. Co., 141 Mass. 292 (1886). Where the president causes the corporation to loan him money, in direct violation of the statute, he may be sued for the conversion thereof, although his collateral security has been sold and the whole transaction ratified by the directors. A. C. Nellis Co. *v.* Nellis, 62 Hun, 63 (1891).

[1] Allen *v.* Freedman's Sav. etc. Co., 14 Fla. 418 (1874); Mott *v.* U. S. Trust Co., 19 Barb. 568 (1855); Little *v.* O'Brien, 9 Mass. 423 (1812); Mutual Life Ins. Co. *v.* Wilcox, 8 Biss. 203 (1878); S. C., 17 Fed. Cas. 1081; Davis S. M. Co. *v.* Best, 30 Hun, 638 (1883). A loan for two years, instead of one as allowed by statute, is nevertheless enforceable. Germantown, etc. Ins. Co. *v.* Dhein, 43 Wis. 420 (1877). A loan is collectible though for a longer time than allowed, and without the required security, and in excess of the amount allowed by statute. Bond *v.* Central Bank, 2 Ga. 92 (1847).

[2] Thompson *v.* Greeley, 107 Mo. 577 (1891); Dodd *v.* Wilkinson, 42 N. J. Eq. 647 (1887); Williams *v.* McDonald, 42 N. J. Eq. 392 (1886). The treasurer and manager, turning in to the corporation a mortgage not worth double the debt owed by him to the corporation, is liable for any loss. Williams *v.* Riley, 34 N. J. Eq. 398 (1881). The case of Williams *v.* McKay, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made instruments contrary to the by-laws, charter, and statutes. See also § 682, *supra*.

[3] New York, etc. Co. *v.* Helmer, 77 N. Y. 64 (1879), applying the New York act against unauthorized banking; Tracy *v.* Talmage, 14 N. Y. 162 (1856); Talmage *v.* Pell, 7 N. Y. 328 (1852); Weed *v.* Snow, 3 McLean, 265 (1843); S. C., 29 Fed. Cas. 572; Leavitt *v.* Palmer, 3 N. Y. 19 (1849) (a certificate of deposit), and Hayden *v.* Davis, 3 McLean, 276 (1843); S. C., 11 Fed. Cas. 898 (an acceptance); Swift *v.* Beers, 3 Denio, 70 (1846); Tylee *v.* Yates, 3 Barb. 222 (1848), holding also that an assignment of securities for their payment is also void, and transfers no title to the assignees; White *v.* Franklin Bank, 39 Mass. 181 (1839), holding that, while a time deposit is within the prohibition, the money may be recovered in an action brought before the time has expired. See also Slark *v.* Highgate Archway Co., 5 Taunt. 792 (1814); Wigan *v.* Fowler, 1 Starkie, 459 (1816); Broughton *v.* Manchester, etc. Water-works, 3 B. & Ald. 1 (1819); Dockery *v.* Miller, 9 Humph. (Tenn.) 731 (1849); Ohio Life, etc. Co. *v.* Merchants' Ins. etc. Co., 11 Humph. (Tenn.) 1 (1850); Root

but this does not prevent the corporation from collecting the amount due. It may disregard the note and sue on the loan itself.[1]

v. Wallace, 4 McLean, 8 (1845); S. C., 20 Fed. Cas. 1167, holding that an indorsee may recover from the indorser of a note void for this illegality the consideration paid for it; State *v.* Urbana, etc. Co., 14 Ohio, 6 (1846), holding that receiving a deposit of money is not a violation of a charter restriction upon the exercise of banking powers; New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560 (1825), where a corporation was not allowed to recover upon a note because its charter prohibited it from doing a banking business; Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339 (1846), and Green *v.* Seymour, 3 Sandf. Ch. 285 (1846), where the same principle was applied to mortgages issued in violation of statutory prohibition; Safford *v.* Wyckoff, 4 Hill, 442 (1842), holding also that if the form and appearance of the notes indicate that they were intended to be circulated as money, one who takes them, being thereby put upon his inquiry, is not a *bona fide* holder and cannot recover upon them. To same effect, Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842); Mumford *v.* American, etc. Co., 4 N. Y. 463 (1851), holding that a certificate of deposit is not included in such a prohibition; Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843), holding also that a trust deed given to secure such notes was also void; Hazleton Coal Co. *v.* Megargel, 4 Pa. St. 324 (1846), holding that the statute cannot be avoided by issuing a document which is in effect, though not in form, a note; Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Utica Ins. Co. *v.* Scott, 19 Johns. 1 (1821); Montgomery Branch Bank *v.* Crocheron, 5 Ala. N. S. 250 (1843), holding that the bills of a corporation which is prohibited from issuing them cannot be rendered legal by being issued by a bank under a contract with the corporation; Sackett's Harbor Bank *v.* Codd, 18 N. Y. 240 (1858), holding that a statute prohibiting the circulation of foreign bank notes does not prevent their sale and delivery for any other purpose. Payment of a debt by a draft which is prohibited by statute is not payment, the draft not having been paid. Davis *v.* River Raisin Bank, 4 McLean, 387 (1848); S. C., 7 Fed. Cas. 111. A charter provision that no director or officer should borrow from the bank does not apply to loans to a firm of which the director is a member. Fisher *v.* Murdock, 13 Hun, 485 (1878). A deposit made with a corporation which is prohibited by statute from doing a banking business is presumed to have been a loan, and in any case is recoverable back in an action for money had and received. Chapman *v.* Comstock, 58 Hun, 325 (1890).

[1] Oneida Bank *v.* Ontario Bank, 21 N. Y. 490 (1860); Pratt *v.* Short, 79 N. Y. 437 (1880), reviewing New York cases; Davis S. M. Co. *v.* Best, 30 Hun, 638 (1883); Mills *v.* Western Bank, 64 Mass. 22 (1852); Webb *v.* Herne Bay Com'rs, L. R. 5 Q. B. 642 (1870). Compare Faneuil Hall Bank *v.* Bank of Brighton, 82 Mass. 534 (1860), and Western Bank *v.* Mills, 61 Mass. 539 (1851); Utica Ins. Co. *v.* Kip, 8 Cow. 20 (1827); Utica Ins. Co. *v.* Cadwell, 3 Wend. 296 (1829), and Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652 (1830); Planters' Bank *v.* Union Bank, 16 Wall. 483 (1872), holding that, when an illegal contract has been fully executed, the money constituting the price for it may be looked upon as a legal consideration for an express or implied promise.

But where the statute prohibits not only the enforcement of the note, but also the enforcement of any contract, express or implied, growing out of the transaction, then the corporation loses the money loaned. Any corporation, unless expressly prohibited, has power to take a mortgage as security for a debt contracted in the course of its business.[2]

To same effect, Cook *v.* Sherman, 20 Fed. Rep. 167 (1882); Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460 (1882), holding that a note given by a director for a loan in excess of the amount limited by charter is void so far as to release a guarantor upon it; Farmington Sav. Bank *v.* Fall, 71 Me. 49 (1880), holding that a prohibition against lending money on the security of names only is merely directory, and a note so secured may be collected. To same effect, National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); U. S. Trust Co. *v.* Brady, 20 Barb. 119 (1855); Vanatta *v.* State Bank, 9 Ohio St. 27 (1858); Union, etc. Ins. Co. *v.* Keyser, 32 N. H. 313 (1855), where a note given for insurance upon property in one class, when by law it was insurable only in another class, was held valid; McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847), where a bond owned by an insurance company was held to have been taken as an investment in default of proof of consideration; Marion Sav. Bank *v.* Dunkin, 54 Ala. 471 (1875), holding that an accommodation drawer of a bill, who did not at the time know it was discounted by a bank in violation of law, may defend by showing that the bank was not properly organized; Brown *v.* Killian, 11 Ind. 449 (1858), holding that notes in similitude of bank-notes are void, even the issuers not being liable upon them, but any consideration paid for them may be recovered back; White *v.* Franklin Bank, 39 Mass. 181 (1839), holding that money deposited in a savings bank in violation of a statute may be recovered; Lester *v.* Howard Bank, 33 Md. 558 (1870), where a director who borrowed money from a bank in violation of its charter was held liable for the money; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839), where the original debt was validly incurred, but a subsequent note taken by the corporation was illegal; Pratt *v.* Eaton, 79 N. Y. 449 (1880), where notes secured by a mortgage were held void, but the mortgage valid; People *v.* Brewster, 4 Wend. 498 (1830), holding that prohibiting the carrying on of a banking business does not prevent lending money upon notes, if it is not done as a business; Otis *v.* Harrison, 36 Barb. 210 (1862); Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854).

[1] New Hope, etc. Co. *v.* Poughkeepsie Silk Co., 25 Wend. 648 (1841).

[2] State *v.* Rice, 65 Ala. 83 (1880); National Bank *v.* Insurance Co., 41 Ohio St. 1 (1884); Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411 (1824). holding that a power to take mortgages in the course of business confers the power to commute debts really due for land; Bank of Michigan *v.* Niles, 1 Doug. (Mich.) 401 (1844), holding that power to hold lands and take mortgages for business purposes does not confer the right to deal in lands; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (1879), holding that a corporation not authorized to take land as original investment may take a mortgage on land in a foreign state as additional security; Clark *v.* Farrington, 11 Wis. 306 (1860). Sections 5136 and 5137 of the United States Revised Statutes do not prevent a na-

Although a corporation is prohibited by its charter from taking a real-estate mortgage as security for a debt, nevertheless the mortgage, after it has been taken, may be enforced by the corporation. The penalty is that the state may forfeit the corporate charter for misuser.[1] The laws concerning usury are enforced against corporations as fully as against individuals,[2]

tional bank from enforcing the collection of a note secured by a mortgage of land by a foreclosure of the mortgage. National Bank *v.* Matthews, 98 U. S. 621 (1878); Palmer *v.* Lawrence, 3 Sandf. Super. 161 (1849); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114 (1839); Mapes *v.* Scott, 94 Ill. 379 (1880), holding that national banks may take conveyances of land in payment of pre-existing debts. A national bank may enforce a mortgage securing future indebtedness. National Bank *v.* Whitney, 103 U. S. 99 (1880); Simons *v.* First Nat. Bank, 93 N. Y. 269 (1883). The case of U. S. Mortgage Co. *v.* Gross, 93 Ill. 483 (1879), to the effect that foreign corporations for loaning on mortgages could not take mortgages in Illinois, inasmuch as no domestic corporation could be organized for that purpose, was overruled by Stevens *v.* Pratt, 101 Ill. 206 (1882), and Commercial, etc. Co. *v.* Scammon, 102 Ill. 46 (1882). A foreign corporation may foreclose a mortgage. American, etc. Ins. Co. *v.* Owen, 81 Mass. 491 (1860).

[1] National Bank *v.* Whitney, 103 U. S. 99 (1880), reversing Crocker *v.* Whitney, 71 N. Y. 161 (1877), holding that, where a national bank takes a mortgage to secure future advances, it can be objected to only by the government; National Bank *v.* Matthews, 98 U. S. 621 (1878), reversing Matthews *v.* Skinker, 62 Mo. 329 (1876), holding that a bank holding a deed of trust upon real estate as security for a note, contrary to the act, may sell the land in order to collect the note; followed in Winton *v.* Little, 94 Pa. St. 64 (1880); Thornton *v.* National Exch. Bank, 71 Mo. 221 (1879), holding that the only penalty for violations of that act is forfeiture of charter, to be invoked only by the United States. To same effect, Graham *v.* National Bank, 32 N. J. Eq. 804 (1880); Oldham *v.* Bank, 85 N. C. 240 (1881), and Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a contrary decision, see Green *v.* Seymour, 3 Sandf. Ch. 285 (1846); Bard *v.* Chamberlain, 3 Sandf. Ch. 31 (1845).

[2] McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); S. C., 16 Fed. Cas. 264; New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Parkins *v.* Watson, 2 Baxt. (Tenn.) 173 (1872), holding that a bank may discount on the same terms as an individual, and should suffer the same forfeit for usury; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308 (1874), holding that general usury laws apply to corporations. Charter privileges to a building association to take larger interest than is allowed to others under the usury law are unconstitutional in Kentucky. Gordon *v.* Winchester, etc. Assoc., 12 Bush (Ky.), 110 (1876). A note of a third party given by a debtor to a bank in good faith for an existing debt is not usurious; Dunkle *v.* Renick, 6 Ohio St. 527 (1856); Morse, Banking (3d ed.), § 72, etc. A corporation limited to "legal interest" may take legal interest as allowed by the laws of the state where the money is loaned. It is not confined to the rate prescribed by the laws of the state in which it is incorporated. U. S. Mortgage Co. *v.* Sperry, 138 U. S. 313 (1891). In

and where their charters forbid them from exacting more than a specified rate of interest they are bound by the restriction.[1] National banks are limited to the same rate of interest as the banks of the state wherein they are located are allowed to take, and to seven per cent if there is no restriction in that state;[2] but for any infraction of this statute the bank forfeits the interest, or, if already paid, is liable for twice such interest, but is not subject to the state statutes relative to usury.[3]

§ 691. *Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments — Preferences by way of mortgages, etc.*— Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.

In making the assignment the corporation may make preferences to one or more creditors over others, or to one class of creditors over other classes.[4]

some states the excess of interest is forfeited; in other states the whole interest is forfeited; and in still other states the whole debt is forfeited. See Stimson, Am. Stat. Law, § 4832. As to usury as a defense to a suit against a corporation, see § 766, *infra*.

[1] Bank of U. S. *v.* Owens, 2 Pet. 527 (1829), where notes given for more than the rate fixed by the charter of a bank were declared void; Planters' Bank *v.* Sharp, 12 Miss. 75 (1844). But here it was held that taking a greater amount of interest than that allowed by the charter rendered the corporation liable under the general usury laws, and that the contract was not void. On this point see Rock River Bank *v.* Sherwood, 10 Wis. 174 (1860); Commercial Bank *v.* Nolan, 8 Miss. 508 (1843); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Bank of Chillicothe *v.* Swayne, 8 Ohio, 257 (1838), where a contract for more than the specified rate was held void. To same effect, Creed *v.* Commercial Bank, 11 Ohio, 489 (1842); Spalding *v.* Bank of Muskingum, 12 Ohio, 544 (1841), holding also that taking a commission is only a method of avoiding the statute, and Miami Exporting Co. *v.* Clark, 13 Ohio, 1 (1844), where the same ruling was made in regard to charging for exchange; Morse, Banking (3d ed.), § 52. A national bank cannot take usurious interest under the cover of a "commission," the latter to be paid in case the borrower does not keep a balance in the bank of a specified amount. Although a corporation is forbidden by statute to set up usury, yet a national bank cannot collect usurious interest from a railroad corporation borrowing money of the bank. Union Nat. Bank *v.* Louisville, etc. R'y, 145 Ill. 208 (1893).

[2] U. S. Rev. Stats., § 5197.

[3] U. S. Rev. Stats., § 5198; Barnet *v.* National Bank, 98 U. S. 555 (1878).

[4] *Federal Courts:* That an assignment for the benefit of creditors may be made, see Graham *v.* Railroad Co., 102 U. S. 148 (1880). Compare on this subject the dictum in Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891). That preferences may be given, see Smith, etc. Co. *v.*

There have been a few decisions to the contrary. There has also been considerable discussion in legal periodicals, decisions,

McGroarty, 136 U. S. 237 (1890); Allis *v.* Jones, 45 Fed. Rep. 148 (1891); Atlanta, etc. R. R. *v.* Western R'y, 50 Fed. Rep. 790 (1892); Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891); Graham *v.* Railroad Co., 102 U. S. 148 (1880); Gould *v.* Little Rock, etc. R'y, 52 Fed. Rep. 680 (1892). An insolvent corporation may give a chattel mortgage to secure a part of its debts. Such a mortgage is legal, notwithstanding a statute against assignments with preferences. Brown *v.* Grand Rapids, etc. Co., 58 Fed. Rep. 286 (1893), a case arising in Michigan. A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory prohibition against preferences by an insolvent corporation does not prevent the giving of collateral for a debt when contracted. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890). A corporate creditor may take a mortgage on the corporate property, although he knows that the corporation is insolvent. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896). Judgment notes for past and future advances are illegal where the board of directors is at once turned over to the dummies of the holders of the judgment notes, and the company continues to do business as though said judgment notes had not been given, the intent being to ensure a preference not only at once, but in the future. Such preferences as to the future must be evidenced by a mortgage or some other instrument upon the public records. American, etc. Co. *v.* Fargo, 77 Fed. Rep. 671 (1896). A statute prohibiting preferences by any insolvent debtor during ninety days prior to an assignment does not apply to a mortgage given to take the place of a prior mortgage, and of obtaining a larger loan, the creditor having no reasonable cause to suppose the debtor was insolvent. Moore *v.* American L. & T. Co., 80 Fed. Rep. 49 (1896). A remittance to a correspondent by a national bank is legal, although the bank is insolvent at the time. Hayden *v.* Chemical Nat. Bank, 80 Fed. Rep. 587 (1897). In U. S. Rubber Co. *v.* American, etc. Co., 82 Fed. Rep. 248 (1897), where certain creditors of an insolvent corporation took secret security amounting to a preference, and then took control of the board of directors so as to prevent any preference to other creditors, the court said that the transaction was "incompatible with fair dealing in business and with good morals." Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893), a case arising in Indiana. An attaching creditor cannot attack a corporate conveyance which operates as a preference, the corporation itself being insolvent, inasmuch as the reason against preferences by an insolvent corporation applies as much to attaching creditors as to parties taking by conveyance. Walker *v.* Miller, 59 Fed. Rep. 869 (1894).

Section 5242 of the Revised Statutes of the United States prohibits a national bank from transferring any notes, bonds, bills of exchange, or other evidences of debt or mortgages

and elsewhere to the effect that at common law an insolvent corporation could not prefer one creditor as against another.

or judgments or deposits either after an act of insolvency or in contemplation thereof with a view to a preference. The following decisions are on this statute: National Security Bank *v.* Butler, 129 U. S. 223 (1889), aff'g 22 Fed. Rep. 697, where a bank holding a certificate of deposit of an insolvent bank took assets of the latter on the day of its failure, and gave a certificate of deposit therefor, and then sought to offset the one against the other. The court held that it was immaterial that the creditor of the insolvent bank was not aware of the insolvency. Roberts *v.* Hill, 24 Fed. Rep. 571 (1885), rev'g S. C., 23 Fed. Rep. 311, where a bank transferred to one of its depositors a note which the bank held, the transfer being made when the bank was insolvent. Although the bank kept open for about three months thereafter, and even though the note was given to the depositor as collateral security, and was the only way of preventing him from drawing out his money, the court held that the act was in contemplation of insolvency, inasmuch as the officers could reasonably see that the bank would presently be unable to meet its obligation, and would be obliged to suspend operations. Case *v.* Citizens' Bank, 2 Woods, 23 (1873); S. C., 5 Fed. Cas. 251, in which an insolvent bank transferred various bills and notes to another bank, to which the former bank had, while solvent, transferred bills of exchange which were not thereafter honored. The court held the act to be illegal. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890), wherein it was held that an insolvent bank might transfer assets to secure a loan made contemporaneously with such transfer. Irons *v.* Manufacturers' Nat. Bank, 6 Biss. 301 (1875); S. C., 13 Fed. Cas. 100, where the phrase "act of insolvency" was held to mean any act which would be an act of insolvency by an individual banker. See also National Bank *v.* Colby, 21 Wall. 609 (1874). In Casey *v.* Société de Crédit Mobilier, 2 Woods, 77 (1874); S. C., 5 Fed. Cas. 262, it was held that the preference intended by the act is such as is given to secure or pay a pre-existing debt, and does not prevent the borrowing of money upon security. Venango Nat. Bank *v.* Taylor, 56 Pa. St. 14 (1867), holding that the act relates to legal as well as voluntary transfers of property by banks. See also National, etc. Bank *v.* Mechanics', etc. Bank, 89 N. Y. 467 (1882); Robinson *v.* Newberne Nat. Bank, 81 N. Y. 385 (1880), holding that the act applies only to such banks as are insolvent or are about to become so. A state statute giving savings banks a preference in payment from the assets of an insolvent bank does not apply to national banks which become insolvent. Davis *v.* Elmira Sav. Bank, 161 U. S. 275 (1896), rev'g Elmira Sav. Bank *v.* Davis, 142 N. Y. 590, and 73 Hun, 357. Remittances by an insolvent national bank to its correspondent bank are legal where the former bank has not actually stopped business, and the transactions were in good faith. Hayden *v.* Chemical Nat. Bank, 84 Fed. Rep. 874 (1898).

Alabama: That an assignment may be made, see Chamberlain *v.* Bromberg, 83 Ala. 576 (1888); Pope *v.* Brandon, 3 Ala. (O. S.) 401 (1830), holding also that it was not necessary that the creditors should sign the assignment; nor was the deed void because the trustee was the president of the assigning bank, who in that capacity executed the deed as a grantor; Allen

The almost unanimous conclusion, however, is that preferences may be given by an insolvent corporation the same as by an in-

v. Montgomery R. R., 11 Ala. 437, 451 (1847). The president cannot make an assignment by the company for the benefit of creditors. A ratification by the directors is not good as against an attachment in the meantime. Norton *v.* Alabama Nat. Bank, 102 Ala. 420 (1894). A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account, and to hold stockholders liable on stock issued for property, and to reach corporate assets in the hands of third parties, is multifarious. The theory that the capital stock is a trust fund is unfounded. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205 (1895).

A preference, however, is not allowed in this state. Yet even though under the decisions of Alabama an insolvent corporation cannot give a preference, nevertheless so long as the corporation is a going concern it may pay a party who is not aware of the insolvency. Mary Lee, etc. R'y *v.* Knox, 110 Ala. 632 (1895). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895). A mortgage deed of trust to secure bonds executed by an insolvent corporation is presumed to be a conveyance of corporate property to delay and defraud creditors; but a bill attacking such a mortgage must allege that parties receiving bonds to secure their debts did not advance money at the time of receiving bonds, but were antecedent creditors. Coal City, etc. Co. *v.* Hazard Powder Co., 108 Ala. 218 (1896).

Arkansas: Preferences are upheld in this state. Ringo *v.* Biscoe, 13 Ark. 563 (1853); *Ex parte* Conway, 4 Ark. 302, 352 (1842). The statutes of Arkansas prohibit preferences among creditors of insolvent corporations. Sand. & H. Digest, secs. 1425, 1427.

Canada: The directors may make an assignment of the corporate assets for the benefit of creditors. Whiting *v.* Hovey, 13 Ont. App. Cas. 7 (1886).

Colorado: An insolvent corporation may give a preference and convey to one creditor all its property. John, etc. Co. *v.* Sweetzer, 51 Pac. Rep. 1012 (Colo., 1897).

Connecticut: Preferences are upheld. Savings Bank *v.* Bates, 8 Conn. 505 (1831); Smith *v.* Skeary, 47 Conn. 47 (1879). The following case bears upon this principle of law, but does not conflict with it: Catlin *v.* Eagle Bank, 6 Conn. 233 (1826). A deed in trust by a corporation of all its property, made with consent of nearly all its creditors, to trustees to continue the business, is void as to non-consenting creditors. Waterman *v.* Sprague Mfg. Co., 55 Conn. 554 (1888); De Wolf *v.* Sprague Mfg. Co., 49 Conn. 282 (1881). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re* Waddell-Entz Co., 67 Conn. 324 (1896).

Georgia: An assignment for the benefit of creditors is legal. McCallie *v.* Walton, 37 Ga. 611 (1868). And preferences may be given. The following case bears upon this principle of law, but does not conflict with it: Hightower *v.* Mustian, 8 Ga. 506 (1850).

solvent individual. And yet it must be conceded that great abuses have arisen therefrom. The directors and stockholders

Illinois: Assignments by insolvent corporations with preferences are legal. Blair *v.* Illinois Steel Co., 159 Ill. 350 (1896), quoting and approving the text above; Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895); Chicago, etc. Co. *v.* Smith, 158 Ill. 417 (1895). The preference may be by way of mortgage. Reed *v.* Bradley, 17 Ill. 321 (1856). A preference by an insolvent corporation is legal. State Nat. Bank *v.* Union Nat. Bank, 48 N. E. Rep. 82 (Ill., 1897). It is legal in Illinois for an insolvent corporation to give judgment notes, even though judgment is immediately entered thereon and all its assets sold out, the creditor not being a director or stockholder. Peterson *v.* Brabrook, etc. Co., 150 Ill. 290 (1894). Although a New York insolvent corporation is prohibited by statute from preferring a creditor, yet where it turns over in Ohio property to a creditor, the Illinois courts will sustain the preference in accordance with Illinois decisions. Warren *v.* First Nat. Bank, 149 Ill. 9 (1893). A corporation that is unable to pay its debts as they become due in the usual course of business is insolvent. Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894).

Indiana: The assignment may be made by a meeting of the board of directors, as in any other corporate business. De Camp *v.* Alward, 52 Ind. 468 (1876). Preferences are legal. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 550 (1895); Smith *v.* Wells, etc. Co., 46 N. E. Rep. 1000 (Ind., 1897).

Iowa: Preferences are legal. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). The following case bears upon this principle of law, but does not conflict with it: Buell *v.* Buckingham, 16 Iowa, 284 (1864). A director and stockholder who acquiesces in the giving of a mortgage to a certain creditor cannot afterwards complain of the same. Gillette *v.* Meredith, 72 N. W. Rep. 443 (Iowa, 1897).

Kentucky: A creditor of an insolvent corporation may, by attachment, obtain a preference over other creditors, and if an insolvent corporation makes a fraudulent assignment for the benefit of creditors, any creditor may levy such an attachment. A secret unrecorded mortgage, held until the company becomes insolvent, is fraudulent as to other creditors. Louisville, etc. Co. *v.* Etheridge, etc. Co., 43 S. W. Rep. 169 (Ky., 1897).

Louisiana: The Louisiana statute allowing insolvent individuals to apply to the court and obtain an extension of time on their debts does not apply to corporations. Isabella Lumber Co. *v.* Creditors, 19 S. Rep. 136 (La., 1896).

Maine: An insolvent corporation in Maine may be declared an insolvent debtor under the statute, but cannot obtain a discharge in insolvency. A creditor may obtain judgment at law, and levy on property which the insolvent illegally transferred away. Miller *v.* Waldoborough Packing Co., 88 Me. 605 (1896). Although an Illinois corporation has passed through insolvency proceedings in Maine, yet a non-resident creditor who was not a party to such proceedings may thereafter sue such corporation in Maine. Hammond, etc. Co. *v.* Best, 40 Atl. Rep. 338 (Me., 1898).

Maryland: Assignments are legal. State *v.* Bank of Maryland, 6 Gill & J. 205, 219 (1834). A vendor of goods to an insolvent corporation may rescind and replevy the goods if the corporate officers at the time had no reasonable expectation of making

of a corporation are numerous, and each generally wishes some particular creditor to be preferred. Moreover an insolvent cor-

payment when the bill became due. Edelhoff *v.* Horner, etc. Co., 39 Atl. Rep. 314 (Md., 1898). An assignment for the benefit of creditors, executed by the president and secretary without authority from the board of directors, may be valid if not promptly repudiated by the board of directors. Miller *v.* Matthews, 40 Atl. Rep. 176 (Md., 1898).

Massachusetts: Assignments are legal. Sargent *v.* Webster, 54 Mass. 497 (1847), holding also that the assignment may be to a stockholder to pay a debt of the corporation to him, and the remainder to go to the corporate treasurer for the benefit of other creditors. As to the Massachusetts statute providing for insolvency proceedings against a corporation which makes an assignment for the benefit of creditors, see Steel, etc. Co. *v.* Manchester Sav. Bank, 163 Mass. 252 (1895).

Michigan: An insolvent corporation may make an assignment for the benefit of creditors, and the board of directors may make it without the assent of the stockholders. Boynton *v.* Roe, 72 N. W. Rep. 257 (Mich., 1897). The Michigan statute against preferences in assignments does not prevent the giving of a mortgage to a trustee to secure certain debts due from the insolvent corporation mortgagor. Austin *v.* First Nat. Bank, 100 Mich. 613 (1894). At common law in Michigan an insolvent corporation might assign. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892); Kendall *v.* Bishop, 76 Mich. 634 (1889). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re* George, etc. Co., 86 Mich. 149 (1891); Covert *v.* Rogers, 38 Mich. 363 (1878), holding that the assignee may be one of the stockholders. In this case he was a former treasurer, who had resigned. Stockholders cannot prevent directors making an assignment for the benefit of corporate creditors, though their term of office expires in four days, the corporation being insolvent.

Minnesota: The board of directors of an insolvent corporation may order an assignment for the benefit of creditors. Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400 (1889), 45 Minn. 383 (1891). In Minnesota, by statute, an insolvent corporation cannot give preferences. Yanish *v.* Pioneer Fuel Co., 64 Minn. 175 (1896).

Mississippi: Preferences are legal. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895); Arthur *v.* Commercial, etc. Bank, 17 Miss. 394 (1848); Palmer *v.* George W. Hutchison Grocery Co., 11 S. Rep. 789 (Miss., 1892). The following case bears upon this principle of law, but does not conflict with it: Robins *v.* Embry, 1 Sm. & M. Ch. (Miss.) 207, 258 (1843). An assignment by a railroad assigns its income only. Arthur *v.* Commercial, etc. Bank, 17 Miss. 394, 430 (1848). See also State *v.* Commercial Bank, 21 Miss. 569 (1850).

Missouri: Assignments are legal. Hutchinson *v.* Green, 91 Mo. 367 (1886); Shockley *v.* Fisher, 75 Mo. 498 (1882), construing a statute authorizing an assignment "by a debtor to any person in trust for his creditors" to include corporations, and holding that the right exists at common law, citing 2 Kent, Com. 398, and note. Preferences may be given. Meyer *v.* American, etc. Co., 130 Mo. 188 (1895); Slavens *v.* Cook Drug Co., 128 Mo. 341 (1895). A creditor of an insolvent corporation may obtain a preference by an attachment, and it is legal, even though a director of the corpo-

poration never hopes to resume business again, and is more ruthless and unconscionable in its preferences, because no moral

ration advised him to attach. La Grange, etc. Co. *v.* National Bank, 122 Mo. 154 (1894), the court refusing to follow the Tennessee rule. An embarrassed corporation may take title to land in a director's name and have him give a mortgage thereon to raise money for the corporation. Donham *v.* Hahn, 127 Mo. 439 (1895). An insolvent corporation may turn over to a bank book-accounts, merchandise, and fixtures as security for a debt, even though the corporation thereafter, on the same day, assigns for the benefit of creditors. Alberger *v.* National Bank, 123 Mo. 313 (1894), calling attention also to the fact that contrary decisions in Ohio and Texas were based on statutes. A creditor who has not yet reduced his claim to a judgment cannot file a bill to set aside an alleged illegal transfer of property. Atlas Nat. Bank *v.* Moran, etc. Co., 39 S. W. Rep. 71 (Mo., 1897). An assignment for the benefit of creditors, authorized by the directors acting separately and not as a board, is invalid. Calumet Paper Co. *v.* Haskell, etc. Co., 45 S. W. Rep. 1115 (Mo., 1897).

Montana: An insolvent corporation may give a preference by a mortgage. Teitig *v.* Boesman, 12 Mont. 404 (1892). Preferences are legal. Ames, etc. Co. *v.* Heslet, 47 Pac. Rep. 805 (Mont., 1897).

Nebraska: An insolvent corporation may, in the absence of actual fraud, prefer one or more of the creditors, to the exclusion of others. Wallachs *v.* Robinson, etc. Co., 70 N. W. Rep. 52 (Neb., 1897); Shaw *v.* Robinson, etc. Co., 69 N. W. Rep. 947 (Neb., 1897).

New Hampshire: Assignments may be made. Flint *v.* Clinton Co., 12 N. H. 430, 435 (1841). As to preferences, the following case bears upon this principle of law: Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). As to proceedings against a corporation under the insolvent debtor's act, see Kennett *v.* Woodworth-M. Co., 39 Atl. Rep. 585 (N. H., 1896).

New Jersey: Section 64 of the Laws of 1896 now forbids any assignment whatsoever of any of the assets of an insolvent corporation. The statute of 1895, prohibiting insolvent corporations from making assignments, did not apply to companies organized before the passage of the statute. Such a statute did not invalidate an assignment for the benefit of creditors given by an insolvent New Jersey corporation in Pennsylvania. Borton *v.* Brines-Chase Co., 175 Pa. St. 209 (1896). A mortgage given by an insolvent corporation to a creditor for a pre-existing debt is invalid under the New Jersey statutes. Frost *v.* Barnert, 38 Atl. Rep. 956 (N. J., 1897). The proper way to attack a preference given by an insolvent corporation is in the distribution proceedings in a suit to have the company declared insolvent, and a receiver appointed, and its assets distributed. A warrant of attorney to confess judgment given in September and used in February is evidence of an intent to give a preference if existing notes are taken up and new notes given at the time of entry of judgment. Consolidated Coal Co. *v.* National St. Bank, 38 Atl. Rep. 657 (N. J., 1897). At common law insolvent corporations may assign for the benefit of creditors. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). And preferences may be given. Vail *v.* Jameson, 41 N. J. Eq. 648 (1886); Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). A chattel mortgage made in contempt of court and in violation of the statutes against preferences by

obligation to do equity rests on any one director or stockholder. In all this an insolvent corporation differs from an insolvent

a corporation is void. Bissell *v.* Besson, 47 N. J. Eq. 580 (1890). See also Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397 (1886). Under the old New Jersey statute the directors of a corporation might mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870). Although New York corporations are forbidden by the statutes of New York to execute mortgages or give preferences in contemplation of insolvency, yet a mortgage given by a New York corporation on chattels and real estate in New Jersey was upheld in New Jersey, although made in contemplation of insolvency. The New Jersey courts did not apply the New York law, but will apply that of New Jersey. The debt secured by the mortgage in this case was payable in New Jersey, however, and most of the creditors resided there. Boehme *v.* Rall, 51 N. J. Eq. 541 (1893). A mortgage made in New Jersey and on property in New Jersey, by a New York corporation, was valid although the corporation was insolvent at the time, and although the New York laws prohibited the giving of a mortgage by an insolvent corporation. Boehme *v.* Rall, 51 N. J. Eq. 541 (1893). A levy of execution prior to the appointment of a receiver has a prior claim on the assets levied upon. Van Steenberg *v.* Parsil, etc. Co., 34 Atl. Rep. 135 (N. J., 1896).

New York: In New York, from 1825 to 1892, the statutes prohibited corporations from making any transfers or assignments in contemplation of insolvency, and declared any such transfers and assignments utterly void. (1 R. S. 603, § 4.) By this statute all assignments by New York corporations for the benefit of creditors were held to be void. Sibell *v.* Remsen, 33 N. Y. 95 (1865); National, etc. Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467 (1882); Harris *v.* Thompson, 15 Barb. 62 (1853); Atkinson *v.* Rochester Printing Co., 114 N. Y. 168 (1889).

The following decisions were as to what was meant by "in contemplation of insolvency:" In Robinson *v.* Bank of Attica, 21 N. Y. 406 (1860), where a state bank, three days before its failure, induced a party to give it accommodation checks, and on the following day turned out securities to secure such checks, the court held that the securities could be recovered back by the receiver. In Marine Bank *v.* Clements, 31 N. Y. 33 (1865), where an insolvent corporation assigned a note to a party, and that party brought suit upon the note, the court held that the maker of the note could not set up the insolvency as a defense, there being no proof that the indorsee did not give value at the time he took the note from the insolvent corporation. In Dutcher *v.* Importers', etc. Nat. Bank, 59 N. Y. 5 (1874), the court held that where the bank paid a check to a depositor who had no knowledge of the insolvency of the bank, this was not such a prefer-

individual. As a result, the abuses from allowing an insolvent corporation to make preferences are so great that the various states are enacting prohibitory statutes on this subject.

ence as was prohibited by the statute. In Paulding *v.* Chrome Steel Co., 94 N. Y. 334 (1884), although a chattel mortgage had been given five years before the company became insolvent, and had not been recorded, and was renewed and recorded at the time when the corporation was insolvent, yet the court held that the mortgage was valid. In Baker *v.* Emerson, 4 N. Y. App. Div. 348 (1896), where a manufacturing company, being insolvent, paid a note for $3,000, leaving $17,000 of debts unpaid, payment being made May 29, 1893, and the company suspended business June 5, 1893, the court held that the payment was illegal, although the company expected at the time of the payment to raise sufficient money to go on with its business; citing to this effect, Vennard *v.* McConnell, 93 Mass. 555, 562 (1866); also Forbes *v.* Howe, 102 Mass. 427, 436 (1869).

In 1892 the above statute was changed so that assignments by insolvent corporations are now legal, provided no preferences are given. (Stock Corporation Law, § 48.) Preferences given to any creditor, whether a corporate officer, or stockholder, or outsider, are void. Where preferences are forbidden in contemplation of insolvency, payment of a debt while other debts are due, the company being insolvent, is illegal, even though the company expected to be able to borrow and continue business. Baker *v.* Emerson, 4 N. Y. App. Div. 348 (1896). Under the New York act a director cannot obtain a preference by attachment, nor by a judgment taken by default. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). A preference to a partnership of which a stockholder is a member is illegal. Jones *v.* Blun, 145 N. Y. 333 (1895). An assignment for the benefit of creditors is authorized by the directors and not the stockholders. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority; but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). In New York an insolvent corporation may make an assignment for the benefit of creditors, but there must not be any preferences. Croll *v.* Empire, etc. Co., 17 N. Y. App. Div. 282 (1897). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. Marbury *v.* Stone, 17 N. Y. App. Div. 352 (1897). The fact that the company is unable to meet its obligations, and that judgments are being entered against it, shows insolvency. Nealis *v.* American, etc. Co., 76 Hun, 220 (1894). Even in New York, where a conveyance in view of insolvency is void, an embarrassed corporation may mortgage all its property to secure bonds which are given to creditors for their debts, where the creditor who refuses to take the bonds waits over three years before attacking the mortgage. New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun, 447 (1895). An insolvent

§ 692. *Preferences and assignments by insolvent corporations to directors, officers, or stockholders — Loans by directors to the corporation — Mortgages by corporations to directors.*— Turning now from preferences given to the ordinary creditor of a

corporation may give a mortgage to secure bonds given at that time, if the issue is a fair business transaction and for the purpose of saving the company and its property. Cochran *v.* Anglo-American, etc. Co., 69 Hun, 168 (1893).

Formerly a foreign corporation might make, in New York, an assignment for the benefit of its creditors, where such assignment would be valid if made in the state where the company was incorporated; in this case in New Jersey. The New York statute against such assignments applied only to a domestic corporation. At common law any corporation might make such an assignment. Vanderpoel *v.* Gorman, 140 N. Y. 563 (1894). At common law the president and secretary, under authority of the board of directors, may execute an assignment for the benefit of creditors made by the corporation. Vanderpoel *v.* Gorman, 140 N. Y. 563 (1894). An insolvent Massachusetts corporation, having goods in New York, may transfer the same to a creditor, and the transfer takes precedence of an attachment subsequently levied in New York by another creditor. The New York act against assignments by insolvent corporations formerly applied only to domestic corporations. Lane *v.* Wheelwright, 69 Hun, 180 (1893). A creditor of a foreign corporation may obtain a preference in New York upon assets in New York. Logan *v.* McCall Pub. Co., 140 N. Y. 447 (1893); Coats *v.* Donnell, 94 N. Y. 168 (1883), holding that a statute prohibiting preferences by corporations does not apply to foreign corporations. It seems that a temporary receiver may file a bill to set aside an illegal preference given by the insolvent corporation to one of its creditors. Stiefel *v.* New, etc. Co., 14 N. Y. App. Div. 371 (1897). In an action by a receiver to set aside a transfer of property made in violation of the statute, it seems that it is no defense that an execution sale by a third party had taken all the equity of the company in the property. Stonebridge *v.* Perkins, 141 N. Y. 1 (1894). As to foreign corporations see L. 1897, ch. 384.

North Carolina: Preferences are upheld. Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99 (1892). An insolvent corporation may prefer creditors in North Carolina subject to a sixty-day statutory restriction. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507 (1894). A corporation is not insolvent so long as its property, at market prices, is equal in value to its debts. Silver, etc. Co. *v.* North, etc. Co., 25 S. E. Rep. 954 (N. C., 1896).

Ohio: Preferences are illegal. Damarin *v.* Huron Iron Co., 47 Ohio St. 581 (1890); Sayler *v.* Simpson, 46 Ohio St. 510 (1890); Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493 (1889); followed in Smith, etc. Co. *v.* McGroarty, 136 U. S. 237 (1890), in an Ohio case.

Oregon: A failing corporation may give a mortgage if in good faith. Currie *v.* Bowman, 25 Oreg. 364 (1894); Sabin *v.* Columbia Fuel Co., 25 Oreg. 15 (1894).

Pennsylvania: Assignments may be made. Ardesco Oil Co. *v.* North American, etc. Co., 66 Pa. St. 375 (1870). A New York corporation may execute a judgment note which is good in Pennsylvania, notwithstanding the New York statute against preferences. East Side Bank *v.* Columbus Tanning Co., 170 Pa. St. 1 (1895). A New Jersey corporation,

corporation to preferences given to a director of the corporation, it is found that entirely different rules prevail. No statute is necessary to prevent preferences to a director of an insolvent

although forbidden by New Jersey statutes from giving a preference by way of confession of judgment, yet may do so in Pennsylvania, where such a preference is legal, the New Jersey laws allowing preference by any other means than a confessed judgment. Pairpoint Mfg. Co. *v.* Philadelphia, etc. Co., 161 Pa. St. 17 (1894). See also note, p. 1398.

Rhode Island: A New York corporation owning property in Rhode Island cannot make in the latter state an assignment which the New York statutes prohibit. Pierce *v.* Crompton, 13 R. I. 312 (1881).

South Dakota: An assignment for the benefit of creditors may be made by a corporation. A foreign corporation may make such an assignment. It is legal, although the foreign corporation has not complied with the law relative to filing a copy of its charter and appointing a resident agent. The assignment is properly made by the directors, and not by a meeting of the stockholders. Where the assignment is made to a director and there are indications of fraud, it is for the jury to say whether there was fraud. Wright *v.* Lee, 2 S. D. 596 (1892).

Tennessee: It has been held that preferences are illegal. Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634 (1895). *Cf.* Hopkins *v.* Gallatin, etc. Co., 4 Humph. 403 (1843). But a diligent creditor may obtain a preference by a judgment although the corporation is insolvent, it being a going concern. Buchanan *v.* Barnes, 34 S. W. Rep. 425 (Tenn., 1896). An assignment by a corporation for the benefit of creditors does not displace existing attachments. First Nat. Bank *v.* Lumber, etc. Co., 91 Tenn. 12 (1891). An insolvent corporation cannot turn over practically all its assets to one creditor by way of preference. Smith *v.* Bradt Printing Co., 97 Tenn. 351 (1896). After a corporation has been declared insolvent by the board of directors and directions given to file a bill to wind up its affairs, a creditor cannot obtain a preference by levy of execution before the bill is actually filed. Memphis B. etc. Co. *v.* Ward, 42 S. W. Rep. 13 (Tenn., 1897).

Texas: In Texas the statutes as construed by the courts make the corporate property upon insolvency a trust fund to be distributed equally among all creditors. The corporation may turn the property over to its directors for that purpose. Wright *v.* Euless, 12 Tex. Civ. App. 136 (1896). An insolvent corporation cannot prefer its creditors by giving a mortgage. Judgment creditors may cause it to be set aside and an accounting had. Lyons, etc. Co. *v.* Perry, etc. Co., 88 Tex. 468 (1894). An insolvent corporation cannot prefer certain creditors, and equity will prevent unjust preferences. Lang *v.* Daugherty, 74 Tex. 226 (Tex., 1889). In Texas, however, any creditor may obtain a preference by legal proceedings. Moon, etc. Co. *v.* Waxahachie, etc. Co., 35 S. W. Rep. 337 (Tex., 1896); aff'd, 89 Tex. 511; Florsheim, etc. Co. *v.* Wettermark, 10 Tex. Civ. App. 102 (1895); Harrigan *v.* Quay, 27 S. W. Rep. 897 (Tex., 1894). But not by assignment. Orr, etc. Co. *v.* Thompson, 36 S. W. Rep. 1129 (Tex., 1896); Fowler *v.* Bell, 90 Tex. 150 (1896); Specht *v.* Bookhout, 37 S. W. Rep. 193 (Tex., 1896), the court holding also that a debtor of the corporation who pays such preferred creditor, to whom the claim has been assigned, does so at his peril. It has been held that no

corporation. It is undoubtedly true that the law allows a director to loan money to a corporation, and allows the corporation, while it is solvent, to give a mortgage to the director to

preference is sustained, even by attachment against an insolvent corporation, in Texas. Farmers', etc. Bank *v.* Waco, etc. Co., 36 S. W. Rep. 131 (Tex., 1896). Attachment lies against a corporation, although it is insolvent but is still doing business. American Nat. Bank *v.* Dallas, etc. Co., 39 S. W. Rep. 955 (Tex., 1897). The directors of an insolvent corporation may authorize an assignment for the benefit of creditors. Birmingham, etc. Co. *v.* Freeman, 39 S. W. Rep. 626 (Tex., 1897).

Utah: Preferences are legal. Wyeth, etc. Co. *v.* James, etc. Co., 47 Pac. Rep. 604 (Utah, 1897).

Vermont: Preferences are legal. Warner *v.* Mower, 11 Vt. 385, 390 (1839).

Virginia: Assignments may be made. Lewis *v.* Glenn, 84 Va. 947 (1888). And preferences given. Planters' Bank *v.* Whittle, 78 Va. 737 (1884).

Washington: A corporation may assign for the benefit of creditors. Nyman *v.* Berry, 3 Wash. St. 734 (1892). But preferences are illegal. Conover *v.* Hull, 10 Wash. St. 673 (1895); Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892). An insolvent corporation may sell its property to one of its creditors. Klosterman *v.* Mason, etc. R. R., 8 Wash. 281 (1894); Holbrook *v.* Peters, etc. Co., 8 Wash. 344 (1894). A mortgage by an embarrassed corporation is valid, if in good faith, even though the company soon after fails. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566 (1894). Even though a corporation has made an assignment for the benefit of creditors, yet a court of equity may appoint a receiver of the assets so assigned under the Washington statutes. Oleson *v.* Bank of Tacoma, 15 Wash. 148 (1896). Preferences are illegal. Compton *v.* Schwabacher, etc. Co., 15 Wash. 306 (1896). An insolvent corporation cannot make a voluntary preference by way of mortgage. Biddle, etc. Co. *v.* Port Townsend, etc. Co., 48 Pac. Rep. 407 (Wash., 1897). A mortgage by an insolvent corporation to one of its creditors as a preference is illegal. Cook *v.* Moody, 50 Pac. Rep. 1020 (Wash., 1897).

West Virginia: Assignments formerly were legal. Lamb *v.* Cecil, 25 W. Va. 288 (1884); Lamb *v.* Pannell, 25 W. Va. 298 (1884). And preferences also. Pyles *v.* Furniture Co., 30 W. Va. 123 (1887). A mining company having assets of $25,000 and debts of $20,000 is solvent, and may execute a mortgage. Coaldale Min. etc. Co. *v.* Clark, 27 S. E. Rep. 294 (W. Va., 1897). Preferences by insolvent corporations are now prohibited by statute. See Part VII, *infra*.

Wisconsin: At common law a corporation may make an assignment for the benefit of creditors. Garden City, etc. Co. *v.* Geilfuss, 86 Wis. 612 (1893). In Wisconsin it is held that a trust deed executed by an insolvent corporation, giving the trustee power to take charge of the business and carry it on, is void, as intended to defeat and delay corporate creditors. First Nat. Bank *v.* McDonald Mfg. Co., 67 Wis. 373 (1886). In Wisconsin an insolvent corporation cannot prefer creditors. Ford *v.* Plankinton Bank, 87 Wis. 363 (1894). The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences. Ford *v.* Hill, 92 Wis. 188 (1896). A creditor of an insolvent corporation may levy an attachment on its property, and thereby obtain a preference. Ballin *v.* Merchants' Exch.

secure the money so loaned. The giving of the mortgage is viewed with suspicion; but it is legal when it is perfectly free from actual fraud.[1]

Bank, 89 Wis. 278 (1895). An insolvent corporation may give a preference, and such preference may be to creditors who by contract have named two of the five directors. South Bend, etc. Co. *v.* George, etc. Co., 72 N. W. Rep. 749 (Wis., 1897).

Wyoming: Preferences are legal. Conway *v.* Smith, etc. Co., 46 Pac. Rep. 1084 (Wyo., 1896).

[1] Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875); Duncomb *v.* New York, etc. R. R., 88 N. Y. 1 (1882), 84 N. Y. 190; Hotel Co. *v.* Wade, 97 U. S. 13 (1877). Directors may execute judgment bonds to themselves at a time when the company is solvent, and may enforce them after it becomes insolvent. Neal's Appeal, 129 Pa. St. 64 (1889). A corporation, at the time of borrowing money from its treasurer personally, who is also a director, may give him a judgment bill to enter judgment. Cowan *v.* Pennsylvania, etc. Co., 38 Atl. Rep. 1075 (Pa., 1898). A mortgage is not void on the ground that it was to a director, where the director was absent when elected, did not serve, was not eligible, and soon sent in a resignation. Augusta, etc. R. R. *v.* Kittel, 52 Fed. Rep. 63 (1892). A solvent corporation may make a mortgage to one of its officers and stockholders to secure a loan made by him. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655 (1891). The fairness of a debt alleged to be due from the corporation to directors and audited by them will be closely scrutinized, and a note and mortgage therefor set aside if not found entirely in good faith, and the whole amount justly due. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A director may loan money to a corporation and take a mortgage to secure the same, and foreclose and buy in the property. Preston *v.* Loughran, 58 Hun, 210 (1890). A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company. *Re* Pyle Works, [1891] 1 Ch. 173. A mortgage by a company to its directors to secure them as loaners of money to the company is valid and may be enforced where the transaction was in good faith and beneficial to the company, and sanctioned by the stockholders, and no offer is made to restore the consideration. Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893); Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885); Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). And see the principles and cases in § 653, *supra*. See also Harpending *v.* Munson, 91 N. Y. 650 (1883); Hallam *v.* Indianola Hotel Co., 56 Iowa, 178 (1881), where, however, the purchase of the property by the director at the foreclosure sale for a small price was set aside; Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). *Cf.* Wilbur *v.* Lynde, 49 Cal. 290 (1832), invalidating a note given to a director. In the important case of Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862), the court held void a mortgage given by the directors to themselves, where there were other unsecured claims, and where the giving of the mortgage was inequitable. In Cumberland, etc. Co. *v.* Parish, 42 Md. 598 (1875), a mortgage to a director was defeated, there being no clear proof that the debt was actually incurred. Directors who guarantee a corporate debt may take a mortgage from the company as security, and may foreclose it. Hopson *v.* Ætna, etc. Co., 50 Conn. 597 (1883). A company indebted to its president may, to secure

The supreme court of the United States, speaking of loans made by an officer and stockholder to a corporation, said: "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it, making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."[1]

such debt, give a mortgage to secure a debt due from him to a third party. Bank *v.* Flour Co., 41 Ohio St. 552 (1885). Directors may loan money to the corporation and have it repaid. Ulster R'y *v.* Banbridge, etc. R'y, Ir. L. R. 2 Eq. 190 (1868); Borland *v.* Haven, 37 Fed. Rep. 394 (1888). A person may enforce a note against a corporation, although he was a promoter thereof, and is a director, stockholder, and manager of the corporation. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 110 (1890). Where two directors borrow money for the corporation and give their own notes therefor, the company, being still solvent, may give them security. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 534 (1896). *Cf.* Cahill *v.* People's, etc. Co., 47 La. Ann. 1483 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. Hook *v.* Ayers, 63 Fed. Rep. 347 (1894). A corporation may make a mortgage to one of its directors. St. Joe, etc. Co. *v.* First Nat. Bank, 50 Pac. Rep. 1055 (Colo., 1897). A director may take a mortgage from the company for money loaned at the time of the mortgage, and may buy in the property at the foreclosure sale thereof. Jones *v.* Hale, 52 Pac. Rep. 311 (Oreg., 1898). A mortgage given by a solvent corporation to a director, which, in order to preserve the credit of the corporation, is not recorded, is invalid. Montgomery *v.* Phillips, 53 N. J. Eq. 203 (1895), holding also that a mortgage by an insolvent corporation to a director is illegal. An officer advancing money to a corporation may repay the money to himself from the treasury when its condition will permit. Stokes *v.* Stokes, 91 Hun, 605 (1895). The president may own receivers' certificates. McKittrick *v.* Arkansas Central R'y, 152 U. S. 473 (1894). A loan by the president of a bank to himself is legal, if the directors acquiesce therein. Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895).

[1] Hence where an officer, for a loan of $100,000 to the company, takes its notes therefor and four hundred bonds as collateral and twelve hun-

But where the corporation is insolvent an entirely different question arises. There has been a difference of opinion in the courts, but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay or secure a debt due to a director in preference to debts due others, either by turning out property or cash to him or by giving him a mortgage on corporate assets.[1]

dred and fifty shares of paid-up stock as a "bonus," the court characterized the transaction as a fraud, and held that the pledge of the bonds would be disregarded and declared void. Richardson *v.* Green, 133 U. S. 30 (1890).

[1] Hays *v.* Citizens' Bank, 51 Kan. 535 (1893); Chicago, etc. Bridge Co. *v.* Fowler, 55 Kan. 17 (1895); Ingwerson *v.* Edgecombe, 42 Neb. 740 (1894). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. Wyman *v.* Williams, 74 N. W. Rep. 48 (Neb., 1898); Hulings *v.* Hulings Lumber Co., 38 W. Va. 351 (1893). A sale of property by an insolvent company to a director in order to prefer his debt is illegal. Beach *v.* Miller, 130 Ill. 162 (1889). Where a corporation has $15,000 assets, owes $160,000, and confesses judgment for $40,000 to its largest stockholder for an old indebtedness due him, a court of equity will restrain a sale under that judgment until the rights of all creditors are determined. Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J., 1889). Where the board of directors borrow money on the statement that the loan is from an outsider, and it afterwards transpires that the loan was by the president and another director, a commission of twenty per cent paid for the loan can be recovered back by the corporation. Bensiek *v.* Thomas, 66 Fed. Rep. 104 (1895). Where a corporate creditor offers to take payment, but is induced to let the debt stand in order that the president personally may use the money, the corporation is no longer liable. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). Corporate creditors may enjoin the collection of judgments fraudulently confessed by an insolvent corporation to its officers and stockholders. Nimocks *v.* Cape Fear Shingle Co., 110 N. C. 230 (1892). A preference by an insolvent corporation to one of its directors is invalid. It is insolvent when early suspension of business and a failure are inevitable. Corey *v.* Wadsworth, 99 Ala. 68 (1892). A director of an insolvent corporation cannot obtain a preference for his debt. Gibson *v.* Trowbridge Furnace Co., 96 Ala. 357 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder, and who signs the mortgage, cannot do so. Perry *v.* Pearson, 135 Ill. 218 (1890). Where a corporation purchases a firm's business, it cannot legally pay a debt due by the firm to a director in the corporation, if such payment is induced by such director and the corporation is insolvent. Rudd *v.* Robinson, 54 Hun, 339 (1889). If a director as a

But a corporation acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be successful, may give a mortgage to directors who have lent their credit to it,

creditor takes all the corporate assets in payment of his debt, he is liable to other creditors for the difference between the actual value of the property and the price at which he took it. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). The president of an insolvent corporation cannot provide for the payment of a debt to his wife, thereby giving her a preference. West *v.* West, etc. Co., 9 N. Y. St. Rep. 255 (1887). Directors knowing that the company is insolvent cannot assign its property in trust to pay debts due to themselves. Gaslight Imp. Co. *v.* Terrell, L. R. 10 Eq. 168 (1870); Haywood *v.* Lincoln Lumber Co., 64 Wis. 639 (1885). A preference to a director by an insolvent corporation is unlawful, and the directors who cause the preference are personally liable for property so applied. A director who took no part is not liable. Adams *v.* Kehlor Milling Co., 36 Fed. Rep. 212 (1888). The law "prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation, or from preferring debts in the payment of which they have a personal interest." So held in a case where a deceased director was preferred by the other directors, his brothers, and agents. Adams *v.* Kehlor Milling Co., 35 Fed. Rep. 433 (1888). A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors. Adams *v.* Cross, etc. Co., 5 R'y & Corp. L. J. 18 (Ill., 1888), holding void a mortgage upon which this suit for foreclosure was brought, it having been given by an insolvent corporation to its directors to secure debts due from it to them. A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The director will be allowed to come in the same as other creditors. Stratton *v.* Allen, 16 N. J. Eq. 229 (1863). A mortgage by an insolvent corporation preferring its president and director was canceled in Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885).

In Bradley *v.* Farwell, Holmes, 433 (1874); S. C., 3 Fed. Cas. 1146, a transfer by an insolvent corporation of all its assets to a partnership in payment of a debt was set aside, where one member of the partnership was also a director in the corporation. The fact that nine months elapsed before the corporation passed into a receiver's hands was immaterial. A sale of corporate property to a director in payment of debts due him from the insolvent company cannot be objected to in a suit at law by him for the conversion of the property. The objection must be made by bill in equity. Little Rock, etc. R'y *v.* Page, 35 Ark. 304 (1880). In New Jersey, by statute, a receiver is invested with all the rights of creditors. After his appointment a creditor cannot sue to set aside illegal conveyances to the officers, not even in the federal court. Werner *v.* Murphy, 60 Fed. Rep. 769 (1894). A mortgage by an insolvent company to secure a director on an antecedent debt, his vote being necessary to authorize the mortgage, is illegal. Savage *v.* Miller, 36 Atl. Rep. 578 (N. J., 1897). A preference to a president is illegal. Mallory *v.* Kirkpatrick, 54 N. J.

in order to induce a continuance of that credit, and in order to obtain renewals of maturing paper at a time when the corporation, although it may not be then in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern,

Eq. 50 (1895). A stockholder may cause to be set aside a lease of a warehouse and a sale of the wheat therein to two of the directors, and a foreclosure by them of a chattel mortgage on the buildings, which chattel mortgage had been purchased by two of the directors and the property purchased by them at the foreclosure sale. Loftus *v.* Farmers' Shipping Assoc., 8 S. D. 201 (1896). Under the Michigan decisions (prior to the statute) and of the federal court sitting in Michigan, the president of an insolvent corporation could secure a preference for debts due him, even though the corporation was insolvent and the debts were old debts. Childs *v.* Carlstein Co., 76 Fed. Rep. 86 (1896). Where the board of directors of a failing corporation voted all the assets to a few of their number in payment of an antecedent debt, the transaction is fraudulent and will be set aside, even in Michigan, the directors so preferred being three-fourths of the board. Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896). Although a director's mortgage is illegal, yet where, after its foreclosure, another prior mortgage is foreclosed, he is not liable to stockholders as having wrecked the corporation. Keeney *v.* Converse, 99 Mich. 316 (1894). In Doyle *v.* Leitelt, 97 Mich. 298 (1893), the court refused to compel a director to refund moneys applied on his claim against the corporation, although he had caused all the corporate property to be sold, it appearing that substantial justice had been done and that complainant had no real grievance. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. Rep. 518 (1898). At common law a mortgage may be made by a corporation to a director as trustee for creditors. Savage *v.* Miller, 39 Atl. Rep. 665 (N. J., 1898). The corporation itself cannot defend against a suit by a director on a note on the ground that the judgment will be an illegal preference. Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116 (1897); Bangs *v.* National Macaroni Co., 15 N. Y. App. Div. 522 (1897). For a detailed review of the authorities on this subject, see Lamb *v.* Laughlin, 25 W. Va. 300 (1884). Directors may be compelled to pay back salaries which they pay to themselves when the company is insolvent. Smith *v.* Putnam, 61 N. H. 632 (1882). An insolvent bank cannot legally transfer its real estate to a director in exchange for his stock. Roan *v.* Winn, 93 Mo. 503 (1887). Where the president causes the company illegally to buy its own stock from his wife, a preference to her for the debt will be set aside. Butler Paper Co. *v.* Robbins, 151 Ill. 588 (1894). No preferences to directors. W. P. Noble, etc. Co. *v.* Mt. Pleasant, etc. Inst., 12 Utah, 213 (1895). Where, three months prior to a petition for winding up a company, the directors, who owe on their stock, offset the same by applying the amount on their unpaid salaries, they jointly and severally will be compelled, under the English statute, to refund the money with interest. The transaction is fraudulent. *Re* Washington, etc. Co., [1893] 3 Ch. 95, rev'g the court below.

and is intending and is expecting to continue in business.[1] Where a director cannot legally obtain a preference directly, he cannot do so indirectly by attachment, or by obtaining judgment and causing execution to be levied.[2] A director cannot legally vote on a renewal of a note to himself.[3] The court will set aside a sale by an insolvent corporation of all its assets to its secretary and treasurer, who was the chief creditor, the sale being in payment of his debt; and the court will hold him liable for such of the assets as he has disposed of.[4] A preference to a large stockholder has also been condemned by the courts where, under the facts of the case, the transaction amounted to an actual fraud, as distinguished from an implied fraud.[5] It has been held that a mortgage by an insolvent

[1] Sanford Fork, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312 (1895).

[2] Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894). Under the Pennsylvania statute, directors cannot obtain a preference by taking judgment by default and issuing execution. Hopkins's Appeal, 90 Pa. St. 69 (1879). So also in New York. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). The remedy in such a case is in equity and not at law. Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508 (1891). A statute against preferences by an insolvent corporation is violated by an offer of judgment by the corporation and the appointment of a receiver under it. National Broadway Bank *v.* Wessell Metal Co., 59 Hun, 470 (1891), holding also that a director cannot obtain a preference by causing a receiver to be appointed on his judgment and then purchasing the property at an inadequate price. A judgment obtained by a director against an insolvent corporation by confession is illegal and may be set aside. Hill *v.* Pioneer Lumber Co., 113 N. C. 173 (1893). Where a director of an insolvent corporation obtains judgment against it and sells out its property, another corporate creditor may compel him to account for a proportionate share of the actual value of the property. Kittel *v.* Augusta, etc. R. R., 84 Fed. Rep. 386 (1898).

[3] Smith *v.* Los Angeles, etc. Assoc., 78 Cal. 289 (1889).

[4] Brown *v.* Morristown, etc. Co., 42 S. W. Rep. 161 (Tenn., 1897).

[5] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. R'y, 151 U. S. 1 (1894). Where a stockholder who is also a creditor of an insolvent corporation obtains for himself, just before the cessation of business, an assignment of practically all the assets of the corporation, it is a question for the jury as to whether such assignment is not fraudulent. Wortendyke *v.* Salladin, 45 Neb. 755 (1895). In Texas the court held that an insolvent corporation could not, by way of mortgage, prefer creditors who were stockholders. Lyons, etc. Co. *v.* Perry, etc. Co., 86 Tex. 143 (1893). See also Cochran *v.* Ocean Dry Dock, 30 La. Ann. 1365 (1878), holding that stockholders cannot appropriate assets to pay their salaries as officers,

corporation to a creditor corporation, the two corporations having a majority of their directors in common, is illegal.[1] A purchaser of the equity of redemption from the corporation cannot claim that the mortgage was to a director and hence invalid.[2] A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference.[3]

An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it, even though the officer did not actually know of the insolvency.[4]

If a majority of the directors of an insolvent corporation, knowing it to be insolvent, vote and cause the treasurer to execute to themselves the corporation's judgment note, and then

or to pay money due them on other accounts, until all creditors who are not stockholders have been paid; Swepson *v.* Exchange, etc. Bank, 9 Lea (Tenn.), 713 (1882), holding that a conveyance of land by the president of a bank to its sole stockholder, after its insolvency, would be set aside at the suit of a judgment creditor of the bank who had levied upon and sold it. Where all the corporate property is pledged to a creditor who owns all the stock, other creditors may object. Stewart *v.* Gould, 8 Wash. 367 (1894). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). See also Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883). In Massachusetts it has been held that a preference given to a large stockholder is legal. Sargent *v.* Webster, 54 Mass. 497 (1847). An insolvent corporation may give a preference to a stockholder. Moreover, a corporate creditor, who became such after such preference, cannot complain. Burchinell *v.* Bennett, 52 Pac. Rep. 51 (Colo., 1898). See also Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J., 1889).

[1] Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894). See also § 658, *supra*. An insolvent corporation may give a preference to a creditor, another corporation, having stockholders and directors in common with it. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895). A preference by an insolvent corporation is legal, although one of the directors is interested in the corporation that is preferred. Colorado, etc. Co. *v.* Western Hardware Co., 50 Pac. Rep. 628 (Utah, 1897). Where the president and a director, without authority from the board of directors of an insolvent corporation, turn over the assets to another corporation in payment of a debt, such president and director being interested in the latter corporation, the transaction is illegal. German Nat. Bank *v.* First Nat. Bank, 75 N. W. Rep. 531 (Neb., 1898).

[2] Greenstreet *v.* Paris, 21 Grant, Ch. (Can.) 229 (1874).

[3] Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

[4] Sicardi *v.* Keystone Oil Co., 149 Pa. St. 148 (1892).

enter judgment on it at once, the judgment is fraudulent as to other creditors, though the debt was legal.[1]

A mortgage by an insolvent corporation to a director may be upheld to the extent that the director, at the time of the mortgage, advanced funds to pay its debts, but not as to antecedent debts due the director.[2]

There are cases which uphold mortgages given by insolvent corporations to their directors, but these cases are wrong in principle and law.[3]

[1] Roseboom *v.* Whittaker, 132 Ill. 81 (1890).

[2] Corbett *v.* Woodward, 5 Sawyer, 403 (1879); S. C., 6 Fed. Cas. 531. See also Williams *v.* Patrons of Husbandry, 23 Mo. App. 132 (1886); White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887); Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885); Stout *v.* Yaeger Milling Co., 13 Fed. Rep. 802 (1882).

[3] Planters' Bank *v.* Whittle, 78 Va. 737 (1884), dictum, that directors may make preferences in favor of themselves if they are creditors; but in so doing they must act in perfect good faith. A mortgage given by an insolvent corporation is valid, although given to secure debts due to the wife of a director, the administrator of another deceased director, and the payee of a note indorsed by still another director. Garrett *v.* Burlington Plow Co., 70 Iowa, 697 (1886). A sale of all the property of an insolvent corporation to a director, who is also president, in payment of his debt, cannot be set aside by other corporate creditors. Buell *v.* Buckingham, 16 Iowa, 284 (1864). A preference is legal, although given by directors who are relatives of the creditor. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). An insolvent corporation, under the Arkansas decisions, may give a mortgage to one of its directors to secure a present or precedent debt, and such mortgage is valid. Gould *v.* Little Rock, etc. R'y, 52 Fed. Rep. 680 (1892), reviewing the authorities. An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892). The following cases are exceptions to and not contradictory of the general rule: Where a part of the trustees are the only creditors, and the business is a losing one, they may take a mortgage to secure moneys loaned by them to the company, and may foreclose such mortgage. Skinner *v.* Smith, 134 N. Y. 240 (1892); Whitwell *v.* Warner, 20 Vt. 425 (1848), holding that stockholders who avail themselves of their superior advantages to obtain security from the corporation for debts due them, whether by attachment or assignment, are not guilty of fraud so as to render themselves personally liable for corporate debts. Where a corporation owes money to the directors, and to pay the same borrows money and gives a mortgage, and subsequently the property is sold for less than the mortgage, a creditor whose debt was not due when the

§ 693. *Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.*— Where a director is merely the indorser, surety, or guarantor of a corporate debt or note, to which a preference is given by an insolvent corporation, a much more difficult question arises than where such debt or note is held by the director himself. The decisions are in conflict on this subject. The great weight of authority undoubtedly is that such a preference is illegal.[1] This is so held

mortgage was given cannot complain. Holt *v.* Bennett, 146 Mass. 437 (1888). But see St. Louis *v.* Alexander, 23 Mo. 483, 528, 531 (1856), where it was attempted to overturn a deed of trust on the ground that it was executed by a bare quorum of the directors and one or more of them were legally incapacitated by being directly interested. The language of the court was: "I can see no reason why a member of the board of directors might not sit in the board, and, without fraud, in conjunction with others, consent to an order for securing a debt actually due to him from the corporation." A preference given by an insolvent corporation to directors may be legal. The remedy of corporate creditors against an illegal preference is by creditors' bill and not by an execution sale. Butler *v.* Harrison, etc. Co., 41 S. W. Rep. 234 (Mo., 1897). A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party has made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the stock. Robinson *v.* Dolores, etc. Co., 2 Colo. App. 17 (1892). In Illinois it is held that an insolvent corporation may prefer a creditor who is the father of a majority of the directors. It is also held that a preference may be given to directors for a debt contracted while the company was insolvent. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895). In Missouri an insolvent corporation may prefer a director. Schufeldt *v.* Smith, 131 Mo. 280 (1895). *Cf.* National Tube Works Co. *v.* Ring, etc. Co., 118 Mo. 365 (1893). Under the old New Jersey statute the directors of a corporation could mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). In Connecticut it has been held that a corporation may turn over property to a director in payment of a debt, even though the corporation is insolvent, it being shown that all parties supposed at the time that all debts could be paid. Smith *v.* Skeary, 47 Conn. 47 (1879). A mortgage by a solvent corporation to secure its directors as creditors is legal. Hinz *v.* Van Dusen, 70 N. W. Rep. 657 (Wis., 1897).

[1] Where a director is guarantor of a debt, a preference obtained by a judgment creditor's action is illegal. Wisconsin, etc. Bank *v.* Lehigh, etc. Co., 64 Fed. Rep. 497 (1894). A draft drawn by an insolvent corporation to pay a debt for which a director is surety is illegal. Bosworth *v.* Jacksonville Nat. Bank, 64 Fed. Rep. 615 (1894). Where two out of four directors of an insolvent corporation are liable as indorsers on a corporate

because, first, such a preference is practically the same as a preference to the director himself, inasmuch as he would have had to take up the debt as indorser if no preference had been given; and second, because to sustain such a preference would

debt, a mortgage given to secure that debt will be set aside as an illegal preference, even though the mortgage has been foreclosed. Lippincott *v.* Shaw Carriage Co., 34 Fed. Rep. 570 (1888). Where a corporation is practically insolvent, and has assigned its property by deed of trust to pay certain debts for which the directors are sureties, a court of equity in Missouri will enjoin proceeding under the deed of trust, and will appoint a receiver. Consolidated, etc. Co. *v.* Kansas City, etc. Co., 43 Fed. Rep. 204 (1890); S. C., 45 Fed. Rep. 7 (1891). An insolvent corporation may give a preference by confession of judgment, but not to a creditor whose claim was assigned to him by directors. Gottlieb *v.* Miller, 154 Ill. 44 (1895). The directors of an insolvent corporation are trustees for the creditors. They cannot, after it becomes insolvent, take mortgages to themselves on its property to secure advances and indorsements made by them for it. Olney *v.* Conanicut Land Co., 16 R. I. 597 (1889). Directors of an insolvent corporation cannot apply corporate funds exclusively to corporate debts for which they are sureties. All debts will be allowed to participate ratably. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). An insolvent corporation cannot give a preference to creditors for whose debts the directors are sureties. Tillson *v.* Downing, 45 Neb. 549 (1895). A mortgage to secure a debt upon which one of the directors is liable is illegal. Stough *v.* Ponca Mill Co., 74 N. W. Rep. 868 (Neb., 1898). A corporation supposed to be solvent may give a mortgage to secure a debt guaranteed by its directors. Sabin *v.* Columbia Fuel Co., 25 Oreg. 15 (1893). An insolvent corporation cannot transfer all its property to pay a note of which a director is an indorser, joint maker, or guarantor. Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892). A mortgage given by an insolvent corporation to secure debts for which the directors are sureties is illegal. It is not legal, even though it is given for the benefit of co-sureties who are not directors. The directors are bound to know whether the company is solvent or insolvent. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893). A preference by an insolvent corporation to creditors whose notes are secured by the indorsements of directors cannot be given by the corporation by the vote of such directors. Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290 (1896). Even though an insolvent corporation illegally, but in good faith, gives a mortgage by way of preference to its president, this does not sustain an attachment by another creditor on the ground that the corporation is disposing of its property with intent to defraud the creditors. Trebilcock *v.* Big, etc. Co., 68 N. W. Rep. 330 (S. D., 1896). A mortgage to secure a corporate note, on

tempt a director holding a corporate obligation to sell the same with his guaranty or indorsement, and then induce the board of directors to prefer that obligation.

Notwithstanding these decisions and reasons, there are circumstances under which such a preference will be sustained. A corporate creditor is not to be punished simply because the directors have guaranteed his claim. The supreme court of the United States has strongly intimated that such is the law;[1]

which the voting directors are indorsers, is illegal as well as a mortgage to secure a note due a daughter of a voting director, he being her attorney, or to secure a debt due another corporation in which a voting director is also a director. Savage *v.* Miller, 36 Atl. Rep. 578 (N. J., 1897). An insolvent corporation cannot give a preference to a debt for which its directors are sureties. Gray *v.* Taylor, 38 Atl. Rep. 951 (N. J., 1897). But a corporate creditor who advised the directors to take a mortgage from the corporation to secure them in their indorsement of corporate paper cannot afterwards object to such mortgage. *Re* Bloomfield, etc. Mills, 70 N. W. Rep. 115 (Iowa, 1897). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895).

[1] In Sanford, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312, 318 (1895), rev'g Howe, etc. Co. *v.* Sanford, etc. Co., 44 Fed. Rep. 231, Mr. Justice Brewer says, with much force: "Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally with the other creditors of the corporation, because, forsooth, they have also the guaranty of some of the directors or stockholders whose guaranty may or may not be worth anything?" The payment and securing of a corporate debt are not fraudulent merely because some of the directors had guaranteed the debt. Taylor County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). A chattel mortgage securing a part of the creditors of an insolvent corporation may be valid although some of the directors and stockholders who voted for the mortgage are guarantors and indorsers of the debts so secured. Brown *v.* Grand Rapids, etc. Co., 58 Fed. Rep. 286 (1893), following the Michigan decisions, and stating that the supreme court of the United States has not decided that a corporation may not prefer one of its directors. A creditor may be preferred by the giving of security by an insolvent corporation, even though his claim is secured by the directors and stockholders, he not knowing of the insolvency at the time of the giving of the security. Henderson *v.* Indiana Trust Co., 143 Ind. 561 (1895). An insolvent corporation may give a mortgage to a creditor, by way of preference, even though a director is surety on the debt. Waggoner, etc. Co. *v.* Ziegler, etc. Co., 128 Mo. 473

and indeed it is difficult to see how a court of equity can refuse to uphold, in behalf of the corporate creditor himself, a preference which has been given to such creditor, even though a director is surety therefor, where the corporate creditor acquired his claim either from the director or from the corporation itself at a time when the corporation was solvent; or where the corporate creditor did not know that the corporation was insolvent when he acquired his claim from the director or from the corporation itself; or where the corporate creditor loaned money to the corporation itself when it was insolvent, and at the same time received a mortgage by way of preference, and also obtained the indorsements of the directors on his paper; or where the directors were merely indorsers for the accommodation of the corporation. It is true that the above rules would enable a corporation to give a preference to a corporate creditor in most cases where a director is indorser or guarantor of the claim. But, on the other hand, it is now a

(1895). A mortgage to a creditor on part of the property of an insolvent corporation is legal, although some of the stockholders and directors are indorsers of the debt. Weihl *v.* Atlanta, etc. Co., 89 Ga. 297 (1892). In Arkansas it is held that an insolvent corporation may prefer certain creditors, even though their claim is secured by the indorsements of the directors. Worthen *v.* Griffith, 59 Ark. 562 (1894). In Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503 (1896), the court very properly held that a mortgage given by an insolvent corporation to an outside creditor was valid, although the directors had given their personal note as additional security for the debt, such note being purely an accommodation note. The court distinguished Lowry, etc. Co. *v.* Empire, etc. Co., 91 Ga. 624. A director who votes for a preference on debts for which other directors are liable cannot complain. Lucas *v.* Friant, 69 N. W. Rep. 735 (Mich., 1897). Although a mortgage is invalid as to the debts in which the directors are interested, it may be valid as to the remaining debts secured by it. Savage *v.* Miller, 36 Atl. Rep. 578 (N. J., 1897). A preference is legal although some of the directors voting therefor were sureties on the paper to which such preference is given, their votes not being necessary. Levering *v.* Bimel, 45 N. E. Rep. 775 (Ind., 1897). Where a mortgage is given by an insolvent corporation to secure an antecedent debt for which a director is surety, the mortgage is not necessarily illegal; but if the transaction is actually a scheme to give the director a preference, it is illegal. Atlas Tack Co. *v.* Macon Hardware Co., 29 S. E. Rep. 27 (Ga., 1897). Where the debts equal only one-third of the market value of the corporate property, and certain creditors holding notes on which the directors are indorsers demand security or else threaten to sue the corporation, the directors may authorize confession of judgment in their favor. Mueller *v.* Monongahela, etc. Co., 38 Atl. Rep. 1009 (Pa., 1898).

general custom in banking circles not to loan to a business corporation unless the directors guarantee the debt. If the law puts such a debt at a disadvantage as compared with other corporate debts, the credit of business corporations will be greatly curtailed, thereby rendering insolvent many corporations which otherwise would be able to extricate themselves from their troubles. In New Jersey the ingenious rule has been sustained that where a preference has been given by an insolvent corporation to debts guaranteed by the directors, the amount realized from such preference, over and above what would have been realized if there had been no preference, may be recovered by the general creditors from the directors.[1]

§ 694. *Land may be purchased by a domestic corporation.*[2]—The English statutes of mortmain are not in force in this coun-

[1] Savage *v.* Miller, 39 Atl. Rep. 665 (N. J., 1898).

[2] Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881); Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Page *v.* Heineberg, 40 Vt. 81 (1868); Central Gold Min. Co. *v.* Platt, 3 Daly, 263 (1870), to the effect that the holding may be upon special trust; Nicoll *v.* New York, etc. R. R., 12 N. Y. 121, 127 (1854); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Sherwood *v.* American Bible Soc., 1 Keyes, 561 (1864); Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Riley *v.* Rochester, 9 N. Y. 64 (1853); Downing *v.* Marshall, 23 N. Y. 366 (1861); State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855); First Parish *v.* Cole, 20 Mass. 232 (1825); Old Colony R. R. *v.* Evans, 72 Mass. 25 (1856), where the company purchased a gravel-pit to transport and sell the gravel. And see Smith *v.* Sheeley, 12 Wall. 358 (1870). A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land. Stockton Sav. Bank *v.* Staples, 98 Cal. 189 (1893). In a suit by a railroad to quiet title to its land, the defendants cannot question the power of the railroad to hold land. Russell *v.* Texas, etc. R'y, 68 Tex. 646 (1887). In a bill to quiet title, a corporation need not allege that it has power to hold land. Torrent F. Eng. Co. *v.* Mobile, 101 Ala. 559 (1894). A publishing company may take a lease of a building and may sublet such parts of it as it does not use. Oswald *v.* St. Paul, etc. Pub. Co., 60 Minn. 82 (1895). A foreign corporation may buy and sell land if authorized so to do by its charter. Barcello *v.* Hapgood, 118 N. C. 712 (1896). A foreign corporation may own land in Mississippi. Taylor *v.* Alliance Trust Co., 71 Miss. 694 (1894). A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. Brown *v.* Bradford, 72 N. W. Rep. 648 (Iowa, 1897). Where a bank has legally acquired a part interest in real estate, it may purchase the remaining interest for the purpose of handling the property. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

try except in Pennsylvania. The only limitation upon the right of corporations to hold real property is that the purchase must be a natural incident of the business specified in the charter.[1] A different rule prevails in Pennsylvania.[2] In that state the

[1] 2 Kent, Com. *282; Moore *v.* Moore, 4 Dana (Ky.), 354 (1836); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114, 121 (1839); Potter *v.* Thornton, 7 R. I. 252 (1862); Perin *v.* Carey, 24 How. 465 (1860); McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 451 (1827); Page *v.* Heineberg, 40 Vt. 81 (1868). See also Odell *v.* Odell, 92 Mass. 1 (1865); Downing *v.* Marshall, 23 N. Y. 366, 392 (1861); First Parish *v.* Cole, 20 Mass. 232, 239 (1825); Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881). One who agrees to sell land to a corporation is not bound to see that it is required for the purposes of the corporation, and if acting in good faith, and without knowledge of an intention to misapply the corporate funds, he may enforce specific performance of the contract. Eastern Counties R'y *v.* Hawkes, 5 H. L. Cas. 331 (1855). Frequently the charter places some limitations or grants some privileges herein. A charter power to hold land for business purposes and to secure debts does not authorize the purchase of land for the purpose of selling it again. Bank of Michigan *v.* Niles, Walk. (Mich.) 99 (1842); Pacific R. R. *v.* Seely, 45 Mo. 212 (1870), where a railroad was held to have no power to acquire land for speculation; Land *v.* Coffman, 50 Mo. 243 (1872); Rensselaer, etc. R. R. *v.* Davis, 43 N. Y. 137 (1870). Under such an express power the corporation cannot purchase merely for the convenience of the corporation, nor for purposes foreign to its objects. State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855). But the purchase is presumed to be for purposes mentioned in the charter. Chautauque County Bank *v.* Risley, 19 N. Y. 369 (1859); *Ex parte* Peru Iron Co., 7 Cow. 540 (1827); Moss *v.* Rossie Lead Min. Co., 5 Hill, 137 (1843); Alward *v.* Holmes, 10 Abb. N. Cas. 96 (1880), where a foreign bank had purchased. A railroad, instead of condemning a right of way, may purchase the fee. Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854).

[2] This arose from the fact that the judges of the supreme court, appointed to examine and report to the legislature such of the English statutes as were in force in that state, reported that the statutes of mortmain were "so far in force that all conveyances . . . made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly." The report may be found in 3 Binney (Pa.), 595, 626 (1808). See also Methodist Church *v.* Remington, 1 Watts (Pa.), 218 (1832); Miller *v.* Porter, 53 Pa. St. 292 (1866). The statute of April 6, 1833, made all purchases of land by or for corporations, without the license of the commonwealth, subject to forfeiture. Under this act it has been held that a foreign corporation may purchase and hold real estate in Pennsylvania, subject to being divested by the direct action of the state. Runyan *v.* Coster, 14 Pet. 122 (1840). To same effect, Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821). A similar statute, passed April 26, 1855, was construed to the same effect in Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), after having been declared a mortmain act in American Slate Co. *v.* Phillipsburg, etc. Bank, 8 W. N. Cas. 430 (1880). A person sued in Pennsyl-

mortmain laws are held to still exist, and the state itself has enacted a statute restricting the right.

The amount of land which a corporation may purchase can be questioned only by a stockholder or by the state in a direct proceeding for that purpose. The objection cannot be made by others.[1] A stockholder has the same right to object to an

vania on a debt to a foreign corporation cannot set up that the corporation is illegally holding land in the state. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876). Where a foreign corporation cannot directly own land in a state, it cannot own land indirectly by owning a majority of the stock of a domestic corporation which owns the land. The state may escheat the land. Commonwealth *v.* New York, etc. R. R., 114 Pa. St. 340 (1886). But under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and such land does not escheat. Commonwealth *v.* New York, etc. R. R., 139 Pa. St. 457 (1891). See also § 695, *infra*.

[1] Only the state can raise the question that the corporation was not entitled to acquire real estate. Cooney *v.* A. Booth, etc. Co., 48 N. E. Rep. 406 (Ill., 1897); Land *v.* Coffman, 50 Mo. 243 (1872), holding also that a deed voluntarily made to the corporation of real property in excess of the amount allowed by its charter will pass a good title; Natoma Water, etc. Co. *v.* Clarkin, 14 Cal. 544, 552 (1860), Field, C. J., saying: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." A grantor of property to a railroad company for picnic purposes cannot avoid his deed and its obligations by claiming that the purchase by the company was *ultra vires*. Shelby *v.* Chicago, etc. R. R., 143 Ill. 385 (1892). The corporation cannot defend against a mortgage on the ground that it had no power to purchase the property. Butterworth, etc. *v.* Kritzer, etc. Co., 72 N. W. Rep. 990 (Mich., 1897). The state alone can object to a foreign corporation holding more than five thousand acres of land in the state as prescribed by the statutes. American Mortgage Co. *v.* Tennille, 87 Ga. 28 (1891). Where a Connecticut company owning land in South Dakota sells it to a Minnesota corporation organized to speculate in land, a subsequent deed by the former company to an individual is not good. Only the state can question the power of the Minnesota corporation to take title. The constitutional provision of South Dakota relative to land does not change this rule. Gilbert *v.* Hole, 2 S. D. 164 (1891). There are many other cases in which it is held that the state alone can raise this objection. National Bank *v.* Matthews, 98 U. S. 621, 628 (1878), and cases cited; Cowell *v.* Springs Co., 100 U. S. 55 (1879); Myers *v.* Croft, 13 Wall. 291 (1871); Southern Pac. R. R. *v.* Orton, 6 Sawy. 157, 181 (1879), and cases cited; S. C., 32 Fed. Rep. 457, 470; Shewalter *v.* Pirner, 55 Mo. 218 (1874); Chambers *v.* St. Louis, 29 Mo. 543, 576 (1860); McIndoe *v.* St. Louis, 10 Mo. 576 (1847); People *v.* Mauran, 5 Denio, 389 (1848); Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821); Goundie *v.* Northampton Water Co., 7 Pa. St. 233 (1847); Steam-

ultra vires purchase of land as he has to object to any other *ultra vires* act;[1] but he must be prompt in his objection,[2] and must bring suit in behalf of all the stockholders to set the pur-

boat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Morgan *v.* Donovan, 58 Ala. 241 (1877). But in this case it was said that in a suit to enforce a contract of purchase which remained executory, or to recover for its breach, the question of *ultra vires* would be material. Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 146 (1825); Barrow *v.* Nashville, etc. Co., 9 Humph. (Tenn.) 304 (1848), holding that the fact that a corporation uses real estate for purposes beyond its powers furnishes no ground to the vendor for a rescission of the contract of sale; Runyan *v.* Coster, 14 Pet. 122, 129 (1840); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Mapes *v.* Scott, 94 Ill. 379 (1880), in which the rule was applied to national banks; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884); Smith *v.* Sheeley, 12 Wall. 358 (1870); De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878), which case was affirmed in 31 N. J. Eq. 671 (1879), where it was, however, held that an heir-at-law may object that a corporation cannot hold land in trust in excess of its statutory powers. See this report for a well-considered opinion, citing cases, and notes by the reporter. Bone *v.* Delaware, etc. Co., 5 Atl. Rep. 751 (Pa., 1886); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Missouri, etc. Co. *v.* Bushnell, 11 Neb. 192 (1881); Jones *v.* Habersham, 107 U. S. 174 (1882); Barnes *v.* Suddard, 117 Ill. 237 (1886), in which the rule was applied to a foreign corporation; Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), to the same effect; Spear *v.* Crawford, 14 Wend. 20 (1835), where a stockholder was held liable on his statutory liability to a corporate creditor who had sold land to the corporation.

If a corporation buys land and then finds it is *ultra vires*, and sells its contract to a third person, it may collect from the latter moneys paid on the purchase. Crutcher *v.* Nashville Bridge Co., 8 Humph. (Tenn.) 403 (1847). A railroad company cannot refuse to complete a purchase of lands which, *prima facie*, it could use for railroad purposes. It cannot claim that the purchase was *ultra vires*. Eastern Counties R'y *v.* Hawkes, 5 H. L. Cas. 331 (1855). A turnpike company may take a lease of land for storing purposes. Crawford *v.* Longstreet, 43 N. J. L. 325 (1881). An agreement of a company to buy land if a certain bill passes is legal and binding. Taylor *v.* Chichester, etc. R'y, L. R. 4 H. L. 628 (1870), reversing S. C., L. R. 2 Exch. 356 (1867). Coleman *v.* San Rafael Turnp. Co., 49 Cal. 517 (1875), holds that, in an action to quiet title, a bond to convey to a corporation for purposes beyond its requirements is void. Thweatt *v.* Bank of Hopkinsville, 81 Ky. 1 (1883), where an execution sale to a bank was held to be void at the suit of the execution debtor; Riley *v.* Rochester, 9 N. Y. 64 (1853), holding, in an action of trespass, that a conveyance to a municipal corporation of land beyond its limits for the purposes of a street is void. Al-

[1] *Re* Kent Benefit Bldg. Soc., 1 Dr. & Sm. 417 (1861), where stockholders were not required to refund to directors moneys paid by the latter *ultra vires* for land; Grimes *v.* Harrison, 26 Beav. 435 (1859), where the directors were compelled to make good the funds of the corporation used *ultra vires* to purchase land.

[2] See ch. XLIV, *infra*.

chase aside.[1] Whenever a corporation may take the legal title to land it may take the beneficial interest in it, but if it cannot hold a legal title it cannot hold as *cestui que trust*.[2]

Where several persons, in order to evade section 2331 of the United States Revised Statutes, which limits to twenty acres the amount of placer-mining ground that a single person may locate, agree that "dummies" shall be used as locators, and the "dummies" shall transfer the land to one person, who shall hold it for all of the principal parties, and all this is done, the person thus obtaining title cannot be compelled by the others to divide. The contract is illegal and the court will not aid any party.[3]

though a corporation purchases land in excess of the amount limited by its charter, yet only the state can object, and its remedy is forfeiture of the charter. Fayette Land Co. *v.* Louisville, etc. R. R., 93 Va. 274 (1896). The power of a trust company to buy a tax title cannot be attacked by a mortgagee foreclosing a mortgage on the land. Watts *v.* Gantt, 42 Neb. 869 (1894). In a suit by a corporation to quiet title, a grantee of its grantees cannot set up that the corporation had no power to acquire or hold title. Butte Hardware Co. *v.* Cobban, 13 Mont. 351 (1893). For a careful review of the authorities, and an argument that the corporation or its stockholders are in all cases protected as to real estate purchased *ultra vires*, see Harvard L. Rev. 15 (1894).

[1] See ch. XLV, *infra*.

[2] Coleman *v.* San Rafael Turnp. Co., 49 Cal. 517, 522 (1875). In this case a bond to an individual to convey land in trust for the stockholders of a corporation, with power to sell under direction of its board of trustees, was held to constitute the corporation a *cestui que trust*. Vidal *v.* Girard, 2 How. 127, 187 (1844), holding also that, if the trust be repugnant to or inconsistent with the purposes of the corporation, a new trustee may be substituted, but no ground is furnished to declare the trust void. See also De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878); affirmed, 31 N. J. Eq. 671 (1879); Clemens *v.* Clemens, 37 N. Y. 59 (1867); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871); Harris *v.* American Bible Soc., 2 Abb. App. Dec. 316 (1867), but here the corporation had express power to hold in trust; Downing *v.* Marshall, 23 N. Y. 366 (1861).

[3] Mitchell *v.* Cline, 84 Cal. 409 (1890). See also Case *v.* Kelly, 133 U. S. 21 (1890). Where land is entered in the names of individuals in order to evade a statute against corporations, and then they deed to the corporations, the state may set aside the grants. Wichita, etc. Co. *v.* State, 80 Tex. 684 (1891). A corporation taking out patents to land in the names of its employees, and then taking a conveyance from them, holds the land subject to forfeiture by the government. United States *v.* Trinidad Coal, etc. Co., 137 U. S. 160 (1890). A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to 2 Utah Comp. L. 1888, § 2272, which provides that a corporation "shall not have power to enter into, as a business, the buying and selling of real estate," but

Although the officers of a railroad company take in their own names the title to lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands.[1] The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[2]

Quo warranto does not lie to oust a corporation from the possession of land. *Quo warranto* lies only to oust a company from the franchises it claims, and not to divest it of property.[3]

It is well settled that corporations may, without special authority, dispose of land as they may deem expedient,[4] and may mortgage lands in the course of legitimate business.[5]

affixed no penalty for its violation. Fisk *v.* Patton, 7 Utah, 399 (1891). Even a domestic corporation cannot obtain a patent to a mining claim under the federal statutes, unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). A foreign corporation not authorized to own and register ships in America cannot evade the law by taking title in the names of trustees who are residents of America. Ogden *v.* Murray, 39 N. Y. 202 (1868),—a dictum. Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. State *v.* Hudson Land Co., 52 Pac. Rep. 574 (Wash., 1898).

[1] Case *v.* Kelly, 133 U. S. 21 (1890).

[2] Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894).

[3] State *v.* Pittsburgh, etc. R. R., 50 Ohio St. 239 (1893).

[4] White Water, etc. Co. *v.* Vallette, 21 How. 414, 424 (1858); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873); Burton's Appeal, 57 Pa. St. 213 (1868); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Reynolds *v.* Stark County, 5 Ohio, 204 (1831); Newark *v.* Elliott, 5 Ohio St. 113 (1855); De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119 (1848); aff'd, 3 N. Y. 238; Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding also that the sale may be by directors having general powers to make contracts; Aurora, etc. Soc. *v.* Paddock, 80 Ill. 263 (1875). And see Binney's Case, 2 Bland, Ch. 99, 142 (1829); Railroad Co. *v.* Howard, 7 Wall. 392 (1868), in which a sale by a corporation without authority, but with the consent of all the parties interested in the subject-matter of it, was held valid; Edward *v.* Fairbanks, 27 La. Ann. 449 (1875); Rutland, etc. R. R. *v.* Proctor, 29 Vt. 93 (1856), holding also that a purchaser from a corporation cannot defeat an action for the purchase-money by the defense that the corporation had no power to acquire the property. A corporation may authorize an agent to deed land belonging to the corporation. Barcello *v.* Hapgood, 118 N. C. 712 (1896).

[5] See §§ 779, etc., *infra*.

Under the English statute of wills a devise of land to certain bodies corporate is unlawful. Similar statutes have been enacted quite generally in America.[1]

An educational corporation authorized to accept property to a certain amount cannot take a devise or bequest of property after it already has property equal to the amount limited by its charter.[2]

[1] McCartee *v.* Orphan Asylum Soc., 9 Cow. 437 (1827); Downing *v.* Marshall, 23 N. Y. 366, 384 (1861), but holding that a charter provision enabling a corporation to take land "by direct purchase or otherwise" is an express authority within the meaning of the statute of wills. See also Kerr *v.* Dougherty, 79 N. Y. 327 (1880), overthrowing a bequest by a resident of another state to a New York corporation which was forbidden to take by bequest; State *v.* Bates, 2 Harr. (Del.) 18 (1835), where a devise of money arising from the sale of land was held to be in effect a devise of land; but the contrary view of such a devise was taken in American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. C.) 156 (1859). The statutes of New York against bequests to certain corporations made within a certain time before the testator's death do not apply to a bequest by a foreigner made in a foreign land to a corporation to be organized under the laws of New York, the bequest being valid at the domicile of the testator. Dammert *v.* Osborn, 140 N. Y. 30 (1893). In Massachusetts it has been held that a town or parish may take and hold a devise for the use of schools. First Parish *v.* Cole, 20 Mass. 232 (1825). As to the rule governing bequests to charitable corporations in New York, see Wetmore *v.* Parker, 52 N. Y. 450 (1873). A foreign charitable corporation cannot take New York land by devise unless the New York statute permits. White *v.* Howard, 46 N. Y. 144 (1871). *Cf.* White *v.* Howard, 38 Conn. 342 (1871). And concerning the common-law restrictions on the power of charitable corporations to sell land, see Madison Ave. Bapt. Ch. *v.* Oliver St. Bapt. Ch., 46 N. Y. 131 (1871). See also § 695, *infra*, as to foreign corporations.

[2] Cornell University *v.* Fiske, 136 U. S. 152 (1890). Where land is willed to a corporation, the heirs cannot defeat the devise by claiming that the corporation already has all the land that the statutes allow. Only the state can raise that question. Hamsher *v.* Hamsher, 132 Ill. 273 (1890). In Jones *v.* Habersham, 107 U. S. 174 (1882), where the limit was on the income and the gift increased it beyond the limit, the court held that only the state could object. Where the limitation upon the capacity of a corporation to hold land is based upon a yearly value, the yearly value at the time it is acquired is intended, and the title is not affected by a subsequent increase in its value above the amount limited. Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847); Humbert *v.* Trinity Church, 24 Wend. 587, 629 (1840). And see Harvard College *v.* Boston, 104 Mass. 470 (1870). In McGraw *v.* Cornell University, 45 Hun, 354 (1887), a will giving to the defendant more property than its charter allowed was overthrown by the heirs of the testatrix. Affirmed, *Re* McGraw, 111 N. Y. 66 (1888). See also Church of Redemption *v.* Grace Church, 68 N. Y. 570 (1877); Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847). *Cf.*

A devise or bequest to a corporation to be hereafter created is valid.[1] A corporation may take the title to land in fee although the duration of the corporation itself is limited.[2] Where a deed is made by or to a *de facto* corporation, the corporate existence cannot be questioned by any of the parties.[3]

A deed to an unincorporated association is void. The land owned by such an association is generally vested in trustees for its benefit.[4]

§ 695. *Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.*— A foreign corporation other than an alien corporation, having power to buy and sell land, may at common law buy and sell land.[5]

In the exercise of comity between the states, corporations created in one of them may acquire, hold, and transfer land in another, the same as individuals.[6]

Rainey *v.* Laing, 58 Barb. 453 (1871). Although a corporation is limited by its charter as to the amount of property it may take, yet a devise to it of property greater in value than that amount is not void, inasmuch as only the state can complain. Farrington *v.* Putnam, 37 Atl. Rep. 652 (Me., 1897).

[1] Russell *v.* Allen, 107 U. S. 163 (1882); Burrill *v.* Boardman, 43 N. Y. 254 (1871); Webster *v.* Wiggin, 31 Atl. Rep. 824 (R. I., 1895). A bequest to a company to be incorporated within the time allowed by statute is valid. People *v.* Simonson, 126 N. Y. 299 (1891).

[2] Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854); Rives *v.* Dudley, 3 Jones. Eq. (N. C.) 126 (1856); Asheville Division *v.* Aston, 92 N. C. 578 (1885); Delhi School Dist. *v.* Everett, 52 Mich. 314 (1883). A deed of property to a railroad for fifty years, or so long as its charter continued, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1888). A dissolution of a corporation after it has conveyed real estate does not impair the title of the grantees. People *v.* Mauran, 5 Denio, 389 (1848).

[3] See § 637, *supra.*

[4] See § 504, *supra.*

[5] Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 584 (1894), wherein the court said: "As a corporation *de facto*, possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed."

[6] Cowell *v.* Springs Co., 100 U. S. 55 (1879); Runyan *v.* Coster, 14 Pet. 122, 130 (1840); Christian Union *v.* Yount, 101 U. S. 352 (1879); Barnes *v.* Suddard, 117 Ill. 237 (1886); New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73 (1884); Lathrop *v.* Commercial Bank, 8 Dana (Ky.), 114 (1839); Amer-

This right of foreign corporations to acquire and hold real estate is, however, subject to the statutory laws of the state wherein the land is situated, and also to its public policy and the general policy of its statutes relating to domestic corporations.[1]

ican Bible Soc. *v.* Marshall, 15 Ohio St. 537 (1864); State *v.* Boston, etc. R. R., 25 Vt. 433 (1853); Claremont Bridge *v.* Royce, 42 Vt. 730, 736 (1870); Lumbard *v.* Aldrich, 8 N. H. 31 (1835); Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867); Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820), holding that a corporation of another state may file a bill for the foreclosure of a mortgage on land in New York; Columbus Buggy Co. *v.* Graves, 108 Ill. 459 (1884); Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 130, 422 (1871), the chancellor saying "that a foreign corporation may own property in this state and transact business, and make contracts in it to be performed here, is too well settled to discuss;" Northern Transp. Co. *v.* Chicago, 7 Biss. 45, 52 (1874); S. C., 18 Fed. Cas. 362, 365; Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322 (1882); New York Dry Dock *v.* Hicks, 5 McLean, 111 (1850); S. C., 18 Fed. Cas. 151; Whitman Gold, etc. Co. *v.* Baker, 3 Nev. 386 (1867); Metropolitan Bank *v.* Godfrey, 23 Ill. 579 (1860), holding also that foreign corporations can only acquire and hold lands upon the terms and conditions and in the way authorized by the law of their creation. They may loan money on real-estate mortgages. See § 690, *supra*. *Cf.* Northwestern, etc. Ins. Co. *v.* Overholt, 4 Dill. 287 (1878); S. C., 18 Fed. Cas. 403; Morris Canal, etc. Co. *v.* Townsend, 24 Barb. 658 (1857), where a statute authorizing a foreign corporation to appropriate land on payment of a just compensation to its owners was held valid (affirmed as to this point, *Re* Townsend, 39 N. Y. 171 — 1868); Stewart *v.* Lehigh Valley R. R., 38 N. J. L. 505 (1875); National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (1879); Sherwood *v.* American Bible Soc., 1 Keyes, 561 (1864); Elston *v.* Piggott, 94 Ind. 14 (1883), to the effect that it may hold land purchased at a judicial sale under a decree in its favor. An alien corporation may purchase and hold land in Missouri. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). Although an alien cannot own real estate, yet he may own stock in a corporation which owns real estate. Princeton Min. Co. *v.* First Nat. Bank, 7 Mont. 530 (1888). As to foreign corporations holding land, see 35 Cent. L. J. 166. As to the recent act of congress prohibiting foreign corporations from owning land in the territories, see Potter *v.* Rio Arriba, etc. Co., 4 N. M. 322 (1888). Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas does not allow incorporation for that purpose. Galveston, etc. Co. *v.* Perkins, 26 S. W. Rep. 256 (Tex., 1894). Where a banker sells stock to a lawyer, and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. Daly *v.* Brennan, 87 Wis. 36 (1894).

[1] Christian Union *v.* Yount, 101 U. S. 352 (1879); Carroll *v.* East St. Louis, 67 Ill. 568 (1873), where a corporation chartered by Connecticut for the sole purpose of buying and selling land

Only the state or a dissenting stockholder can question the power of a foreign corporation to hold land.[1] And only the state can object to a foreign corporation holding more land than

was held not competent to acquire land in Illinois, because such business was contrary to the general policy of the state and tended to create perpetuities; U. S. Trust Co. *v.* Lee, 73 Ill. 142 (1874), in which the court denied the right of a foreign corporation to hold real estate in Illinois beyond what is necessary to the transaction of its business or the collection of its debts, either for its own benefit or in trust for others; U. S. Mortgage Co. *v.* Gross, 7 Cent. L. J. 226 (1878), in which the Illinois rule was explained so as not to exclude foreign corporations empowered to loan money on real-estate securities: Thompson *v.* Waters, 25 Mich. 214 (1872); Holbert *v.* St. Louis, etc. R'y, 45 Iowa, 23 (1876), holding that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations; Farmers' L. & T. Co. *v.* McKinney, 6 McLean, 1 (1853); S. C., 8 Fed. Cas. 1048; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. 33 (1868); White *v.* Howard, 46 N. Y. 144 (1871); Hollis *v.* Drew Theol. Seminary, 95 N. Y. 166 (1884), holding that foreign corporations are subject to the New York statute which declares invalid a devise or bequest in a will executed less than two months before the death of the testator. In *Re* Prime's Estate, 136 N. Y. 347, 362 (1893), the court said: "A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the act binds such corporations *ex proprio vigore*, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations." For the decisions in Pennsylvania on its statutes and policy excluding foreign corporations from holding land, see § 695. Where land is claimed by a foreign corporation, the courts of the state in which the land is situated will construe its charter and determine whether it authorizes the corporation to hold the real estate. Boyce *v.* St. Louis, 29 Barb. 650 (1859); White *v.* Howard, 38 Conn. 342 (1871). And in construing such foreign charters the court will consider the decisions of the courts of the state granting them, though it will not be bound thereby. Thompson *v.* Waters, 25 Mich. 214 (1872); Boyce *v.* St. Louis, 29 Barb. 650 (1859). The right of a corporation to hold realty is determined not alone by its charter, but by the statutes of the state where the land is. A corporate deed in a chain of title is presumed good. Tarpey *v.* Deseret Salt Co., 5 Utah, 494 (1888). If a foreign corporation is not authorized to hold real estate, it cannot take land in another state by devise. Boyce *v.* St. Louis, 29 Barb. 650 (1859); Starkweather *v.* American Bible Soc., 72 Ill. 50 (1874). See also § 695. On the other hand, if by its charter, either expressly or impliedly, a corporation may take lands by devise, a provision of law in its own state prohibiting corporations from taking by devise, unless expressly authorized to do so, will not prevent its taking by devise in another state. American Bible Soc. *v.* Marshall, 15 Ohio St. 537 (1864); Thompson *v.* Swoope, 24 Pa. St. 474 (1855); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871), but

[1] Seymour *v.* Slide, etc. Mines, 153 U. S. 523 (1894).

the statutes permit.[1] A deed of land to a foreign corporation in Colorado is valid, although the corporation has not filed a copy of its charter as required by the statutes. The grantor cannot complain.[2]

A state may restrict the right of foreign corporations to take and hold real property within its borders.[3]

§ 696. *Foreign corporations — Their right to do business in the various states.*— The corporations of one state may exercise any or all of their powers in another state, unless the latter state, by its statutes, decisions, or policy, forbids. This right of a corporation to act and contract in any state is due to the spirit of comity between the states.[4] It is constitutional, however, for a state to refuse to allow that privilege,[5] except as against corporations engaged in interstate commerce.

here the bequest was of personal property. To same effect, Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864). A devise of land to a foreign corporation is void unless authorized by the law of the state where it lies, even though such foreign corporation is duly authorized by its charter to take it. White *v.* Howard, 46 N. Y. 144 (1871), followed in United States *v.* Fox, 94 U. S. 315 (1876), declaring void a devise of land in New York to the government of the United States.

[1] Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894).

[2] Fritts *v.* Palmer, 132 U. S. 282 (1889).

[3] Runyan *v.* Coster, 14 Pet. 122 (1840); Thompson *v.* Waters, 25 Mich. 214 (1872); United States *v.* Fox, 94 U. S. 315 (1876).

[4] As to the power of a foreign corporation to do business in New York, the court, in Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 591 (1894), said: "It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a non-resident natural person might have transacted here." In People *v.* Fidelity, etc. Co., 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.

[5] These principles of law have often been enunciated by the courts. See §§ 237–239, *supra*, and notes. See also Bank of Augusta *v.* Earle, 13 Pet. 519 (1839); Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343 (1875); Paul *v.* Virginia, 8 Wall. 168 (1868); affirmed in Ducat *v.* Chicago, etc., 10 Wall. 410 (1870); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Land Grant, etc. Co. *v.* Coffey County, 6 Kan. 245 (1870); Ducat *v.* Chicago, 48 Ill. 172 (1868); Williams *v.* Creswell, 51 Miss. 817 (1876); Hadley *v.* Freedmen's, etc. Co., 2 Tenn. Ch. 122 (1874); Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870); S. C. *sub nom.* Oliver *v.*

Foreign corporations must exercise their powers and franchises in accordance with the laws of the state where they do business, and in consonance with the principles of its general policy.[1]

The validity and enforceability of a contract by a foreign corporation are determined, not by its charter, but by the law prevailing where the contract is made.[2]

Liverpool, etc. Ins. Co., 100 Mass. 531; Kennebec Co. *v.* Augusta Ins. etc. Co., 72 Mass. 204 (1856); Day *v.* Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887), where a domestic corporation leased a railroad in another state; Kerchner *v.* Gettys, 18 S. C. 521 (1882); Mutual, etc. Ins. Co. *v.* Davis, 12 N. Y. 569 (1855); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883); Atterbury *v.* Knox, 4 B. Mon. (Ky.) 90 (1843), where foreign corporations were forbidden to do banking. See also Cooley, Const. Law, p. 183; Wharton, Conf. L., § 48*a*. In Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883), the court refused to mandamus the defendant, a register of deeds, to allow the plaintiff, a foreign corporation, to make abstracts of all the land in the county, there being no evidence of the corporate powers of the plaintiff. A foreign corporation may make a loan in Missouri. Ferguson *v.* Soden, 111 Mo. 208 (1892). An English corporation is of course an alien corporation. Eureka, etc. Co. *v.* Richmond, etc. Co., 2 Fed. Rep. 829 (1880). A state may exclude a foreign corporation from doing business in the state unless engaged in interstate business. Huffman *v.* Western, etc. Co., 36 S. W. Rep. 306 (Tex., 1896).

[1] Runyan *v.* Coster, 14 Pet. 122 (1840); *Re* Comstock, 3 Sawyer, 218 (1874); S. C., 6 Fed. Cas. 244; Phœnix Ins. Co. *v.* Commonwealth, 5 Bush (Ky.), 68 (1868); Gill *v.* Kentucky, etc. Co., 7 Bush (Ky.), 635 (1870); Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870); Milnor *v.* New York, etc. R. R., 53 N. Y. 363 (1873); Frazier *v.* Willcox, 4 Rob. (La.) 517 (1843); Bard *v.* Poole, 12 N. Y. 495 (1855); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); Pierce *v.* Crompton, 13 R. I. 312 (1881); Stevens *v.* Pratt, 101 Ill. 206 (1882), holding that the general policy of a state restricting foreign corporations must be expressed in some affirmative way; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 564 (1847); 2 Kent, Com. 284, 285.

[2] A charter provision prohibiting the corporation from selling its bonds below par does not invalidate the bonds when sold to a *bona fide* purchaser in another state. Elsworth *v.* St. Louis, etc. R. R., 33 Hun, 7; aff'd, 98 N. Y. 553 (1885). See also Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839); Nichols *v.* Mase, 94 N. Y. 160 (1883), holding that the holder of bonds issued by a foreign corporation, valid upon their face, is not bound to show that the provisions of the statute which authorized their issue have been complied with; Bard *v.* Poole, 12 N. Y. 495 (1855), holding that a corporation prohibited by its charter from contracting for interest over a certain rate may, however, contract for a greater rate in another state under whose laws it is legal. To same effect, Knox *v.* Bank of U. S., 26 Miss. 655 (1854), and Bank of U. S. *v.* Owens, 2 Pet. 527 (1829); American

§§ 697–700. *Foreign corporations — Restrictions upon their right to do business.*— A state legislature may impose such terms, conditions, and restrictions upon foreign corporations, other than corporations engaged in interstate commerce, as it may see fit.[1] *Quo warranto* lies against foreign corporations doing business in a state contrary to its statute.[2]

Life Ins. Co. *v.* Dobbin, Hill & D. (Lalor's Supp.) 252 (1843), where, construing the New York restraining act, it was held that a foreign corporation could purchase and sell promissory notes, but not bills of exchange; Bank of Chillicothe *v.* Dodge, 8 Barb. 233 (1850), holding that money paid by a foreign corporation in violation of a local law is recoverable by it. For cases under a statute of Missouri, see Bank of Louisville *v.* Young, 37 Mo. 398 (1866); Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181 (1866); Long *v.* Long, 79 Mo. 644 (1883). But corporate creditors and stockholders are subject to provisions and regulations contained in the charter. Canada Southern R'y *v.* Gebhard, 109 U. S. 527, 536 (1883), where a statutory recapitalization was held to be valid; Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386, 435 (1845), holding that the corporation can exercise only the powers given to it by its charter. A foreign corporation may take any interest allowed by the place of the contract, though such interest is usurious by its charter. Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386 (1845).

[1] Paul *v.* Virginia, 8 Wall. 168 (1868); affirmed in Ducat *v.* Chicago, 10 Wall. 410 (1870); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Lafayette Ins. Co. *v.* French, 18 How. 404 (1855), holding that a corporation doing business in such state is presumed to assent to its rules; State *v.* Lathrop, 10 La. Ann. 398 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Indiana *v.* American Exp. Co., 7 Biss. 227 (1876); S. C., 13 Fed. Cas. 24; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Smith *v.* Alvord, 63 Barb. 415 (1866); Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866); Lamb *v.* Lamb, 13 Bankr. Reg. 17 (1875); S. C., 14 Fed. Cas. 1016; Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a charter power to transact business in other states does not exempt them from local restrictions; People *v.* Howard, 50 Mich. 239 (1883); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883); Goldsmith *v.* Home Ins. Co., 62 Ga. 379 (1879), where a statute imposing upon foreign corporations the same license taxes as their own states impose was held constitutional; Home Ins. Co. *v.* Davis, 29 Mich. 238 (1874); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26 (1880); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212 (1851); Tioga R. R. *v.* Blossburg, etc. R. R., 20 Wall. 137 (1873), prohibiting foreign corporations from setting up the statute of limitations. Foreign corporations doing business in a state which prescribes statutory provisions for that business cannot in contracts do away with the application to it of these provisions. Fletcher *v.* New York Life Ins. Co., 13 Fed. Rep. 526 (1882). The same rule applies to an insurance corporation chartered by congress. It must conform to state restrictions. Daly *v.* National

[2] State *v.* Fidelity, etc. Co., 39 Minn. 538 (1888).

Restrictions by a state on foreign corporations must not conflict with provisions of the federal constitution. Thus, the restriction must not interfere with interstate commerce,[1] or with the jurisdiction of the federal courts,[2] or with the removal of causes from state to United States courts.[3] Corporations are not "citizens" entitled to the privileges and immunities of citizens in the several states within the meaning of article 4, section 2, of the constitution of the United States.[4] A state cannot prohibit agents of foreign corporations entering the state and selling goods.[5]

A statute making void all contracts made in the state by foreign corporations unless a certain fee is paid to the state is unconstitutional as to sales made by traveling salesmen of foreign corporations.[6]

Life Ins. Co., 64 Ind. 1 (1878). A railroad company, by going into another state and having and operating a road there, subjects itself to the legislation of that state. Stone *v.* Illinois Central R. R., 116 U. S. 347 (1885). Foreign corporations may be compelled to pay a license fee before doing business. Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888).

[1] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1 (1877); Telegraph Co. *v.* Texas, 105 U. S. 460 (1881); Rae *v.* Grand Trunk R'y, 14 Fed. Rep. 401 (1882).

[2] Baltimore, etc. R. R. *v.* Cary, 28 Ohio St. 208 (1876); Moore *v.* Chicago, etc. R'y, 21 Fed. Rep. 817 (1884). See also ch. XLV, *infra*.

[3] Southern Pac. Co. *v.* Denton, 146 U. S. 202 (1892); Barron *v.* Burnside, 121 U. S. 186 (1887); Doyle *v.* Continental Life Ins. Co., 94 U. S. 535 (1876); Insurance Co. *v.* Morse, 20 Wall. 445 (1874); Shelby *v.* Hoffman, 7 Ohio St. 450 (1857); Hartford F. Ins. Co. *v.* Doyle, 6 Biss. 461 (1875); S. C., 11 Fed. Cas. 702. A statute requiring foreign corporations to agree not to remove suits to the federal courts is void. Rece *v.* Newport News, etc. Co., 32 W. Va. 164 (1889); Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238 (1895).

[4] Paul *v.* Virginia, 8 Wall. 168 (1868), holding that a statute requiring foreign insurance companies to obtain a license before doing business is not in conflict with that clause; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Tatem *v.* Wright, 23 N. J. L. 429, 444 (1852); Warren Mfg. Co. *v.* Ætna Ins. Co., 2 Paine, 501 (c. 1837); S. C., 29 Fed. Cas. 294; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Ducat *v.* Chicago, 48 Ill. 172 (1868); Cincinnati, etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870); Pierce *v.* Crompton, 13 R. I. 312 (1881). *Cf.* McKinley *v.* Wheeler, 130 U. S. 630 (1889); Thomas *v.* Chisholm, 13 Colo. 105 (1889).

[5] Davis, etc. Co. *v.* Dix, 64 Fed. Rep. 406 (1894).

[6] Aultman, etc. Co. *v.* Holder, 68 Fed. Rep. 467 (1895). A license fee required of foreign corporations before doing business in the state is unconstitutional as an interference with interstate commerce. Coit *v.* Sutton, 102 Mich. 324 (1894). But see Moline Plow Co. *v.* Wilkinson, 105 Mich. 57 (1895). A statute by which Pennsylvania requires a New York

Where a state statute provides that contracts made by foreign corporations shall not be enforced in the courts of the state before compliance with certain requirements of the statute, the prohibition will not be extended to suits brought in the federal courts, the contracts not being void.[1]

But a requirement that a foreign corporation shall duly execute a power of attorney appointing an agent upon whom service of process may be made, or obtain a certificate from a state officer, is valid. The corporation is usually forbidden to contract or sue in the state before complying with it. It was formerly held that contracts made before complying with the requirement were void;[2] but the later doctrine is that they are not void, though not enforceable until compliance,[3] and that

railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void. New York, Lake Erie, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

[1] Sullivan *v.* Beck, 79 Fed. Rep. 200 (1897).

[2] *Re* Comstock, 3 Sawyer, 218 (1874); S. C., 6 Fed. Cas. 244; Bank of British Columbia *v.* Page, 6 Oreg. 431 (1877); Semple *v.* Bank of British Columbia, 5 Sawyer, 88 (1878); S. C., 21 Fed. Cas. 1063; Oregon, etc. Inv. Co. *v.* Rathbun, 5 Sawyer, 32 (1877); S. C., 18 Fed. Cas. 764; but here a note made in Oregon, but payable in Scotland, was treated as if made in Scotland; American Button, etc. Co. *v.* Moore, 2 Dak. 280 (1880), holding, under a similar statute, that the foreign corporation could sue in the courts of the state, but could not transact business. To same effect, Utley *v.* Clark-Gardner, etc. Co., 4 Colo. 369 (1878); Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853); Union, etc. Co. *v.* Thomas, 46 Ind. 44 (1874); Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Smith *v.* Little, 67 Ind. 549 (1879), holding that the statute referred only to actions upon contract and not to suits in replevin; Beard *v.* Union, etc. Pub. Co., 71 Ala. 60 (1881), holding that soliciting subscriptions for a foreign newspaper is not "doing business" within the meaning of such a statute; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536 (1865), holding, however, that a contract is not void as to a citizen; Morgan *v.* White, 101 Ind. 413 (1884), holding that requiring an agent to file his authority to act does not apply to a general agent appointing local agents; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880), holding that a failure of the state officer to furnish the proper certificate after the corporation has substantially complied with the statute does not affect its contracts; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860).

[3] Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 270 (1876); Singer Mfg. Co. *v.* Brown, 64 Ind. 548 (1878); Elston *v.* Piggott, 94 Ind. 14 (1883), holding that advantage of the failure to comply can only be taken by answer in abatement, and that a foreclosure and title under sale cannot be questioned on that ground; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880); Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347 (1879); National Mut. F. Ins. Co. *v.* Pursell, 92 Mass. 231 (1865);

the corporation cannot defeat its obligations by such a defense.[1] Some states have gone much farther than this, and have declared void and unenforceable the contracts of foreign corporations which have not complied with the state laws in reference to filing certificates, appointing a local agent, and keeping an office in the state. The courts endeavor to alleviate the harshness of the statutes as much as possible, but do not always succeed. Various decisions on different statutes are given in the notes below.[2] The supreme court of the United States

Hagerman *v.* Empire Slate Co., 97 Pa. St. 534 (1881), holding that a foreign corporation cannot take advantage of its own neglect to file the power of attorney; and that service upon an acting agent will suffice in such case; American Ins. Co. *v.* Wellman, 69 Ind. 413 (1879); American, etc. Co. *v.* East, etc. R. R., 37 Fed. Rep. 242 (1889). Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the state laws. Kilgore *v.* Smith, 122 Pa. St. 48 (1888).

[1] Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37 (1880), holding that a foreign corporation doing business in the state cannot set up its failure to comply with the provisions of the statute relating to such companies to defeat an action on contract. A corporation cannot repudiate its obligations on the ground that it was not authorized to do business in the state. Williams *v.* Bank of Commerce, 71 Miss. 858 (1894).

[2] Under the New York act providing that foreign corporations shall not sue on contracts where they have not taken out a license from the state, a foreign corporation may, subsequently to the breach of contract, take out a license and then sue. Neuchatel, etc. Co. *v.* Mayor, etc., 155 N. Y. 373 (1898). A failure to file the certificate is a question that cannot be raised for the first time in the higher court. Dahl *v.* Montana Copper Co., 132 U. S. 264 (1889); Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 (1885), holding that a single act, without the purpose of doing others, in a state does not bring a foreign corporation within the statute of the state forbidding it to transact business there without complying with certain requirements; Northwestern, etc. Ins. Co. *v.* Overholt, 4 Dill. 287 (1878); S. C., 18 Fed. Cas. 403, where, the requirement not being made a condition precedent to doing business, a foreign corporation which had not complied with it was held to have power to take a mortgage upon real estate. A statute that no suit shall be brought by a foreign corporation which shall not have filed a statement concerning its business does not prevent the federal courts from exercising jurisdiction. Barling *v.* Bank of British N. A., 50 Fed. Rep. 260 (1892). A statute compelling a foreign corporation to file its charter before doing business in the state may have the effect of making it a domestic corporation. James *v.* St. Louis, etc. R'y, 46 Fed. Rep. 47 (1891). The Montana statute requiring foreign corporations to file their charter in the state before doing business there does not apply to a foreign trust company which purchases bonds of a domestic corporation and takes a mortgage to secure them. Gilchrist *v.* Helena, etc. R. R., 47 Fed. Rep. 593 (1891). A corporate agent who employs labor and

has held that, where a contract made by a foreign corporation is not to be valid until approved in its home office in another state, the contract is not made within the former state, within the meaning of the Michigan statute declaring all contracts void when made by foreign corporations in the state without having filed their articles of association in that state.[1]

buys goods in the state for a foreign corporation which has not complied with the law prohibiting such corporations to do business in the state until a resident office and agent have been named is personally liable for such labor and goods. Lasher *v.* Stimson, 145 Pa. St. 30 (1892). The objection that the foreign corporation has not filed the statement as required by statute must be clearly raised in order to be available. Campbell, etc. Co. *v.* Hering, 20 Atl. Rep. 1061 (Pa., 1891). Although the statute requires foreign corporations doing business in the state to file a power of attorney authorizing the commissioner of corporations to accept service for them, yet a corporation not doing so may sue on one of the contracts. Rogers, etc. Co. *v.* Simmons, 155 Mass. 259 (1892). A foreign corporation for mining and *various other purposes* cannot file its certificate under the Michigan statute authorizing foreign corporations for mining purposes to file such certificate and have all the rights of domestic corporations. Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889). Where the statute requires foreign corporations to file a statement of their condition before doing business, a foreign corporation cannot enforce a contract until it does so. Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 271 (1876). But it may recover from an agent money paid to him for it. U. S. Express Co. *v.* Lucas, 36 Ind. 361 (1871). See § 696, *supra*. Although the statutes require a foreign corporation, before doing any business in the state, to file certain papers, and makes it a misdemeanor not to do so, yet this does not render contracts void, although such statute is not complied with. Dearborn Foundry Co. *v.* Augustine, 5 Wash. St. 67 (1892).

[1] Holder *v.* Aultman, 169 U. S. 81 (1898). An agreement of a foreign corporation to sell all its property cannot be enforced by the corporation in Michigan, where such corporation has not complied with the Michigan statute relative to doing business within the state. Rough *v.* Breitung, 75 N. W. Rep. 147 (Mich., 1898).

Parties who have contracted with a foreign corporation and received the benefits of the contract cannot, when sued upon the contract, set up that the company has not complied with the statutory requisites in regard to doing business in the state. Washburn Mill Co. *v.* Bartlett, 3 N. D. 138 (1893). The Arkansas provision requiring foreign corporations to file certificates, etc., and rendering void contracts made by a foreign corporation not complying therewith, does not apply to a sale of a sewing-machine made in Ohio and shipped to Arkansas, this being interstate commerce. Gunn *v.* White S. M. Co., 57 Ark. 24 (1892). The statute relative to foreign corporations doing business in the state is not applicable to loans made out of the state, and the securities delivered and money paid out of the state. Scruggs *v.* Scottish Mortgage Co., 54 Ark. 566 (1891). A foreign corporation may sue on contracts made out of the state, although it has not complied with the

In Alabama particularly there has been a large number of decisions on this subject.[1]

The statutes of the various states of the Union imposing re-

law as to contracts made in the state. White River Lumber Co. *v.* Southwestern Imp. Assoc., 55 Ark. 625 (1892). As against a milling company that solicits business and sells goods through commercial agents, the statute of Texas prohibiting a foreign corporation from transacting business in the state without filing its articles of incorporation with the secretary of state is void as being an interference with interstate commerce. Bateman *v.* Western, etc. Co., 1 Tex. Civ. App. 90 (1892). A foreign corporation purchasing a piece of machinery in the state may be held liable therefor, although it has not filed the certificate. Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499 (1890). A bondsman for a corporate agent cannot escape liability by alleging that the corporation has not complied with the law relative to foreign corporations. Singer Mfg. Co. *v.* Hardee, 4 N. M. 175 (1888). A foreign corporation not having an office in the state may sell machinery to persons in Tennessee without filing its papers,

[1] In the case of Dundee, etc. Co. *v.* Nixon, 95 Ala. 318 (1891), an alien corporation failed in its suit on a note because it had no known place of business or authorized agent in Alabama, as required by the constitution and statutes of the state. The note was dated in that state. A purchase of brick in another state, to be delivered in the state, is an act of interstate commerce, and a foreign corporation making the sale need not comply with the state laws. A foreign corporation may bring suit in the state without complying with the state law in regard to having a place of business and an agent in the state. Cook *v.* Rome Brick Co., 98 Ala. 409 (1893). Where a foreign corporation not complying with the statute sells chattels, the sale is void and the corporation may reclaim its property. Boulden *v.* Estey Organ Co., 92 Ala. 182 (1890). The statute against foreign corporations doing business in the state unless they conform to certain requisites does not apply to interstate traffic, such as selling goods to be shipped in, having been sold out of, the state. Ware *v.* Hamilton, etc. Co., 92 Ala. 145 (1890). The objection as to the failure to file the certificate cannot be raised for the first time on appeal. Ginn *v.* New England, etc. Co., 92 Ala. 135 (1890). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A mortgage taken by a foreign corporation in Alabama which has no known place of business or authorized agent in the state, as required by the constitution of the state, is void and not enforceable. Farrior *v.* New England, etc. Co., 88 Ala. 275 (1889). A foreign corporation suing in Alabama to enforce a mortgage made in that state must allege that it has a known place of business and an authorized agent in the state. Christian *v.* American, etc. Co., 89 Ala. 198 (1889). An agent suing a person for a commission on a loan made by the latter with a foreign corporation which has not filed its certificate as required by statute cannot recover. Dudley *v.* Collier, 87 Ala. 431 (1888). For a valuable discussion as to what constitutes the doing of business in the state, see Sullivan *v.* Sullivan Timber Co., 103 Ala. 371 (1894).

strictions on foreign corporations are given in another part of this work.[1]

Restrictions upon foreign insurance companies are strictly enforced.[2] A state may require a foreign corporation to pay a

etc. Milan, etc. Co. *v.* Gorten, 93 Tenn. 590 (1894). Where an Indiana corporation ships goods to Texas, it may sue in Texas for the price thereof, although it has not filed its articles of incorporation in Texas as required by statute. The business is interstate business. American, etc. Co. *v.* Bateman, 22 S. W. Rep. 771 (Tex., 1893). Under the California statute forbidding foreign corporations to maintain suits until a certain statement has been published, the publication may be prior to the time specified in the statute. Bank of British N. A. *v.* Madison, 99 Cal. 125 (1893), passing upon the requisites of the statute, and what constitutes compliance therewith. In Wright *v.* Lee, 4 S. Dak. 237 (1893), the court passed upon the statute which requires foreign corporations to file a copy of their articles of incorporation, etc., with the secretary of state, and prohibiting the doing of business by such corporations until such certificates are filed. The court held that the failure to file such a certificate did not invalidate contracts of the corporation. As to the Mississippi statute relative to foreign corporations doing business in the state, see Hart *v.* Livermore, etc. Co., 72 Miss. 809 (1895). A statute that a foreign corporation, upon filing its charter, shall become a domestic corporation is constitutional as to the right to construct a railroad. State *v.* Southern R'y, 25 S. E. Rep. 982 (S. C., 1896). A foreign corporation is doing business in a state, within the meaning of a statute, where a mortgage deed of trust is made to a resident for the benefit of such foreign corporation. Myers, etc. Co. *v.* Wetzel, 35 S. W. Rep. 896 (Tenn., 1896). The Tennessee statute prohibiting foreign corporations doing business in the state without first complying with certain requisites does not render invalid a note held by a *bona fide* purchaser from a foreign corporation. Lauter *v.* Jarvis, etc. Co., 83 Fed. Rep. 894 (1897). A foreign corporation is not doing business in the state, within the meaning of the Ohio law, where the corporation merely sells through traveling agents and delivers goods manufactured outside of the state. Toledo, etc. Co. *v.* Glen, etc. Co., 45 N. E. Rep. 197 (Ohio, 1896). The defense that a corporation has not filed its articles in the county where property is to be foreclosed must be set up by plea in abatement. Ontario State Bank *v.* Tibbits, 80 Cal. 68 (1890). An alien corporation may sue to recover back taxes paid under protest, although it has not filed its charter as required by statute. Powder River Cattle Co. *v.* Custer County, 9 Mont. 145 (1889).

[1] See Part VII, *infra*.

[2] If an insurance company does business in the state without complying with the statutory conditions it cannot collect a premium note. Reliance Mut. Ins. Co. *v.* Sawyer, 160 Mass. 413 (1894); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a premium note given to a foreign company which had not obtained a certificate from the state auditor as required was void in its hands. To same effect, Hoffman *v.* Banks, 41 Ind. 1 (1872), and Roche *v.* Ladd, 83 Mass. 436 (1861); Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860), where filing a statement of the condition with the secretary of state was

license fee before doing business within its borders.[1] And in nearly all particulars foreign corporations must bend to the will of the state.

A foreign corporation may sue or be sued in the courts of a state whenever jurisdiction is legally obtained.[2]

required; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526 (1883); Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387 (1878), but holding that they may sue for or secure debts due from residents without complying with such statutes; Williams *v.* Cheney, 69 Mass. 215 (1855), but holding that a premium note void for this reason is valid in the hands of a *bona fide* holder for value without notice; Jones *v.* Smith, 69 Mass. 500 (1855), holding that the payee of a premium note must prove compliance by the insurance company with the statute; Ehrman *v.* Teutonia Ins. Co., 1 McCrary, 123 (1880), holding that if the statute merely imposes penalties for non-compliance with such requirements, the contracts of a foreign corporation not complying are not void. To same effect is King *v.* National M. & E. Co., 4 Mont. 1 (1881); Clark *v.* Middleton, 19 Mo. 53 (1853), holding that the failure of an agency to file a statement was not to make void a promise to pay premium notes given to the foreign insurance company; Brooklyn Life Ins. Co. *v.* Bledsoe, 52 Ala. 538 (1875), holding that a foreign corporation cannot avail itself of its own failure to comply; Union, etc. Ins. Co. *v.* McMillen, 24 Ohio St. 67 (1873), holding that neglect to comply does not make void a policy issued by a foreign company nor excuse the holder from paying premiums; Eureka Ins. Co. *v.* Parks, 1 Cin. Super. Ct. (Ohio), 574 (1871), holding that a company which issues a policy on property in another state from its home office is not subject to the restricting statute of that state, though it has paid a commission for obtaining the insurance to a resident thereof; Mutual, etc. Ins. Co. *v.* Bales, 92 Pa. St. 352 (1879), holding that it cannot recover from sureties upon an agent's bond unless it has complied with a statute requiring the agents to be commissioned. To same effect, Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15 (1875); but in U. S. Life Ins. Co. *v.* Adams, 7 Biss. 30 (1873); S. C., 28 Fed. Cas. 816, it was held that compliance with a restraining act is not essential to the validity of an agent's bond; Lamb *v.* Bowser, 7 Biss. 315 (1876); S. C., 14 Fed. Cas. 980, holding that a policy of insurance is not void because the company has not complied with the statute. *Cf.* Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889). As a defense to a note, see Dudley *v.* Collier, 87 Ala. 431 (1880). See also § 696, notes, *supra;* Charter Oak, etc. Ins. Co. *v.* Sawyer, 44 Wis. 387 (1878), holding that it may sue or take security for a debt without complying with the local act. To same effect, Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853). See also People *v.* Howard, 50 Mich. 239 (1883).

[1] Walker *v.* Springfield, 94 Ill. 364 (1880); Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888).

[2] This question is fully discussed in §§ 757, 758, *infra.*

CHAPTER XLII.

STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.

§ 701. Remedy of the stockholder herein.
702. Instances of negligence of directors in the performance of their duties.
§ 703. Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.

§ 701. *Remedy of the stockholder herein.*— Where, by reason of the negligence of the directors or other officers, the corporate funds, property, or rights have been lost, the injury is practically and ultimately an injury to the stockholders. But, in the eye of the law, the injury is to the corporation itself. The loss has depleted its treasury. Moreover, the negligent act was in reference to the affairs of the corporation, and was an injury to the corporation. Accordingly, it is for the corporation to call the directors to an account for their negligence. The action is not one which the stockholder is to bring. The negligence affects him, not directly, but indirectly. Hence, the law is well settled that a stockholder cannot bring the ordinary action at law for damages against the corporate directors for their negligence in the management of the corporate affairs.[1] It is clear also that the stockholder cannot hold the corporation itself liable for the negligence herein of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent, and equally in position to complain.[2] It has been held that the remedy for the negligence of corporate directors in the management of the corporate affairs is a suit in equity instituted by the corporation itself.[3] If, however, the corporation is

[1] See § 734, *infra*.

[2] Oliphant *v.* Woodburn, etc. Co., 63 Iowa, 332 (1884).

[3] In an action by a corporation against its officers for damages for negligence, all of the guilty parties must be joined. The remedy of the company is in equity. North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892). The corporation itself may hold directors liable for neglect of duty. Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889). Even though the corporation itself brings the action to hold the

under the control of the guilty parties, or if it refuses to sue when requested by a stockholder to do so, then the stockholder himself may bring a suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or property lost by their negligence.[1] The money or property recovered in such an action belongs to the corporation, and not to the stockholder who brings the suit.[2] In a stockholder's suit to hold the directors liable for negligence, the acts of negligence need not be set out with great particularity. The suit is in a court of equity, and the court decides the questions of fact, since the suit is in the nature of an accounting.[3] A general allegation, however, that the board of directors were negligent does not render a particular director liable.[4] A receiver may institute the suit.[5]

directors liable for negligence, the action should be in equity. Empire State Sav. Bank *v.* Beard, 81 Hun, 184 (1894), holding also that all the guilty parties should be joined as defendants. See also § 734, *infra*. But see note 5, *sub*.

[1] A stockholder in a national bank who has been subjected to a statutory liability may sue the directors, in behalf of the corporation, to render them liable for their gross negligence, the receiver having neglected to sue. Nelson *v.* Burrows, 9 Abb. N. Cas. 280 (1881), giving the complaint in full. See also §§ 734, 740, *infra*.

[2] Evans *v.* Brandon, 53 Tex. 56 (1880); Dewing *v.* Perdicaries, 96 U. S. 193, 198 (1877); Smith *v.* Poor, 40 Me. 415 (1855); Carter *v.* Ford, etc. Co., 85 Ind. 180 (1882). See also § 734, *infra*.

[3] Halsey *v.* Ackerman, 38 N. J. Eq. 501 (1884), affirming Ackerman *v.* Halsey, 37 N. J. Eq. 356. This case holds also that the stockholder's action lies even after the corporation has become insolvent. See also Smith *v.* Poor, 3 Ware, 148 (1858); S. C., 22 Fed. Cas. 627; Gardiner *v.* Pollard, 10 Bosw. 674 (1863); and § 734, *infra*. Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. Sayles *v.* White, 18 N. Y. App. Div. 590 (1897).

[4] Fisher *v.* Graves, 80 Fed. Rep. 590 (1897).

[5] Where a receiver has been appointed, it is for him and not for a stockholder to hold the directors responsible for mismanagement of a bank. Howe *v.* Barney, 45 Fed. Rep. 668 (1891). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). A receiver of a national bank may hold the directors personally liable for losses where they left the entire management in the hands of the officers and made no inquiries. The court held them liable from the time when, dividends having ceased, they were bound to investigate. Gibbons *v.* Anderson, 80 Fed. Rep. 345 (1897). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow

An action by the receiver against directors for negligence should be at law, and there must be a separate suit against each director.[1] An action by the receiver to hold a director liable for negligence does not abate by the death of such director.[2] In a stockholder's suit against the executive committee of a bank for negligence in managing the business of the company, the release of one of the defendants and a settlement with him releases the others.[3]

§ 702. *Instances of negligence of directors in the performance of their duties.*— It is difficult to lay down any rules as to what acts will constitute negligence on the part of corporate officers. Each case is to be determined largely on its own facts. Thus, where the directors kept no accounts, paid no calls, and collected no subscriptions, they were quite properly held guilty of negligence and were made liable therefor.[4] So also the directors of a national bank are liable when they loan money to irresponsible persons, allow overdrafts, employ dishonest, unfaithful, and incompetent clerks, and neglect to take security from the cashier, president, and other officers for good conduct and the performance of duties.[5] Where the president of a corporation sells large quantities of coal to a firm which his sons control, and allows the debt to increase when he could easily have collected it, and ultimately the debt is lost, he is liable for negligence and must make good the loss.[6] The business usages of the community enter into the question of whether a director was negligent in making loans. The directors may commit the

an unreasonably large sum without good security, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors, and the results of the suit will be administered by the court. Gores *v.* Day, 74 N. W. Rep. 787 (Wis., 1898). See also § 735, *infra*.

[1] O'Brien *v.* Fitzgerald, 143 N. Y. 377 (1894). See also § 734, *infra*. A receiver's action against the directors for negligence is at law. Higgins *v.* Tefft, 4 N. Y. App. Div. 62 (1896). The remedy of the receiver against the directors for negligence is at law. Dykman *v.* Keeney, 154 N. Y. 483 (1897). In Stearns *v.* Lawrence, 83 Fed. Rep. 738 (1897), the receiver held the president liable for negligence in the management of a bank by a suit in equity.

[2] O'Brien *v.* Blaut, 17 N. Y. App. Div. 288 (1897).

[3] Chetwood *v.* California Nat. Bank, 113 Cal. 414, 649 (1896).

[4] Neall *v.* Hill, 16 Cal. 145 (1860).

[5] Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882). See also Smith *v.* Rathbun, 22 Hun, 150 (1880). As to the liability of a cashier, see Commercial Bank *v.* Ten Eyck, 48 N. Y. 305 (1872).

[6] Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896).

business to the officers, but must give reasonable supervision and not be guilty of gross inattention. Thus, the loan of one-third of the capital stock to one person is not necessarily negligent.[1] Where for three years the directors turn the management for years over to the cashier, of no responsibility, and know of illegal loans and neglect to record mortgages, they are liable for losses incurred thereby.[2] Where the president of a bank cancels a debt of the bank against one of his relatives in exchange for securities which ultimately become worthless, he is liable for the loss.[3] It is negligence for directors to build a hotel before they have provided funds therefor and before they have the title to the land.[4] Directors of a bank are not liable in an action for deceit to a purchaser of stock, although they signed the cashier's annual statement which was false, there being proof that they believed it to be true.[5] A director is not liable for a deposit made in a bank after it was insolvent, where there was no fraud on his part inducing the deposit.[6] A depositor in a bank may sue the directors for gross negligence leading to the loss of his money, and may join also a cause of action against them for false statements as to the condition of the bank.[7] The president is negligent and is liable if he does not require the secretary to give a bond for his good conduct, as required by the by-laws of the corporation.[8] But it has been held that the directors are not liable for a failure to have the secretary's bond renewed, they supposing that it did not expire at the end of the year.[9] The law is well established that the corporate officers are not liable on the ground of negligence for *ultra vires* acts which they have done or sanctioned, but in good faith and without knowledge of their *ultra vires* character. The act itself may be impeached and set aside, and property transferred thereunder may be recovered back; but if the directors have made an honest mistake, and it was a mistake which

[1] Wheeler *v.* Aiken County, etc. Bank, 75 Fed. Rep. 781 (1896).

[2] Robinson *v.* Hall, 63 Fed. Rep. 222 (1894), rev'g 59 Fed. Rep. 648.

[3] Lawrence *v.* Stearns, 79 Fed. Rep. 878 (1897).

[4] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[5] Foster *v.* Gibson, 38 S. W. Rep. 144 (Ky., 1896).

[6] Minton *v.* Stahlman, 96 Tenn. 98 (1896); *Cf.* 27 N. Y. App. Div. 80.

[7] Solomon *v.* Bates, 118 N. C. 311 (1896). Such a suit is in tort. Tate *v.* Bates, 118 N. C. 287 (1896).

[8] Pontchartrain R. R. *v.* Paulding, 11 La. 41 (1837).

[9] Vance *v.* Phœnix Ins. Co., 4 Lea (Tenn.), 385 (1880).

a man of usual intelligence might make, they are not personally liable therefor. The law does not require them to be learned in the law.[1] Bank directors who meet but once or twice during the year, and do not examine the books, and have no knowledge of affairs, are liable for losses resulting from long-continued overdrafts by insolvent parties.[2] Managers of a building-loan corporation are liable for loans made to a firm in excess of the amount allowed by a by-law; but are not liable for a mistaken estimate of value of the security taken, nor for a defect in the acknowledgment of the security — a mortgage.[3] A director has been held not liable for negligence in failing to sue for a debt due to the corporation.[4] Directors are not liable for money lost by an overdrawn account.[5] A director of a loaning company is not liable for an unsecured loan merely because it appeared on the books and turns out to be uncollectible. Proof is necessary that he knew of the loan.[6] Bank directors are not liable for negligence merely because the cashier has for years been embezzling the funds and making false entries.[7] The directors, however, are liable for allowing the treasurer to use corporate funds for lobbying purposes;[8] but not for allowing one of their number to manage the business, though he appropriate its property to himself.[9] They are liable for mak-

[1] Watts's Appeal, 78 Pa. St. 370 (1875); Hodges *v.* New England Screw Co., 1 R. I. 312, 348 (1850); Spering's Appeal, 71 Pa. St. 11, 24 (1872); Williams *v.* McDonald, 37 N. J. Eq. 409 (1883). *Cf.* Joint-Stock Discount Co. *v.* Brown, L. R. 3 Eq. 139; S. C., L. R. 8 Eq. 381 (1869). See also § 682, *supra.*

[2] Marshall *v.* Farmers', etc. Bank, 85 Va. 676 (1889).

[3] Citizens' Bldg. etc. Assoc. *v.* Coriell, 34 N. J. Eq. 383 (1881).

[4] *Re* Forest. etc. Min. Co., L. R. 10 Ch. D. 450 (1878).

[5] Turquand *v.* Marshall, L. R. 4 Ch. App. 376 (1869).

[6] Couper *v.* Whitson, 9 Ct. of Sess. Cas. (4th ser.) 1115 (1882).

[7] Louisville Sav. Bank *v.* Caperton, 8 S. W. Rep. 885 (Ky., 1888). The directors of a bank are not bound to know of the cashier's mismanagement, and are not liable therefor. Clews *v.* Bardon, 36 Fed. Rep. 617 (1888). For an English case holding the trustees and managers of a savings bank liable for a defalcation of the actuary, see *Re* Cardiff Sav. Bank, L. R. 45 Ch. D. 537 (1890). Where the president of a bank purchases a note which contains a guarantee on the part of the payee, which guarantee subsequently reduces the amount of the note, the president is guilty of negligence in purchasing the note. Stearns *v.* Lawrence, 83 Fed. Rep. 738 (1897).

[8] Shea *v.* Mabry, 1 Lea (Tenn.), 319 (1878).

[9] A director is not liable to a creditor of the bank for negligence in allowing the president to gradually embezzle all its assets, where such director received no pay, and once or

ing investments contrary to the charter.[1] But they are not liable for errors of themselves or the cashier in making loans.[2] Inasmuch as directors serve in nearly all cases without pay, the law is not exacting in its requirements of them.

It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed.[3] They are not liable for special deposits where there was no negligence on their part.[4]

Directors are not bound to make a thorough examination of the books and papers of a bank.[5]

twice a week he attended to the discounts, saw how much money was on hand, and once a year counted the cash and securities. Swentzel *v.* Penn Bank, 147 Pa. St. 140 (1892), holding also that the plaintiff was not entitled to costs, having failed to prove his case. *Contra* in New Jersey. The corporation should be a party defendant. Creditors also may be made parties defendant. Camp *v.* Taylor, 19 Atl. Rep. 968 (N. J., 1890).

[1] The case of Williams *v.* McKay, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made investments contrary to the by-laws, charter, and statutes.

[2] The directors of a building corporation are not liable for investing in second mortgages, the act being *ultra vires*. Sheffield, etc. Soc. *v.* Aizlewood, L. R. 44 Ch. D. 412 (1889). Directors are not liable for a negligent or *ultra vires* act in lending the funds without taking proper security, unless it is shown that they failed to really exercise in good faith their discretion and judgment as directors. *Re* New Mashonaland, etc. Co., [1892] 3 Ch. 577. Negligence is not proved by the facts that the bank's capital is gone; that large dividends were declared, based on large amounts of assets that turned out to be worthless; that real estate taken for debts depreciated in value; that real estate was bought in on foreclosure sales by the bank; that the directors did not closely watch the cashier, there being no proof of lack of reasonable skill, etc., on his part; that they entrusted the management to the cashier, a man of experience and ability; that overdrafts were allowed to responsible parties; and that there was delay in suing on notes. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). Various acts of mismanagement were considered in *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890).

[3] *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890).

[4] An officer of a corporation is not liable for the loss of corporate securities without negligence on his part, though entrusted with their care. Mowbray *v.* Antrim, 123 Ind. 24 (1890).

[5] Briggs *v.* Spaulding, 141 U. S. 132 (1891). Although the directors trust the management of the bank entirely to the cashier, and do not examine the books, they are not liable to the creditors of the bank, even though the cashier, by dishonesty and reckless management, wrecks the bank. Warner *v.* Penoyer, 82 Fed. Rep. 181 (1897).

A director who is absent on leave of absence is not liable for losses occurring during that time,[1] nor for losses occurring shortly after he becomes a director.[2]

The measure of damages for negligence cannot be the entire capital stock which was paid in in cash, and also the debts which the stockholders may have to pay.[3]

§ 703. *Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.*— The directors of a corporation are not guarantors that no mistakes will be made in the management of the corporate business, nor do they insure the corporation against loss by the frauds or embezzlement of subordinate officers and agents. They are required to exercise reasonable care and sound business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their own interest in the stock of the company are directly interested in the welfare of the corporation. But, though this is the case, they must use ordinary diligence in ascertaining the condition of things, and ordinary intelligence in their action as directors.[4] They

[1] Briggs *v.* Spaulding, 141 U. S. 132 (1891).

[2] A bank director is not liable for negligence where the bank becomes insolvent within a short time after he became a director. Briggs *v.* Spaulding, 141 U. S. 132 (1891).

[3] Bloom *v.* National, etc. Loan Co., 152 N. Y. 114 (1897).

[4] The leading case on the liability of directors for negligence is Charitable Corp. *v.* Sutton, 2 Atk. 400 (1742). The most important, recent, and fully considered case, however, is Briggs *v.* Spaulding, 141 U. S. 132 (1891), where the supreme court of the United States laid down rules (pp. 147, 151, 152) which very largely exempt directors in national banks from any liability whatsoever. In North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460, 476, 477 (1892), the court said that an officer is "responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business." The court also said: "Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions." In Percy *v.* Millaudon, 8 Mart. (La.) 68 (1829), the court said: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard,

are liable for losses if they pay no attention to business at meetings of the directors, or if they regularly fail to attend such meetings. They must exercise a reasonable amount of diligence and care.

a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." This case also holds that directors are not liable for errors of judgment unless they are grossly wrong. United Society, etc. *v.* Underwood, 9 Bush (Ky.), 609 (1873), holding that the directors must use ordinary diligence; Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297 (1848). In Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861), the court said: "The rule is a just one that an agent is bound to apply the same diligence to obtain payment of debts in his care that he does to recover his own." In Land Credit Co. *v.* Fermoy, L. R. 5 Ch. App. 763 (1870), an attempt was made to hold liable, for negligence, directors who innocently approved of a loan which in reality had not been made, but the money had been used by other directors for speculative purposes. See also *Re* Railway Imp. Co., 42 L. T. Rep. 206 (1880); Scholefield's Case, 17 W. N. 22 (1882); British, etc. Ass. Co., L. R. 14 Ch. D. 335 (1880). In Dunn *v.* Kyle, 14 Bush (Ky.), 134 (1878), where a cashier had embezzled the funds of the bank, the court said: "Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this." The court also approved of the rule given in Morse on Banking, p. 117, to the effect that, "for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible." The mere fact that loans by a bank turn out to have been unwise and hazardous does not render the director liable therefor. Witters *v.* Sowles, 31 Fed. Rep. 1 (1887). Bank directors cannot be held liable for negligence in loans, etc., at the suit of a stockholder, where they have used ordinary care and acted in good faith. Jones *v.* Johnson, 86 Ky. 530 (1888). The case of *Re* Cardiff Sav. Bank, [1892] 2 Ch. 100, is an example of one mode of doing business. The Marquis of Bute was made president of a savings bank at the age of six months. He continued to be president from 1848 until 1886. During this time he attended one meeting in 1869. His name, however, always appeared in the pass-books, annual reports, and circulars. He paid no attention whatsoever to the bank. It transpired in 1886 that the deceased actuary of the bank had defrauded it of a great deal of money. The court held that the marquis was not liable. The duty of an auditor is to examine the books, ascertain their correctness, and prepare a balance sheet showing the company's financial position at the time he is appointed, but he is bound to use only a reasonable amount of care and skill, varying according to the case. *Re* Kingston Cotton Mill Co., [1896] 2 Ch. 279. A director who is habitually absent from meetings of the board may be liable for the acts of the board. Schout *v.* Conkey, etc. Assoc., 87 Hun, 568 (1895).

The law on this subject is ably and

The directors are not bound to examine the books of the company, nor to investigate the mode of living of their employees. But they are required to attend the directors' meetings with reasonable regularity; to have statements of the

clearly set forth by Mr. Justice Earl, in Hun *v.* Cary, 82 N. Y. 65 (1880). *Cf.* Van Dyck *v.* McQuade, 86 N. Y. 38 (1881). See also Scott *v.* Depeyster, 1 Edw. Ch. 513 (1832); Litchfield *v.* White, 3 Sandf. Super. 545 (1850); Liquidators, etc. *v.* Douglas, 32 Scot. Jur. 212 (1860); Spering's Appeal, 71 Pa. St. 11 (1872), an important case, and one which is frequently spoken of as the leading case herein. A director who trusts everything to the other directors, or who performs all acts as a mere man of straw, is liable. Joint-Stock Discount Co. *v.* Brown, L. R. 8 Eq. 404, 405 (1869). See also Williams *v.* McKay, 40 N. J. Eq. 189 (1885); Ackerman *v.* Halsey, 37 N. J. Eq. 356 (1883); aff'd, Halsey *v.* Ackerman, 38 N. J. Eq. 501; Mutual, etc. Bank *v.* Bosseiux, 3 Fed. Rep. 817 (1880). That directors are not liable for the fraud or misconduct of co-directors, see Movius *v.* Lee, 30 Fed. Rep. 298 (1887). Directors are not liable for gross negligence in buying out a business where the corporation was organized for the express purpose of buying out that business. Overend, etc. Co. *v.* Gibb, L. R. 5 H. L. 480 (1872). Where loans without securities are improperly made, and the guilty directors are liable therefor, a director who did not participate is nevertheless liable, if he does not take steps to remedy the matter as soon as he learns of it. Jackson *v.* Munster Bank, 15 L. R. Ir. 356 (1885). After a director sends in a letter of resignation he is not liable for the wrongful acts of the directors, even though no attention is paid to his letter. Perry's Case, 34 L. T. Rep. 716 (1876). In the case, however, of Movius *v.* Lee, 30 Fed. Rep. 298, 307 (1887), the court held, reviewing the cases, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. . . . It is nowhere adjudged that all must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others." The treasurer is not liable for losses by deposits made by him, where the corporation acquiesced in the deposits. New York, etc. R. R. *v.* Dixon, 114 N. Y. 80 (1889). Directors are required to use such care and diligence as a prudent man exercises in his own affairs. If he utterly neglects his duties he is liable. Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889). Misfeasance is such non-feasance as is negligence amounting to a breach of trust. Liability for negligence cannot be imputed to directors unless it is gross negligence resulting in loss. To constitute gross negligence there must be, first, a plain duty to do or abstain from a particular thing; secondly, such abstention or such action as the court would be justified in holding to be mischievous or reckless. When a duty incumbent on the directors has not been performed, the burden of proving gross negligence is on those who allege that conclusion; but where the facts establish gross negligence, but at the same time show that it is pos-

business made to them; to object to the transaction of important business without the knowledge and consent of the board of directors; to examine with reasonable care the reports and matters of business brought before them; and not to shut their eyes to obvious objections to the business transactions and general condition of the corporation, or to the character and well-known reputation of the employees. Moreover, when a director has knowledge that an unauthorized act is being done, he cannot escape liability, however innocent he may be, unless he prevents the act by his protest, or files a bill in equity to remedy the wrong.[1]

sible or likely that a satisfactory explanation ought to be forthcoming, the burden of proof is shifted. *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890). A treasurer of an association who receives no compensation is a gratuitous bailee, and is only liable for gross negligence in paying out funds. Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296 (1893).

[1] Joint-Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381, 402 (1869); Ashhurst *v.* Mason, L. R. 20 Eq. 225 (1875). That a director is not in general liable for misdeeds of subordinate corporate agents, see Bath *v.* Caton, 37 Mich. 199 (1877); Bacheller *v.* Pinkham, 68 Me. 253 (1878); Nicholson *v.* Mounsey, 15 East, 384 (1812); Stone *v.* Cartwright, 6 T. R. 411 (1795); Hewett *v.* Swift, 85 Mass. 420 (1862). *Cf.* Weir *v.* Barnett, L. R. 3 Exch. D. 32, 238 (1878). But knowledge obtained by the director previous to becoming such does not compel him to act. *Re* Forest, etc. Co., L. R. 10 Ch. D. 450 (1878).

CHAPTER XLIII.

THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS — ADMISSIONS AND NOTICE.

§ 704. Under what circumstances is a corporation bound by a contract made in its name.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION.

705–707. Promoters — Their liability and the liability of the corporation and subscribers.
708–711. Stockholders — Their power to make by-laws and contracts, expel members, and remove directors.
712–714. Directors — Their power to contract—Ratification by directors — *De facto* directors — Directors' meetings, call, quorum—Their minute-book as evidence.
715. Executive committee.
716. President.
717. Secretary and treasurer.
718. Cashier.
719. General manager and superintendent.
720. Subordinate agents.

B. THE FORM OF CORPORATE CONTRACTS — CORPORATE SEAL — DRAFTING, SIGNING, AND SEALING — LIABILITY OF OFFICERS ON CONTRACTS IRREGULARLY EXECUTED.

§ 721. Ordinary corporate contracts, by the modern rule, need not be under seal.
722. Method of drafting, signing, sealing, and acknowledging a corporate contract — Proof of seal and authority to attach it.
723. Corporation is liable on irregularly-executed instruments.
724. Liability of officers on irregularly-executed instruments.
725. Charter and by-law requirements as to manner of executing corporate contracts.

C. ADMISSIONS OF OFFICERS AND NOTICE TO OFFICERS.

726. When is the corporation bound by its officers' or agents' admissions.
727. Notice to the corporation by notice to the officers—When notice is chargeable to directors and stockholders — Notice of fraud perpetrated on the corporation.

§ 704. *Under what circumstances is a corporation bound by a contract made in its name — The three tests for determining whether a contract may be enforced against a corporation.*— In determining whether a contract may be enforced against a corporation, three things are to be considered. First, did the corporation have the power to enter into such a contract? Second, was the contract entered into by a duly-authorized agent of the corporation? Third, was the contract drawn, signed, and sealed in a form which binds the corporation?

The first of these questions has been already treated in the preceding chapters of this book.[1]

There is an infinite variety of contracts which the corporation may enter into, and the great mass of law on this subject is constantly being increased by new decisions. A corporation may enter into any contract which is within its express or implied powers, and which is not *mala in se*. And even a contract which is not within the express or implied powers of the corporation is sometimes enforced against it or for it when one party to the contract has already performed, or when the parties cannot be restored to their original positions.[2]

The second and third tests of whether a contract is enforceable against a corporation are considered in this chapter.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION, AND CONTRACTS BINDING ON THE CORPORATION BY RATIFICATION.

§ 705. *Promoters — Liability to strangers, to the corporation, and to subscribers for stock — Liability of subscribers herein — Contribution — Liability of the corporation herein to strangers and to promoters.* — A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[3]

There has been great difficulty in determining who is to be

[1] See particularly chs. XL and XLI, *supra*.

[2] See ch. XL, *supra*.

[3] An interesting description of the "promoter" is given by Judge Lurton, in McMullen *v.* Ritchie, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." In England the word "promoters" is used often in special acts of incorporation in place of the word "incorporators." Marshall *v.* South Staffordshire Tramways Co., [1895] 2 Ch. 36. The secretary of a prospective company ordering advertisements is liable for the same, though he orders as "secretary *pro tem.*" Hopcroft *v.* Parker, 16 L. T. Rep. 561 (1867). For definitions of a promoter, in reference to his liability to the corporation itself, see § 651, *supra*.

considered a promoter and who is not. As regards the liability to strangers, however, it seems that every one is liable herein as a promoter who induces such stranger to act in expectation of payment from the prospective corporation. Having induced the party to act, the promoter must see that he is paid.

In America the question of the liability of promoters to persons who have performed services or entered into contracts relative to a prospective corporation has rarely arisen. But in England this question has frequently been passed upon. In general the promoter of a prospective corporation is liable for services rendered by others who are employed as clerks, engineers, or in a similar capacity in the work of promoting the enterprise.[1]

[1] The promoters may be liable for royalties according to contract, even though they organized a corporation which did all the business. American Paper Bag Co. *v.* Van Nortwick, 52 Fed. Rep. 752 (1892). Promoters are liable for goods ordered and delivered for a corporation that is never organized. Hub Pub. Co. *v.* Richardson, 13 N. Y. Supp. 665 (1891). Where the individuals who intend to incorporate a company employ an attorney and authorize him to contract for printing, they are personally liable for the printing-bill. Hersey *v.* Tully, 8 Colo. App. 110 (1896). Promoters may be liable on a contract to pay a commission to a person obtaining subscriptions to the stock of the company. Pratt *v.* Finkle, 25 S. E. Rep. 941 (Ga., 1896). A promoter is liable for preliminary debts incurred. Sandusky Coal Co. *v.* Walker, 27 Ont. (Can.) 677 (1896). Where the promoters after incurring debts abandon the enterprise, each one of them is liable for at least his proportionate part of such debts. Roberts Mfg. Co. *v.* Wright, 62 Minn. 337 (1895). A committee appointed at a public meeting of mechanics to carry out certain things are personally liable for the wages of workmen employed by them. McCartee *v.* Chambers, 6 Wend. 649 (1831). The chairman of the promoters who signs the prospectus may by the jury be held to have authorized the expense of printing, and is liable personally. Riley *v.* Packington, L. R. 2 C. P. 536 (1867). In Collingwood *v.* Berkeley, 15 C. B. (N. S.) 145 (1863), a director who allowed his name to be used as such for a proposed company was held liable for a passage ticket which was purchased on a representation of the secretary that the company would be organized. That the interested parties may be liable to the attorney of the provisional committee of a company which is abandoned before incorporation, see Parsons *v.* Spooner, 5 Hare, 102 (1846). A promoter who employs a person in behalf of a proposed company is liable. Bell *v.* Francis, 9 Car. & P. 66 (1839). A local committee to form a company are liable to their secretary. They are not allowed to say that he must look to the corporation for pay. Kerridge *v.* Hesse, 9 Car. & P. 200 (1839). A promoter is liable personally on contracts made by him in behalf of the company with third persons, and his liability is not released by the subsequent adoption of the contract by the company. Kilner *v.* Baxter, L. R. 2 C. P. 174 (1866); Scott *v.* Embury,

Where, however, the owner of land, with knowledge that several parties contemplate forming a corporation, makes a lease to one of such promoters, the intent being that the lease shall be

L. R. 2 C. P. 255 (1867). The question of whether a surveyor employed by promoters can look to them for compensation, the company not having been formed, is for the jury, considering all the facts of the employment. Higgins *v.* Hopkins, 3 Exch. 163 (1848). If he was present when the promoters resolved that they should not be liable he cannot recover from them. Laudman *v.* Entwistle, 7 Exch. 632 (1852). In Lake *v.* Argyle, 6 Q. B. 477 (1844), it was left to the jury to decide whether the president of a proposed corporation thereby held himself out as liable on a contract made by an agent of the proposed company. It is a question for the jury whether the president of a proposed corporation is liable. Wood *v.* Argyle, 6 M. & Gr. 928 (1844). Allowing one's name to be used as a director and suggesting that advertising be done does not render a person liable for the advertising. Burbridge *v.* Morris, 3 H. & C. 664 (1865). A promoter is not liable on a contract made before he joined in the enterprise, though the contract is performed afterwards. Newton *v.* Belcher, 12 Q. B. 921 (1848). A promoter is not liable on contracts made in writing before he became such. Beale *v.* Mouls, 5 R'y & Can. Cas. 105 (1847).

A person contracting with a partnership may hold the partners liable, although he knew that their articles provided for incorporation and they afterwards did incorporate. Witmer *v.* Schlatter, 2 Rawle (Pa.), 359 (1830). But the rule is otherwise where the party allows the account to be transferred to the corporation and then carries on a long running account. Whitwell *v.* Warner, 20 Vt. 425 (1848). Or where the party knew that he was contracting with the other as an agent of an unincorporated association. Abbott *v.* Cobb, 17 Vt. 593 (1845). As to this subject of liability, see also § 245, *supra*, on the liability of trustees; § 508, *supra*, on the liability of officers of unincorporated associations; § 888, *infra*, on the liability of committee-men, and § 724, *infra*, on the liability of persons who sign their names and add an official title. In England a provisional committee is generally appointed by the subscribers. This committee is generally held not liable. But a committee of management is usually appointed subsequently, and this committee is generally held liable. That a provisional committee is not liable, see Nevins *v.* Henderson, 5 Railw. & Can. Cas. 684 (1848); Dawson *v.* Morrison, 5 Railw. & Can. Cas. 62 (1847); *Ex parte* Roberts, 2 Macn. & G. 192 (1850); Carmichael's Case, 17 Sim. 163 (1850); *Ex parte* Clarke, 20 L. J. (Ch.) 14 (1851); Maitland's Case, 3 Giff. 28 (1861); Hall's Case, 3 De G. & S. 214 (1850); *Ex parte* Stocks, 22 L. J. (Ch.) 218 (1853); Tanner's Case, 5 De G. & S. 182 (1852); Forrester *v.* Bill, 10 Ir. L. Rep. 555 (1847); *Ex parte* Osborne, 15 Jur. 72 (1851); Burnside *v.* Dayrell, 3 Exch. 224 (1849); McEwan *v.* Campbell, 2 Macq. 499 (1857). *Contra*, Lefroy *v.* Gore, 1 Jo. & Lat. 571 (1844). It is for the jury to say whether a provisional director is liable for advertisements which he authorized the secretary to publish at the secretary's expense. Maddick *v.* Marshall, 17 C. B. 829 (1864), affirming 16 C. B. 387. As to a provisional committee-man, see also Williams *v.* Pigott, 2 Exch. 201 (1848). Merely allowing one's name to be used as a member of a provisional committee does not render a person liable on contracts made. Barker *v.*

assumed by the corporation, he cannot hold the individual taking the lease personally liable, the lease having been assigned

Stead, 3 C. B. 946 (1847); Patrick *v.* Reynolds, 1 C. B. (N. S.) 727 (1857). Nor is he liable to an engineer, although the former took part in meetings. Rennie *v.* Wynn, 4 Exch. 691 (1849). Moreover, the person sued may show that no personal liability was to be incurred and that the plaintiff knew it. Rennie *v.* Clarke, 5 Exch. 292 (1850). It is a question for the jury whether the provisional committee authorized and became liable on contracts made by the managing committee. Williams *v.* Pigott, 5 R'y & Can. Cas. 544 (1848). For a case where the provisional committee were held not to have so authorized, see Dawson *v.* Morrison, 5 R'y & Can. Cas. 62 (1847). But Barrett *v.* Blunt, 2 Car. & K. 271 (1846), made it a question for the jury. Barker *v.* Lyndon, 2 Car. & K. 651 (1847), held the committee not liable. So also Giles *v.* Cornfoot, 2 Car. & K. 653 (1847); Griffin *v.* Beverley, 2 Car. & K. 648 (1847). In Bailey *v.* McCauley, 13 Q. B. 815 (1849), the court said that it was a question for the jury whether a committee-man, *i. e.*, a promoter, allowed himself to be held out as liable, and that if the debt incurred was a necessary and usual one he is liable. In *Ex parte* Cottle, 2 Macn. & G. 185 (1850), affirmed *sub nom.* Norris *v.* Cottle, 2 H. L. Cas. 647 (1850), it was held that the mere fact of allowing one's name to appear as a member of the provisional committee does not render a person liable at law for the debts. To same effect, *Ex parte* Roberts, 2 Macn. & G. 192 (1850).

A person who consents to the use of his name as a provisional committee to promote and organize a company is liable, as a partner, for the debt of the committee for stationery. Barnett *v.* Lambert, 15 M. & W. 489 (1846). But not where a board of managers afterwards takes charge and incurs the expense. Bright *v.* Hutton, 3 H. L. Cas. 341 (1852), rev'g 1 Sim. (N. S.) 602, and substantially overruling Hutton *v.* Upfill, 2 H. L. Cas. 674 (1850). To same effect, Reynell *v.* Lewis, 15 M. & W. 517 (1846). As to the matters to be proved in rendering a promoter liable, see Carrick's Case, 1 Sim. (N. S.) 505 (1851). Lindley, Partn. (see Thompson, Liability of Officers, p. 202), says of Bright *v.* Hutton, 3 H. L. Cas. 341 (1852), that it overruled directly or indirectly the following cases: "Upfill's Case, 2 H. L. Cas. 674 (1850); *Ex parte* Besley, 2 Macn. & G. 176 (1850). This case occurs three times in the books. It was first decided by Vice-Chancellor Knight-Bruce (3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Macn. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the vice-chancellor (3 Macn. & G. 287). The case as reported in 3 De G. & S. 224, and 3 Macn. & G. 287, is still law. Bright's Case, 1 Sim. (N. S.) 602 (1851). This was reversed on appeal (3 H. L. Cas. 341). *Ex parte* Brittain, 1 Sim. (N. S.) 281 (1851), decided reluctantly on the authority of Upfill's Case. Hole's Case, 3 De G. & S. 241 (1850), decided on the authority of *Ex parte* Besley, 2 Macn. & G. 176 (1850). Markwell's Case, 5 De G. & S. 528 (1852), decided on the authority of Upfill's Case, but after the decision of Bright *v.* Hutton. It cannot, however, be considered law. See *Ex parte* Capper, 1 Sim. (N. S.) 178 (1851), and Carrick's Case, 1 Sim. (N. S.) 505 (1851). *Ex parte* Morrison, 15 Jur. 346, and 20 L. J. (Ch.) 296 (1851), decided on the authority of Upfill's Case, and in effect overruled

by such individual to such corporation after it was formed.[1] But a promoter, who makes a contract to purchase, and gives a mortgage in his own name, is personally liable thereon, even though he was acting as agent for a corporation, the stockholders of the vendor and mortgagee not knowing that he was acting as agent.[2]

The subject of the liability of persons who sell a business to a corporation for stock, bonds, or cash is fully considered elsewhere.[3]

Where a promoter has been held liable to strangers he may have contribution from his fellow-promoters.[4]

by Sharp and James's Case, 1 De G., M. & G. 565 (1852). Nicholay's Case, 15 Jur. 420 (1851), decided on the authority of Upfill's Case. *Ex parte* Sichell, 1 Sim. (N. S.) 187 (1851), decided reluctantly on the authority of Upfill's Case. *Ex parte* Studley, 14 Jur. 539 (1850). This case is very briefly reported, but it seems inconsistent with such cases as Hall's (3 De G. & S. 214—1850), Stocks's (22 L. J. (Ch.) 218—1852), and Carrick's (1 Sim. (N. S.) 505—1851)."

[e] A member of the managing committee is liable where he attended a meeting and knew of the employment. Norbury's Case, 5 De G. & S. 423 (1852); Pearson's Case, 3 De G., M. & G. 241 (1852). *Cf.* Sharp & James's Case, 1 De G., M. & G. 565 (1852). But not if he was unaware of his being on the committee. *Ex parte* Haight, 1 Drew, 484 (1853). For a case where promoters were held liable on a contract that the company would pay certain damages to a landowner, see Bland *v.* Crowley, 6 Exch. 522 (1851). In Webb *v.* London, etc. R'y, 1 De G., M. & G. 521 (1852), reversing 9 Hare, 129, the company was held not liable on such a contract. A promoter who promises that an existing railway company will pay the parliamentary expense of a contemplated new railway is not liable on such promise, the same being illegal and contrary to public policy. MacGregor *v.* Dover, etc. R'y, 18 Q. B. 618 (1852). Where no stock is subscribed for, but an organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. Whetstone *v.* Crane, etc. Co., 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters, concerning which see ch. XIII, *supra*.

[1] *Re* Heckman's Estate, 172 Pa. St. 185 (1896).

[2] Lewis *v.* Weidenfeld, 72 N. W. Rep. 604 (Mich., 1897).

[3] See chs. XL and XIII, *supra*.

[4] Boulter *v.* Peplow, 9 C. B. 493 (1850); Batard *v.* Hawes, 2 El. & B. 287 (1853): Edgar *v.* Knapp, 7 Jur. 583 (1843); Spottiswoode's Case, 6 De G., M. & G. 345 (1855); Lefroy *v.* Gore, 1 Jo. & Lat. 571 (1844). A promoter who has advanced money may have contribution. Hamilton *v.* Smith, 5 Jur. (N. S.) 32 (1859). An action at law lies for contribution between promoters. Batard *v.* Hawes, 2 El. & B. 287 (1853). Where the secretary was the original promoter and persuaded the others to go in, he cannot recover from them for his services. Parkin *v.* Fry, 2 Car. & P. 311 (1826). The promoters are not partners. Lindley, Companies, p. 143. They are not liable to each other for services. Holmes *v.* Higgins, 1 B. &

Another difficult question connected with this subject is the liability of one promoter to another for breach of the contract of promotion. The general rule is that where the contract is definite and the obligations are clear, an action at law will lie by one promoter against another for a breach thereof.[1]

C. 74 (1822). A person may collect on a surveying contract from co-promoters, though he was also a promoter. Lucas *v.* Beach, 1 Man. & Gr. 417 (1840). But not for services as secretary. Wilson *v.* Curzon, 15 M. & W. 532 (1847).

[1] Where parties intending to incorporate a company contract in behalf of that company to purchase certain property, and the parties selling refuse to fulfill, the parties purchasing may sue in their own names for breach of contract. They may recover damages, not as members of the company, but "which they suffered, if any, by reason of the defendants preventing them from successfully establishing and fitting out a business to be conducted by them as a" company. Abbott *v.* Hapgood, 150 Mass. 248 (1889). Where promoters agree to construct a railroad and to give a part of the stock to parties who furnish valuable privileges, right of way, grants, etc., but instead of doing so sell out the affair to a competing railroad company, which buys with notice and does not go on with the enterprise, the parties who are injured may sue the purchasing railroad company for an accounting, etc. The promoters are not necessary parties defendant. Hamilton *v.* Savannah, etc. R'y, 49 Fed. Rep. 412 (1892). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he get specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties. The value of the stock can be estimated in damages. There was no allegation of defendant's insolvency. The promoter has ample remedy at law for damages. Avery *v.* Ryan, 74 Wis. 591 (1889). Specific performance of a contract to form a corporation will not be granted. Avery *v.* Ryan, 74 Wis. 591 (1889). As to the remedy at law, see Crow *v.* Green, 111 Pa. St. 637 (1886); Hudson *v.* Spaulding, 6 N. Y. Supp. 877 (1889). For the measure of damages for the breach of a contract of defendants to organize a company and pay to plaintiff for his patents certain stock and cash, see Kirschmann *v.* Lediard, 61 Barb. 573 (1872). As to the measure of damages in a suit by a vendor of property to the corporation for damages against it and its promoters for breach of the contract to employ him as manager, see Marston *v.* Singapore Rattan Co., 163 Mass. 296 (1895). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division

Thus, where a party agrees with a promoter and constructer of water-works that he, the former, will take a certain amount of water from the corporation for ten years, and he fails to do so, the former may hold him liable. It is immaterial that no

of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. Kountze *v.* Flannagan, 19 N. Y. Supp. 33 (1892). Where a promoter buys property for the corporation before it is formed, and the seller supposes he is selling to a corporation, but the latter is never formed, the seller may recover back the property, even from one who bought the property from the promoter in good faith. Wyckoff *v.* Vicary, 75 Hun, 409 (1894). In Angle *v.* Chicago, etc. R'y, 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. R'y *v.* Hoyt, 89 Wis. 314 (1895). A promoter who does not complete the transaction or consummate an enforceable contract cannot recover commissions. Hammond *v.* Crawford, 66 Fed. Rep. 425 (1895). Where one of the promoters agrees with others that he will purchase property and turn it into the company, the price to apply on his subscription for stock, and he does purchase, and the company takes possession of the property and builds thereon, he will be compelled to transfer title to the company. Nester *v.* Gross, 69 N. W. Rep. 39 (Minn., 1896). Sometimes, where the corporation cannot enforce the contract, the promoters may. Carmody *v.* Powers, 60 Mich. 26 (1886). Where one promoter sues another for failure to form the corporation, and obtains a verdict for the par value of the stock which plaintiff was to receive, there being no proof as to what the value would have been if issued, nor whether the company would be successful, the verdict will be set aside as excessive. Pitt *v.* Kellogg, 11 N. Y. Supp. 526 (1890). A contract

formal contract was made with the company. The contractor, owning practically all the stock of the company, may sue and collect for himself the price of the water less the cost.[1] A promise and contract of promoters to subscribers to certain bonds may give the latter an equitable lien on the bonds enforceable in equity.[2]

On the other hand, even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company to become insolvent, and buy in the assets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise.[3] A promoter who has taken a contract to purchase a property at a certain price, based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out.[4]

Another class of cases arise where the enterprise is carried to a successful conclusion, but one promoter refuses to divide the profits in accordance with the contract. In such cases the courts may compel an accounting and distribution according to the contract.[5] Thus, where a promoter agrees to pay a cer-

between promoters by which one agrees to assist in the building of a road is too indefinite to sustain an action for breach thereof. Porter *v.* Blair, 83 Fed. Rep. 104 (1897). Where competing applicants for a street-railway franchise agree to act together, whereby one is to withdraw and the other is to obtain the grant, and the benefits are to be divided equally, which is done with the full knowledge of the municipal authorities, and then the one who secured the grant refuses to divide with the other, the remedy of the latter is at law, and not in equity, even if the agreement should be held to be valid. Hyer *v.* Richmond Traction Co., 168 U. S. 471 (1897), modifying 80 Fed. Rep. 839.

[1] Drummond *v.* Crane, 159 Mass. 577 (1893).

[2] Badgerow *v.* Manhattan Trust Co., 64 Fed. Rep. 931 (1894).

[3] Smith *v.* Parker, 45 N. E. Rep. 770 (Ind., 1897).

[4] Loewer *v.* Harris, 57 Fed. Rep. 368 (1893).

[5] Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed

tain compensation to a person for services to be performed by the latter in connection with a reorganization, the promoter must pay such compensation, even though he changes his reorganization agreement and carries out the reorganization with other parties than those originally contemplated.[1] Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.[2] And where the promoters, who are also stockholders, agree that the profits are to be divided in a certain way under a construction contract, and a part of them make a secret profit, the others may compel a complete division.[3]

The liability of promoters to persons who have been induced

the amounts invested by them in forwarding the enterprise. Bates *v.* Wilson, 14 Colo. 140 (1890). One promoter is not entitled to compensation for services as against the other, unless there was an agreement to that effect. Baily *v.* Burgess, 48 N. J. Eq. 411 (1891). One of the promoters suing for his interest according to the contract cannot hold any of them liable where he has released some. Burgess *v.* Sherman, 147 Pa. St. 254 (1892). Several persons defrauded as to their contract, whereby they were to receive stock, cannot sue jointly. Each must sue separately. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). As to promoters' suits to enforce their right to stock, see also § 334, *supra*. For an agreement to take effect when a certain corporation should be formed, see Childs *v.* Smith, 46 N. Y. 34 (1871). Where for $1,300 a person was to have a ten per cent commission on the price for which a mine is sold, and is to have all stock received over and above the sum of $225,000 net to the vendor, and the mine is sold by the vendor, a complaint by the holder of the contract is subject to demurrer where the negotiations and agreements are not fully set forth. Sipes *v.* Seymour, 44 Fed. Rep. 326 (1890). Where a promoter conveys property to a different corporation from the one agreed upon by him with a co-promoter, the latter may make the promoter account for the consideration on the basis of the contract. Sims *v.* Tyrer, 26 S. E. Rep. 508 (Va., 1897). A promoter's contract that he should receive a certain percentage of all stock received by the interested parties was enforced in the case of Hix *v.* Edison, etc. Co., 10 N. Y. App. Div. 75 (1896). Where two persons, each being interested in different street railways, make a contract to form a new corporation to which such street railways are to be transferred, and one of the parties afterwards turns his street railways over to a different corporation, the other party cannot hold him liable in an action for an accounting for profits. A breach of contract must be set up. Schantz *v.* Oakman, 10 N. Y. App. Div. 151 (1896).

[1] Babbitt *v.* Gibbs, 150 N. Y. 281 (1896).

[2] Dennison *v.* Chapman, 105 Cal. 447 (1895).

[3] Krohn *v.* Williamson, 62 Fed. Rep. 869 (1894); affirmed in Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895).

by fraudulent prospectuses to subscribe for stock,[1] and the liability of promoters to the corporation itself to account for fraudulent profits which the promoter has secretly made out of contracts which he caused the corporation to enter into,[2] have already been fully considered.

§ 706. The questions sometimes arise whether a subscriber for stock in a projected corporation is liable to its creditors in case the enterprise is abandoned before incorporation; and also whether the promoters of the abortive corporation are liable to the subscribers for deposits made by the latter. The former question is decided in the negative. "The subscribers to the stock or articles of association are not partners with those who assume the risk of acting for a corporation not yet legally established."[3] As to the latter question the rule has become well established in England that a subscriber for stock in a corporation that never comes into existence, who has paid a part of his subscription, may recover back from the promoters of the enterprise the amount so paid, and is not liable even for

[1] See chs. IX and XX, *supra*.

[2] See § 651, *supra*.

[3] Ward *v.* Brigham, 117 Mass. 24 (1879), the court saying also: "Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction." See also Duke *v.* Andrews, 2 Exch. 290 (1848); Hutton *v.* Thompson, 3 H. L. Cas. 161 (1857); Duke *v.* Diver, 1 Exch. 36 (1847), where the stockholder had promised to pay on a certain day, and was held to his promise. To same effect, Duke *v.* Forbes, 1 Exch. 356 (1847): Aldham *v.* Brown, 7 El. & Bl. 164 (1857); 2 El. & El. 398, on appeal; Woolmer *v.* Toby, 10 Q. B. 691 (1847). However, in the case of Lake *v.* Duke of Argyle, 6 Q. B. 477 (1844), the court held that attendance at a meeting, announcement of intention of being president and of taking stock, and concurrence in measures for incorporation, may be strong evidence that defendant "held himself out as a paymaster to all who executed the orders." The question, then, is for the jury. Where a proposed corporation, never incorporated, contracts to purchase certain property of a subscriber, he cannot bring suit *at law* against other subscribers for damage caused by non-fulfillment of contract. Crow *v.* Green, 111 Pa. St. 637 (1886). Subscribers are not liable. Bourne *v.* Freeth, 9 B. & C. 632 (1829). Unless they allow themselves to be held out as partners in the enterprise. Fox *v.* Clifton, 9 Bing. 115 (1832), rev'g 6 Bing. 776. *Cf.* Heraud *v.* Leaf, 5 C. B. 157 (1847); Dickinson *v.* Valpy, 10 B. & C. 128 (1829). *Ex parte* Hirschel, 15 Jur. 924 (1851), held that a subscriber for stock in an abortive company was not liable for debts incurred. The vice-chancellor said: "Where courts have been contradicting each other for years, this court can do no otherwise than follow the last decision."

the preliminary expenses.[1] His remedy may be by bill in equity.[2] If, however, the subscriber expressly or by implication authorizes expenditures, he cannot recover back his deposit.[3] The subscriber need not submit to the deduction of any

[1] Ashpitel *v.* Sercombe, 5 Exch. 147 (1850), where the court said: "There seems to be no doubt that the plaintiff, having paid his money for shares in the concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to its use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." See also Thompson, Liabilities of Officers, 210; Nockels *v.* Crosby, 3 B. & C. 814 (1825), the leading case; 1 Lindley, Companies, p. 31, citing Walstab *v.* Spottiswoode, 15 M. & W. 501 (1846); Moore *v.* Garwood, 4 Exch. 681 (1849); Coupland *v.* Challis, 2 Exch. 682 (1848); Owen *v.* Challis, 5 C. B. 115 (1848); Ward *v.* Londesborough, 12 C. B. 252 (1852); Mowatt *v.* Londesborough, 3 El. & Bl. 307 (1854), and 4 El. & Bl. 1. See also Vollans *v.* Fletcher, 1 Exch. 20 (1847); Chaplin *v.* Clarke, 4 Exch. 402 (1849). Where a contract is made in the corporate name after the articles have been filed, but before any subscriptions have been obtained, and before an organization meeting has been held or officers elected, the incorporators are liable on the contract as partners. McVicker *v.* Cone, 21 Oreg. 353 (1891). A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription, if he would pay that, is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis *v.* Shafer, 50 Fed. Rep. 764 (1892).

[2] 2 Lindley, Companies, p. 568. "A bill in equity lies to recover back money paid in a bubble." Colt *v.* Woollaston, 2 P. Wms. 154 (1723), where there was fraud; Green *v.* Barrett, 1 Sim. 45 (1826); Blain *v.* Agar, 1 Sim. 37 (1826); S. C., 2 Sim. 289 (1828); Cridland *v.* De Mauley, 1 De G. & S. 459 (1847), before the Judicature Acts; and Cooper *v.* Webb, 15 Sim. 454 (1846); Wilson *v.* Stanhope, 2 Coll. 627 (1846); Apperly *v.* Page, 1 Phillips, 775 (1847); Clements *v.* Bowes, 17 Sim. 167 (1852); Sheppard *v.* Oxenford, 1 K. & J. 491 (1855); Butt *v.* Monteaux, 1 K. & J. 98 (1854), since such acts. In these latter cases the demurrers were overruled. See also Williams *v.* Page, 24 Beav. 654 (1857), and "The Bubble Act," 9 Geo. I, ch. 18.

[3] 1 Lindley, Companies, p. 33, citing Baird *v.* Ross, 2 Macq. 61, 68 (1856); Garwood *v.* Ede, 1 Exch. 264 (1847); Watts *v.* Salter, 10 C. B. 477 (1850); Vane *v.* Cobbold, 1 Exch. 798 (1848); Atkinson *v.* Pocock, 1 Exch. 796 (1848); Willey *v.* Parratt, 3 Exch. 211 (1848); Clements *v.* Todd, 1 Exch. 268 (1847); Jones *v.* Harrison, 2 Exch. 52 (1848); Aldham *v.* Brown, 7 El. & B. 164 (1857); S. C., 2 El. & El. 398 (1859); Burnside *v.* Dayrell, 3 Exch. 224 (1849).

part of his subscriptions to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.[1] An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.[2]

§ 707. Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby.[3]

[1] Nockels *v.* Crosby, 3 B. & C. 814 (1825). *Contra*, Williams *v.* Salmond, 2 Kay & J. 463 (1856).

[2] McIlquham *v.* Taylor, [1895] 1 Ch. 53.

[3] Munson *v.* Syracuse, etc. R. R., 103 N. Y. 58, 75 (1886). The agreement of the promoters of a bank that a person will be paid for obtaining subscriptions to its stock does not bind the bank itself. Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550 (1891). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences business before one-half of its capital is subscribed and twenty per cent paid in, they are not liable on such a contract made before incorporation. Buffington *v.* Bardon, 80 Wis. 635 (1891). The company is not bound to issue stock in payment for services of a claim which the promoters agreed should be paid for by the company. Carey *v.* Des Moines, etc. Co., 81 Iowa, 674 (1891). The corporation is not liable for the breach of an agreement among its organizers as to the distribution of stock. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). A corporation is not bound by the contracts of its promoters, where it has not ratified the same nor accepted the benefit of the same. Moore, etc. Co. *v.* Towers Hardware Co., 87 Ala. 206 (1889). The correspondence of one who afterwards becomes president of a corporation which is afterwards incorporated, does not bind such corporation. First Nat. Bank *v.* Armstrong, 42 Fed. Rep. 193 (1890). A promoter's contract is not binding on the company, even though it obtains the benefits thereof. Wilbur *v.* New York, etc. Co., 58 N. Y. Super. Ct. 539 (1891). The parliamentary agent was held bound to look to the promoters for his pay, and not to the company, in *Re* Skegness, etc. Co., L. R. 41 Ch. D. 215 (1888). Promoters have no power to bind the corporation, even though they afterwards become trustees. Berridge *v.* Abernethy, 24 N. Y. Week. Dig. 513 (1886). An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. Thompson Co. *v.* Brook, 14 N. Y. Supp. 370 (1891). A contract of promoters to sell to a corporation to be formed cannot be enforced by a stockholder suing in behalf of himself and other stockholders, when the company has not performed or endeavored to perform its part of the agreement. Negley *v.* McWood, N. Y. L. J., May 2, 1890. An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a

Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and, if the corporation were to be bound by them, it would be subject to many unknown, unjust, and heavy obligations. The only

salary of $6,000 per year, and this salary has not been paid. Bracher *v.* Hat Sweat Mfg. Co., 49 Fed. Rep. 921 (1892). The company is not liable for goods ordered and received before it was incorporated, even though it used them. Bradley Fertilizer Co. *v.* South Pub. Co., 17 N. Y. Supp. 587 (1892). An agreement of promoters that a corporation should be formed to pay $5,000 to a factory does not bind such corporation. Davis, etc. Co. *v.* Hillsboro Creamery Co., 10 Ind. App. 42 (1894). A corporation is not bound by a contract made in its name before it was organized. Winters *v.* Hub Min. Co., 57 Fed. Rep. 287 (1893). An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. York, etc. Assoc. *v.* Barnes, 39 Neb. 834 (1894). The corporation is not liable for moneys expended by its promoters in developing or purchasing property, nor is it liable on their contracts. Bash *v.* Culver Gold Min. Co., 7 Wash. 122 (1893). A corporation may be liable on a contract made before incorporation by a party who afterwards becomes a director and president, even though the contract was to perform services after incorporation. Oaks *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894). The corporation is not liable for the services and expenses of its promoters. Security Co. *v.* Bennington, etc. Assoc., 40 Atl. Rep. 43 (Vt., 1897). The agreement of the promoters of a corporation that a certain claim of a person would be paid, provided he gave to the corporation certain business, may be binding upon the corporation. Durgin *v.* Smith, 73 N. W. Rep. 361 (Mich., 1897). An insurance company may refuse to pay a loss incurred after its incorporation, but growing out of a policy taken by its promoters before incorporation. Gent *v.* Manufacturers', etc. Ins. Co., 107 Ill. 652 (1883); S. C., 106 Ill. 252. The corporation is not liable for the debts of an old partnership, and not even the parol promise of its president makes it liable. Georgia Co. *v.* Castleberry, 43 Ga. 187 (1871). An agreement among the donors to an academy that the money should be repaid does not bind the academy after incorporation. Bluehill Academy *v.* Witham, 13 Me. 403 (1836). An agreement of promoters to pay a person for obtaining subscriptions is not binding on the corporation. New York, etc. R. R. *v.* Ketchum, 27 Conn. 169 (1858), the court saying: "Can a few persons combine for their own interest to get up a railroad — agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company — and privately make this commission or bonus a charge on the corporation when formed? This would be a breach of faith towards the honest and unsuspecting stockholders who pay the charter price for their stock, and expect to take it clear of all incumbrance." In Illinois the rule is favored that the corporation is never liable on contracts made by its promoters, unless it expressly agreed to perform. So held as regards preliminary surveys. Rockford, etc. R. R. *v.* Sage, 65 Ill. 328 (1872); and book-keeping for one of the promoters, Safety, etc. Co. *v.* Smith, 65 Ill. 309 (1872); and the liability of a new company for the services of the superintendent of an abor-

protection of the stockholders and of subsequent corporate creditors against such a result lies in the rule that the corporation is not bound by the contracts of its promoters. The rule

tive company by the same parties, Western, etc. Co. *v.* Cousley, 72 Ill. 531 (1874).

An agreement of promoters that a certain person shall have a certain part of the stock upon incorporation, upon his paying therefor, does not bind the corporation. Morrison *v.* Gold, etc. Co., 52 Cal. 306 (1877). An agreement with a vendor before formation of the company provided that he should not be removed from the directorate until a certain date. The memorandum and articles provided that this agreement should be adopted, and the articles "confirmed" and incorporated it. The agreement was acted on, but no contract was made between the vendor and the company. *Held*, the articles did not form a contract between them, and the vendor could be removed. Eley *v.* Positive, etc. Co., L. R. 1 Exch. D. 88 (1876), followed; Browne *v.* La Trinidad, L. R. 37 Ch. D. 1 (1887). See Lindley, Companies, p. 146, etc.; Chadwyck, Healey, 36. Where the bondholders, in order to procure a government land grant, contracted with plaintiff to complete the road, and subsequently the bondholders foreclosed and reorganized, the court held that the new company was not liable on such contract merely from having accepted the complete road. The court said: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." Little Rock, etc. R. R. *v.* Perry, 37 Ark. 164, 191 (1881); aff'd in Perry *v.* Little Rock, etc. R. R., 44 Ark. 383 (1884). See also *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1881), where the agreement of the promoters on behalf of the company, that it could pay the costs and charges of the solicitors, for services and disbursements in perfecting the organization thereof, was dismissed, but without prejudice to any equitable claim on a *quantum meruit;* Sully's Case, L. R. 33 Ch. D. 16 (1886), holding that, in the absence of a new contract made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. A provision in the by-laws, which in England are filed, that a certain person shall be the attorney for the company, is not binding on the company. Eley *v.* Positive, etc. Co., L. R. 1 Exch. D. 20, 88 (1876). See also *Re* Skegness, etc. Co., L. R. 41 Ch. D. 215 (1888), holding that a parliamentary agent or lobbyist could not hold the company liable. An agreement of promoters with a turnpike company that the proposed railway company will make a certain grade crossing with the former is not binding on the railway company. Aldred *v.* North Midland R'y, 1 R'y Cas. 404 (1839). An attorney cannot collect his fees from the corporation

is just and should not be weakened. It is entirely legal, however, for the corporation to ratify, confirm, or adopt the contracts of its promoters. A promoter's contract may be adopted by

for services previous to incorporation, even though the by-laws provided for payment, and the directors in meeting assembled said that he would be paid. *Re* Rotherham, etc. Co., L. R. 25 Ch. D. 103 (1883). The corporation is not liable for services in obtaining street permits and franchises prior to its incorporation. Hutchinson *v.* Surrey, etc. Assoc., 11 C. B. 689 (1851). A railway company is not bound by the agreement of its promoters that it will purchase the canal of a canal company if the latter will not oppose the grant of the charter. Leominster, etc. Co. *v.* Shrewsbury, etc. R'y, 3 K. & J. 654 (1857). A railway company is not bound by the contract of its promoters for it with a town that the company would build certain wharves, etc. "If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation." Caledonian, etc. R'y *v.* Magistrates, etc., 2 Macq. 391 (1855), questioning Edwards *v.* Grand Junction R'y, 1 Myl. & C. 650 (1836); Stanley *v.* Chester, etc. R'y, 1 R'y Cas. 58; S. C., 9 Sim. 264; aff'd in 3 Myl. & C. 773 (1838), and Petre *v.* Eastern, etc. R'y, 1 R'y Cas. 462 (1838). Where, by the articles of incorporation, the subscribers are not to be bound until a certain amount of stock is subscribed, the corporation is not liable for the salary of an engineer employed before such full subscription. Pierce *v.* Jersey, etc. Co., L. R. 5 Exch. 209 (1870).

A corporation is not liable on the contracts of its promoters to employ plaintiff as a broker, nor does an express ratification of the contract bind it unless a consideration is alleged. Payne *v.* New South, etc. Co., 10 Exch. 283 (1854). An agreement of promoters that the company shall pay an attorney a certain sum for services is not binding on the company — not even by ratification and agreement between the company and the promoters. *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1880). It has been held that equity will enforce an agreement of the promoters that, if opposition to the grant of its charter is withdrawn, the company will contract to do certain things which the opposition desired to put into the charter. Edwards *v.* Grand, etc. R'y, 1 Myl. & Cr. 650 (1836), aff'g 7 Sim. 337; questioned in Caledonian, etc. R'y *v.* Helensburg, etc., 2 Macq. 391 (1855), and held overruled in Earl of Shrewsbury *v.* North, etc. R'y, L. R. 1 Eq. 593 (1865). But an agreement to pay a large price for land owned by the opposition party is not so enforceable. Preston *v.* Liverpool, etc. R'y, 5 H. L. Cas. 605 (1856), aff'g 17 Beav. 114; S. C., before amendment of the bill, 1 Sim. (N. S.) 586 (1851). *Cf.* Stanley *v.* Chester, etc. R'y, 3 Myl. & C. 773 (1838); and Eastern, etc. R'y *v.* Hawkes, 5 H. L. Cas. 331 (1855); Earl of Lindsey *v.* Great Northern R'y, 10 Hare, 664 (1853), in an inferior court. This doctrine is sustained in Earl of Shrewsbury *v.* North, etc. R'y, L. R. 1 Eq. 593 (1865), disapproving Edwards *v.* Grand, etc. R'y, 1 Myl. & Cr. 650 (1836), and Petre *v.* Eastern, etc. Co., 1 R'y Cas. 462 (1838), and is sustained also in Gooday *v.* Colchester, etc. R'y, 17 Beav. 132 (1852). The articles of association may provide for the payment of promoters' contracts. Terrell *v.* Hutton, 4 H. L. Cas. 1091 (1854). *Cf.* Gunn *v.* London, etc. Ins. Co., 12 C. B. (N. S.) 694 (1862). *Contra*, Mulhado *v.* Porto,

the corporation in any way in which a contract may be made by the corporation.[1]

A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter's contract which has been ratified or adopted by the corporation, or the benefits of which have been accepted by the corporation with knowledge of such contract, may be enforced against it.[2]

etc. R'y, L. R. 9 C. P. 503 (1874); *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1880). Under a charter provision that the company shall be liable, see *Re* Brampton, etc. R'y, L. R. 10 Ch. App. 177 (1875), where an attorney was allowed to collect, although he had assured subscribers that they would not be liable; distinguishing Savin *v.* Hoylake R'y, L. R. 1 Exch. 9 (1865). Where the articles of incorporation expressly provide for the payment of a specified amount to a person who had contracted with the promoters to sell to the company certain facilities for business, the company is liable. Touche *v.* Metropolitan, etc. Co., L. R. 6 Ch. 671 (1871), rev'g 4 De G., M. & G. 465. A judgment against the company, entered by consent on a claim of a landowner that the promoters agreed that the company would take his land at a certain price, is binding. Williams *v.* St. George, etc. Co., 2 De G. & J. 547 (1858).

[1] McArthur *v.* Times Printing Co., 48 Minn. 319 (1892), the court holding also that the contract begins only from its adoption, and on that basis the statute of frauds is applicable,

[2] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); Rogers *v.* New York, etc. Land Co., 134 N. Y. 197, 211 (1892), the court saying: "While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations." In Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894), prior to incorporation a written agreement was made in the name of the company with a party who agreed to secure the right of way, hydrant rental, and to place investments, etc., and was to receive pay from the corporation. He was also to abandon a rival water-works scheme and to aid generally. The president and general manager of the corporation after the incorporation acknowledged the debt and contract, and promised payment. The court held that the fact that the president called upon the party for performance constituted ratification. The whole question was for the jury. Although the promoters have no authority to bind the company by their agreements as to the construction contract, yet where the company receives a benefit from such agreement, and in its records and minutes recognizes it, the company will be liable in damages for letting the contract to others. Wilson *v.* King's, etc. R. R., 114 N. Y. 487 (1889).

"A corporation has power, when fully organized, to ratify a contract made by the promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes." Stanton *v.* New York, etc. R. R., 59 Conn. 272 (1891). The corporation may accept and ratify a contract of its promoters. Davis *v.* Montgomery, etc. Co., 8 S. Rep. 496 (Ala., 1890). Where promoters agree to employ a person,

The corporation alone is liable where its note is given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation.[1]

and the company actually does employ him afterwards, the company thereby ratifies the contract. Pittsburg, etc. Co. *v.* Quintrell, 91 Tenn. 693 (1892). Bonds and mortgages executed by corporate officers in pursuance of a resolution made by promoters previous to incorporation are valid where the directors ordered the issue of the bonds after their execution. Wood *v.* Whelen, 93 Ill. 153 (1879). A bank, after incorporation, may ratify and become liable on the contract of its promoters to the effect that the bank would give stock and a certain sum of money to a person for his services. McDonough *v.* Bank, 34 Tex. 309 (1870). Where a corporation is organized before its articles are filed and a contract of purchase is made, the contract price is collectible, the company having received the property after incorporation. Paxton, etc. Co. *v.* First Nat. Bank, 21 Neb. 621 (1887). A corporation is liable for machinery which is accepted by it on a contract made by its organizers for it before incorporation. Whitney *v.* Wyman, 101 U. S. 392 (1879). An agreement by corporate organizers that the corporation will pay royalties on a patent is enforceable against the corporation when it has acted on the contract and for a time paid the royalties. Bommer *v.* American, etc. Co., 81 N. Y. 468 (1880). See also Lorillard *v.* Clyde, 86 N. Y. 384 (1881). A preliminary agreement that a person may turn in property for stock is valid where the corporation has afterwards accepted the property and issued the stock therefor. Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883). A contract made by the president, as such, after the certificate of incorporation was signed, but before it was filed, binds the corporation where it has adopted the contract by carrying it out. Grape, etc. Co. *v.* Small, 40 Md. 395 (1874). A corporation is not bound by the contracts of its promoters, but it may adopt them after incorporation. Adoption may be in any way in which it might make the contract *de novo*. Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887), and note. The company may of course employ and be liable to a superintendent whom the promoters agreed should be employed. Browning *v.* Great, etc. Co., 5 H. & N. 856 (1860). A grant of a license to use a patent made to an individual with the privilege to assign to a contemplated corporation may, as to royalties, be enforced against the corporation when the corporation expressly adopted the contract and acted on it. Spiller *v.* Paris, etc. Co., L. R. 7 Ch. D. 368 (1878), distinguishing Melhado *v.* Porto Alegre, etc. R'y, L. R. 9 C. P. 503 (1874), as being a case at law. Money paid by a town after its incorporation to a person for bribing the legislature to grant the charter may be recovered back by a bill in equity. Frost *v.* Inhabitants, etc., 88 Mass. 152 (1863). Where persons who give their notes in payment for property deed the property to a corporation, the latter is not bound to reimburse them for amounts paid by them on the notes. Ruby, etc. Co. *v.* Gurley, 17 Colo. 199 (1892). The offer of a party to take such stock as may not be taken by the public when offered to the pub-

[1] Case Mfg. Co. *v.* Soxman, 138 U. S. 431 (1891); Shields *v.* Clifton, etc. Co., 28 S. W. Rep. 668 (1894).

Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it.[1]

A consolidation agreement between individuals, whereby the consolidated company is to assume a lease owned by another company, cannot be enforced by such other company. It is not a party to the agreement.[2] The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[3]

Not only may a ratified contract be enforced against a corporation, but it may be enforced by such a corporation.[4]

lic may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re* Hemp, etc. Co., [1896] 2 Ch. 121. Where promoters are entitled to certain stock from the corporation, but such obligation is canceled by mutual agreement, one of them cannot afterwards revive the obligation on the ground that the other promoter, who dominated the corporation, had agreed that it would all be made right. Dillon *v.* Commercial Cable Co., 87 Hun, 444 (1895). Where a promoter agrees to pay a commission for obtaining a bonus for a corporation, the corporation is liable for the commission if it accepts the bonus with knowledge of the contract. Weatherford, etc. R. R. *v.* Granger, 86 Tex. 350 (1894). Promoters are liable on a contract made before incorporation, but are not liable on the contract if it was made for the company and the company adopts it. Ennis, etc. Co. *v.* Burks, 39 S. W. Rep. 966 (Tex., 1897). See also § 712, *infra*.

[1] Rathbun *v.* Snow, 123 N. Y. 343 (1890).

[2] Lorillard *v.* Clyde, 122 N. Y. 498 (1890). A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence, the corporation cannot refuse to transfer the stock. Ireland *v.* Globe, etc. Co., 38 Atl. Rep. 116 (R. I., 1897).

[3] Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894).

[4] An agreement of land-owners with a promoter that they will sell to the contemplated railway a right of way at a specified price may be enforced by the railway. Bedford, etc. R'y *v.* Stanley, 2 J. & H. 746 (1862). But the company cannot enforce it where no formal ratification has been made. Penn Match Co. *v.* Hapgood, 141 Mass. 145 (1886). A corporation cannot ratify a contract made for it before it was incorporated, but it may adopt the contract expressly. See 3 R'y & Corp. L. J. 482 (English cases). The mortgagor to a corporation cannot set up usury on the ground that the promoters required him to subscribe for stock in order to obtain the loan. Central, etc. Ins. Co. *v.* Callaghan, 41 Barb. 448 (1864). And see many cases in ch. IV, *supra*, holding that a corporation may enforce

In Missouri, Massachusetts, and England it is held that a corporation cannot ratify a promoter's contract,[1] but that a new contract to the same effect may be made by the corporation.

The corporation is not liable to the promoters for their expenses and labor in effecting the incorporation.[2]

subscriptions taken before its incorporation.

[1] There is no such thing as a "ratification" of a promoter's contract. It is the making of an original contract by the corporation, and does not release the promoters. Queen City, etc. Co. *v.* Crawford, 127 Mo. 356 (1895). "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." Abbott *v.* Hapgood, 150 Mass. 248 (1889), citing cases. In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence, a contract as to the secretary's salary is unenforceable. He can recover only on a *quantum meruit*. *Re* Dale, 61 L. T. Rep. 206 (1889).

[2] Where a promoter contracts to obtain subscriptions and take his pay in stock, and the company, when organized, adopts the contract, and he obtains the subscription, but the company is unable to get legislative authority to cross a river, and so abandons the enterprise, he may collect damages. Stanton *v.* New York, etc. R. R., 59 Conn. 272 (1891). Where, prior to the incorporation, property is conveyed to a trustee to be conveyed by him to the corporation, he cannot claim from the corporation compensation for his services, although the promoters agreed that he should have pay. The corporation can compel a conveyance of the property without paying the compensation. Hecla, etc. Min. Co. *v.* O'Neill, 19 N. Y. Supp. 592 (1892). A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. Smith *v.* Seattle, etc. R'y, 72 Hun, 202 (1893). Where two street railways are consolidated, and the stockholders in one are to receive share for share, and the stockholders in the other company are to receive fourteen shares of consolidated stock for one share of the old stock, the stockholders so turning in their stock for new stock cannot also claim from the consolidated company the amount of money which they expended in buying the stock of one of the constituent companies. Wilson *v.* Trenton, etc. R. R., 40 Atl. Rep. 597 (N. J., 1898). Expenses and debts incurred by the promoters for and in behalf of a corporation may be collected from the corporation after it is organized, if the corporation assumes such debts. Schreyer *v.* Turner Flouring Co., 29 Oreg. 1 (1896). Compare Weatherford, etc. R'y *v.* Granger, 86 Tex. 350 (1894). A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organization, it accepts the subscription with the knowledge of such expenses. Weatherford, etc. R. R. *v.* Granger, 22 S. W. Rep. 70 (Tex., 1893). A person who, at the request of a minority of the promoters, attends meetings of the promot-

The question whether a person who has contracted with a corporation as an existing corporation can repudiate his contract on the ground that it was never incorporated is discussed elsewhere.[1]

§ 708. *Acts which must be authorized by stockholders' meetings instead of by directors' meetings — Stockholders make the by-laws.* — The functions of stockholders are exceedingly limited. The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making by-laws, increasing or

ers, lobbies for the charter, makes a preliminary survey, and pays some expenses, cannot recover from the subsequently incorporated company. The court said that in all the cases to the contrary "the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one." Bell's, etc. R. R. *v.* Christy, 79 Pa. St. 54 (1875). For a case where one of the promoters of a consolidation used his stock to bring it about, but failed to hold the consolidated company liable therefor, see Eldred *v.* Bell Tel. Co., 119 U. S. 513 (1886). The company on winding up is not liable for the promoters' expenses. Terrell's Case, 2 Sim. (N. S.) 126 (1851); *Ex parte* Lloyd, 1 Sim. (N. S.) 248 (1851). A promoter cannot recover from the corporation money which he expended before its incorporation in bribing the legislature to grant the charter. Marchand *v.* Loan, etc. Assoc., 26 La. Ann. 389 (1874). See also Hall *v.* Vermont, etc. Co., 28 Vt. 401 (1856). The statute may provide that the corporation shall pay the promoters' expense of obtaining the charter. Hitchins *v.* Kilkenny R'y, 9 C. B. 536 (1850). Where a corporation was not to exist until a certain amount of stock was subscribed, the secretary cannot recover from the corporation any compensation for his services prior to the obtaining of that amount of subscriptions. Franklin, etc. Ins. Co. *v.* Hart, 31 Md. 59 (1869). In Law *v.* Connecticut, etc. R. R., 45 N. H. 370 (1864), a suit at law by a promoter against the company for services rendered in procuring subscriptions was sustained on the ground that "a corporation is liable at law, upon an implied assumpsit, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." Affirmed, 46 N. H. 284 (1865). To same effect, Hall *v.* Vermont, etc. Co., 28 Vt. 401 (1856). Where work has been carried on by the president for his company, he is allowed, in his accounting, credit for work done, materials furnished, and money advanced before as well as after the full incorporation. Grand River Bridge Co. *v.* Rollins, 13 Colo. 4 (1889).

[1] See § 637, *supra*.

decreasing the capital stock, authorizing an amendment to the charter, and dissolving the corporation.[1] Of the functions of the stockholders the most important, perhaps, is that of making by-laws. The law is clear that stockholders in meeting assembled have the power to make the by-laws of the corporation.[2]

§ 709. *Stockholders cannot carry on the business or enter into contracts for the corporation — These are the functions of the directors — One person owning all the stock — "Dummy" corporations.*— The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf.[3] The stockholders have no power

[1] See Eidman *v.* Bowman, 58 Ill. 444 (1871); Metropolitan, etc. R'y *v.* Manhattan, etc. R'y, 11 Daly (N. Y.), 377 (1884). As to increasing or reducing the capital stock, see § 285, *supra;* amending charter, ch. XXVIII, *supra;* dissolution, ch. XXXVIII, *supra.*

[2] For a full discussion of the subject of by-laws, see § 4*a*, *supra.*

[3] Quoted and approved in Sellers *v.* Greer, 172 Ill. 549 (1898), rev'g Greer *v.* Sellers, 64 Ill. App. 505, and holding that the court will not grant specific performance of a contract of one of the stockholders to sell all the property of the corporation to another stockholder, even though these two stockholders owned nine hundred and ninety-eight shares of the one thousand shares of the capital stock, and even though the holders of the remaining two shares of stock were merely nominal holders thereof; Conro *v.* Port Henry, etc. Co., 12 Barb. 27 (1851), where a lease of iron works was declared void because it was the act of the stockholders and not of the directors; McCullough *v.* Moss, 5 Denio, 567 (1846), in which a promissory note signed by the president and secretary of the corporation was held invalid because authorized only by the stockholders and not by the directors; Dana *v.* Bank of United States, 5 Watts & S. (Pa.) 223, 245 (1843); Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875), holding that it is for the directors and not the stockholders to repudiate corporate contracts made by an authorized agent; Gashwiler *v.* Willis, 33 Cal. 11 (1867), holding that the stockholders have no power to authorize a sale of corporate property. Such authority must come from the directors. The stockholders do not authorize contracts. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders. Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896). The stockholders have no power to authorize a mortgage. Only the board of directors can do so.

to elect the president. Their action is a nullity.[1] Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters.[2] It is not for the stockholders to direct how money received on the issue of new stock shall be used.[3] A resolution of the stockholders fixing the rates of mileage to be paid to the directors is not binding on the directors, although if enacted into a by-law it would be binding.[4] A committee appointed by the stockholders to arrange to meet the obligations of the company has no power to make contracts.[5] An assignment for the benefit of creditors is authorized by the directors, and not the stockholders.[6] The stockholders have no power to sell the property of the corporation, either separately or collectively.[7]

The law seems to be clear that all corporate contracts are to be made by the directors. This includes the original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts. Thus, a lease of the corporate property is authorized, not by the stockholders, but by the directors.[8]

Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). See also § 808, *infra*.

[1] Walsenberg Water Co. *v.* Moore, 5 Colo. App. 144 (1894).

[2] Charlestown, etc. Co. *v.* Dunsmore, 60 N. H. 85 (1880).

[3] Jones *v.* Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892).

[4] Mutual F. Ins. Co. *v.* Farquhar, 39 Atl. Rep. 527 (Md., 1898).

[5] Augsburg Land, etc. Co. *v.* Pepper, 27 S. E. Rep. 807 (Va., 1897).

[6] Rogers *v.* Pell, 154 N. Y. 518 (1898).

[7] Rough *v.* Breitung, 75 N. W. Rep. 147 (Mich., 1898).

[8] Beveridge *v.* New York Elev. R'y, 112 N. Y. 1 (1889); Flagg *v.* Metropolitan, etc. R'y, 20 Blatchf. 142 (1881); People *v.* Metropolitan R'y, 26 Hun, 82 (1881); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821 (1886). *Contra*, Metropolitan R'y *v.* Manhattan R'y, 15 Am. & Eng. R'y Cas. 1 (1884). *Cf.* Harkness *v.* Manhattan R'y, 54 N. Y. Super. Ct. 174 (1886); Cass *v.* Manchester, etc. Co., 9 Fed. Rep. 649 (1881); also § 712, *infra*. The result is that directors are never obliged to consult the stockholders in meeting assembled, nor as a majority, as regards corporate contracts. The stockholders cannot, by suit in equity, compel the directors to enter into a contract of lease. Ives *v.* Smith, 8 N. Y. Supp. 46 (1889). But the directors must consider that any stockholder may object to *ultra vires* acts. Thus, stockholders cannot control the direction of the directors when the latter direct an assignment to be made for the benefit of creditors. So held though the directors were to go out of office in four days. Hutchinson *v.*

However, if the contract is beyond the express and implied powers of the corporation, then any stockholder may have the contract enjoined or set aside. He can do so even though a majority of the stockholders approve the act and ratify it in meeting assembled. He may resort to the courts.[1]

A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption in the regular manner.[2] A stockholder, however, may be appointed the agent of the corporation.[3]

Green, 91 Mo. 367 (1886). An extension of a railway cannot be enjoined merely because a majority of stockholders oppose it. *Ultra vires* must be alleged. Moses *v.* Tompkins, 84 Ala. 613 (1888).

[1] Part IV of this work discusses this subject. As regards the relation and rights of stockholders towards suits and compromises of suits by or against the corporation, see § 750, *infra*.

[2] Morelock *v.* Westminster Water Co., 4 Atl. Rep. 404 (Md., 1886); Mays *v.* Foster, 13 Oreg. 214 (1886); Rice *v.* Peninsular Club, 52 Mich. 87 (1883); Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1888). The misrepresentations of a stockholder inducing a person to purchase stock of the corporation are not binding on the corporation. Burnes *v.* Pennell, 2 H. L. Cas. 497, 519 (1849). The circumstance that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation. Harris *v.* Muskingum, etc. Co., 4 Blackf. (Ind.) 267 (1836). A stockholder cannot bind the corporation. Jones *v.* Williams, 39 S. W. Rep. 486 (Mo., 1897). The stockholders do not make the contracts. Solomon Co. *v.* Barber, 49 Pac. Rep. 524 (Kan., 1897). Where all the individuals composing a corporation covenanted in behalf of such corporation for themselves and their heirs that the corporation should do certain acts, they were held to be bound personally. Tilesston *v.* Newell, 13 Mass. 406 (1816). In a suit to recover damages of a corporation for flooding the plaintiffs' land, it was held error to ask a witness whether individual members of the company had employed him to deprive the plaintiffs of their claim. Shay *v.* Tuolumne, etc. Co., 6 Cal. 74 (1856). Where the plaintiff claims the amount of his disbursements for work on the defendant corporation's road, but the evidence does not prove a request to the plaintiff by the corporation, its directors, or authorized agent, or any stipulation, expressed or implied, to authorize a charge against the corporation for such disbursements, no act of an individual member can be held to bind the corporation. Hayden *v.* Middlesex, etc. Corp., 10 Mass. 397 (1813). The intention of a corporation can only be

[3] Stoddert *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227 (1830), where a religious corporation employed a member of its vestry to make sale of pews; Spear *v.* Ladd, 11 Mass. 94 (1814), where the president of a bank was appointed its agent to indorse a note; Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814); Bank Commissioners *v.* Bank of Brest, Harr. Ch. (Mich.) 106 (1840).

A company is not liable on the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation.[1] A deed of corporate property by a person who owns all the stock does not convey good title.[2] Although one person owns a majority of the stock,[3] or all of it,[4]

learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are for this purpose to be inquired after. Thus, a plaintiff resisting a tax may not establish its legality by evidence as to the intent of those voting the levy. Bartlett *v.* Kinsley, 15 Conn. 327 (1843). A deed of real estate executed by the directors of a corporation separately and at different times, but not formally authorized by them as a board, is not only ineffectual as a conveyance of real property, but equally so as a contract to convey. Baldwin *v.* Canfield, 26 Minn. 43, 54 (1879). See also § 713*a*, *infra*. Stockholders' contracts do not bind the corporation. American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890); Wright *v.* Lee, 2 S. D. 596 (1892). Damages may be recovered by a corporation for a fraud practised upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891).

[1] Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

[2] Parker *v.* Bethel Hotel Co., 96 Tenn. 252 (1896). In this case some of the stock had been pledged. The stockholders, as such, cannot convey the real estate of the corporation, though they all join in the deed, unless the execution is in pursuance of some vote of the corporation. Isham *v.* Bennington Iron Co., 19 Vt. 230 (1847); Wheelock *v.* Moulton, etc., 15 Vt. 519 (1843).

[3] Hopkins *v.* Roseclare Lead Co., 72 Ill. 373 (1874). He cannot sell the corporate property. The person owning a majority of the stock cannot contract for the corporation, and a contract in its name made by him is not binding on it. Allemong *v.* Simmons, 124 Ind. 199 (1890). Where a construction contract is signed by an individual in his own name, the corporation is not liable on it, although he owned nearly all the stock and the work was for its benefit. Donoghue *v.* Indiana, etc. R'y, 87 Mich. 13 (1891). Where, however, a part of the stockholders contract to sell the corporate property to a third person, they are liable in damages for breach of the contract. Curtis *v.* Watson, 64 Vt. 536 (1892).

[4] "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation — the artificial being created — holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." Humphreys *v.* McKissock, 140 U. S. 304 (1891). On this subject, see §§ 663, 664, *supra*. A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter. Fitzgerald *v.* Missouri Pac. R'y, 45 Fed.

or all but two shares,[1] he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue.[2] Although one water-works company owns all the stock of another water-works company, a mortgage given by the former company on all its property

Rep. 812 (1891). Stockholders who transfer the corporate property are jointly and severally liable to corporate creditors. Graham *v.* Hoy, 38 N. Y. Super. Ct. 506 (1875). The fact that the manager of a corporation and his brothers own all the capital stock does not make their acts the acts of the corporation. Bank of Monroe *v.* Gifford, 72 Iowa, 750 (1887). Stockholders owning all the stock and bonds of a road cannot destroy the same and then sell the road to another company. Gulf, etc. R'y *v.* Morris, 67 Tex. 692 (1887). See also Button *v.* Hoffman, 61 Wis. 20 (1884), where it is held that such a stockholder is not the corporation. *Contra*, Swift *v.* Smith, 65 Md. 428 (1886). A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. Chicago, etc. R'y *v.* Union Pac. R'y, 47 Fed. Rep. 15 (1891). A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation, and the bridge itself leased to the latter. St. Louis, etc. R'y *v.* Williams, 53 Ark. 58 (1890). Where a corporation or person owns all the stock and bonds of another corporation, and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892). The sole owner of the entire capital stock cannot collect a corporate debt by a suit in his own name. Randall *v.* Dudley, 69 N. W. Rep. 729 (Mich., 1897). The corporate entity is distinct, although one party owns the whole stock. Exchange Bank *v.* Macon Constr. Co., 97 Tenn. 1 (1895). The fact that one person owns all the stock does not dissolve the corporation. Harrington *v.* Connor, 70 N. W. Rep. 911 (Neb., 1897). Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate — a brewery — and the real transaction is a sale of the entire property. Megibben *v.* Perin, 49 Fed. Rep. 183 (1892).

[1] England *v.* Dearborn, 141 Mass. 590 (1886). Such a stockholder cannot mortgage the corporate property.

[2] Newton Mfg. Co. *v.* White, 42 Ga. 148 (1871). See also Sharp *v.* Dawes, 46 L. J. (Q. B.) 104 (1876); Button *v.* Hoffman, 61 Wis. 20 (1884); Swift *v.* Smith, 65 Md. 428 (1886); England *v.* Dearborn, 141 Mass. 590 (1886); Hopkins *v.* Roseclare Lead Co., 72 Ill. 383 (1874); Bellona Co.'s Case, 3 Bland (Md.), 442, 446 (1831); Farmers', etc. T. Co. *v.* Chicago, etc. R'y, 39 Fed. Rep. 143 (1889). The rule is the same where two persons buy all the stock. Russell *v.* McLellan, 31 Mass. 63 (1833). The corporation still subsists, and the two purchasers do not become partners, or joint tenants, or tenants in common of the corporate property. *Cf.* Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); § 663, *supra*.

does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company.[1]

A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter;[2] and ordinarily is not liable for its debts.[3]

There are, however, two exceptions to the rules given above. The first is that corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. It may arise by a long course of dealing which estops the corporation from denying the legality of that mode of dealing.[4] It may arise by passively allowing itself to be used as an instrument of wrong or illegal acts.[5] It is to be borne in mind also that by unanimous consent a corporation may do many acts which ordinarily would be *ultra vires* of the corporation.[6] The second exception is that, where a corporation is merely a "dummy," the court has power to ignore its corporate existence and to hold that the acts of the stockholders are the acts of the corporation itself.[7]

Thus, where a railroad company causes a telegraph company

[1] National Water-works Co. *v.* Kansas City, 78 Fed. Rep. 428 (1896).

[2] Fitzgerald *v.* Missouri Pac. R'y, 45 Fed. Rep. 812 (1891).

[3] Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). When a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892).

[4] See many cases in the succeeding sections relative to the authority of various officers. A chattel mortgage executed by the president and secretary of an insolvent corporation, with the knowledge and consent of all the stockholders, is valid. Kalamazoo, etc. Co. *v.* Winans, etc. Co., 106 Mich. 193 (1895).

[5] People *v.* North River Co., 121 N. Y. 582, 619 (1890). But an agreement of the stockholders of a corporation that they will not compete with a "trust" into which they have entered will not bind the corporation itself. It may revive its business, even though its stockholders are the ones who entered into the "trust." American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890).

[6] See § 3, *supra*.

[7] See §§ 663, 664, *supra*. Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889).

to be incorporated, and subscribes to all its stock and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of law that a principal is liable on the contracts of its agent.[1]

Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subjects to the debts of the parent company.[2]

Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.[3]

§ 710. *The expulsion of stockholders.*— The law forbids the directors or stockholders of a corporation having a capital stock from depriving him of his rights as a stockholder. He certainly cannot be deprived of his right to dividends equally with other stockholders.[4] He cannot be deprived of his right to vote.[5] And it is clear that his various rights as a stockholder cannot be taken from him by any or all of the other stockholders. In this respect a corporation having a capital stock is clearly different from a corporation formed for religious, social, charitable, and similar purposes. The former is for purposes of gain, and the property which is represented by stock cannot be taken from a stockholder by expelling him from the corporation.[6]

§ 711. *Stockholders cannot change the directors except at elections.*— The term of office of directors is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He can-

[1] Interstate Tel. Co. *v.* Baltimore, etc. Tel. Co., 51 Fed. Rep. 49 (1892).

[2] Day *v.* Postal Tel. Co., 66 Md. 354 (1887).

[3] See ch. XLI, *supra*, concerning this subject.

[4] See § 540, *supra*.

[5] See § 621, *supra*.

[6] The right to forfeit stock for nonpayment of calls may possibly be called an "expulsion," but is a misuse of that term. See ch. VIII, *supra*. Brokers' associations frequently have by-laws authorizing the expulsion of members. Concerning expulsion in general, see § 11, *supra*.

not be turned out either by the stockholders,[1] or the directors, or by a court.[2] Sometimes, however, the charter, statutes, or by-laws authorize and empower the stockholders to remove directors at any time.[3] And where the stockholders have power by charter or statute to remove directors for cause, the exercise of their discretion therein will not be reviewed in equity.[4] So, likewise, where such a power is given to the stockholders, a court of chancery will not enjoin the holding of a meeting called by the stockholders to consider, among other matters, the removal of the directors.[5] The president of the corporation, duly elected by the board of directors, does not hold his position at the pleasure of the board.[6]

§ 712. *Directors — Their power as a board and as individuals to contract for the corporation — Ratification by the directors.*— All contracts of a corporation are to be made by or under the direction of its board of directors. The board of di-

[1] Imperial, etc. Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 1 (1882); Powers *v.* Blue, etc. Assoc., 86 Fed. Rep. 705 (1898); Nathan *v.* Tompkins, 82 Ala. 437 (1886), holding also that an election is wholly void where part of those elected are to fill the place of officers illegally removed, there being no particular persons designated to fill the legal vacancies. See also Berry *v.* Cross, 3 Sandf. Ch. 1 (1845); Gorman *v.* Guardian Sav. Bank, 4 Mo. App. 180 (1877). *Cf.* dicta in State *v.* Brice, 7 Ohio (pt. 2d), 82 (1836); Adamantine Brick Co. *v.* Woodruff, 4 MacArthur, 318 (1880); Burr *v.* McDonald, 3 Gratt. (Va.) 206 (1846); Bayless *v.* Orme, Freem. Ch. (Miss.) 161 (1841). A director, however, may resign, and in such a case the corporation may accept the resignation. Cloutman *v.* Pike, 7 N. H. 209 (1834), a municipal corporation case. In England the by-laws generally give the stockholders the power to remove directors. See Browne *v.* La Trinidad, L. R. 37 Ch. D. 1 (1887); Isle of Wight R'y *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883). Where in a corporation the state itself is represented by a certain number of directors, the state may remove those directors at any time, and appoint others in their place. Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

[2] Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). See also § 624, *supra*, and § 746, *infra*.

[3] Such is the law in Ohio, West Virginia, and many other states. See Part VII, *infra*. Such, also, is the law applicable to national banks. See U. S. Rev. St., § 5136; also, Taylor *v.* Hutton, 43 Barb. 195 (1864). The fact that a secretary's salary is annual does not prevent the company from discharging him at any time, where the by-laws provide for removal at any time. Douglass *v.* Merchants' Ins. Co., 118 N. Y. 484 (1890). The president may remove the teller. Harrington *v.* First Nat. Bank, Thompson's N. B. Cas. 760 (1873).

[4] Inderwick *v.* Snell, 2 Macn. & G. 216 (1850).

[5] Isle of Wight R'y *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883).

[6] Archer *v.* People's Sav. Bank, 88 Ala. 249 (1889). Where three out of five directors met without notice to

rectors make corporate contracts by a regular vote of the board; or by authorizing an agent to make them; or by allowing an agent to assume and exercise that power; or by accepting a contract or its benefits after it has been made by an unauthorized agent. And in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions.[1] The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into[2] are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. The directors elect the officers, and in this connection it may be added that "at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other."[3] They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it.[4] But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter into, then any stockholder may enjoin that act or contract.[5] Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation.[6] Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation.[7]

the other two, and deposed the president and authorized a mortgage, their acts are void. Hatch *v.* Johnson L. & T. Co., 79 Fed. Rep. 828 (1895).

[1] See §§ 708, 711, *supra*.

[2] See ch. XLI, *supra*, and in fact most of the preceding chapters of this book.

[3] Throop on Public Officers, § 30; People *v.* Green, 58 N. Y. 295 (1874). *Cf.* Atty.-Gen. *v.* Detroit, 70 N. W. Rep. 450 (Mich., 1897).

[4] See § 750, *infra*.

[5] See ch. XL, *supra*. As to ratification of such acts by the stockholders, see ch. XLIV, *infra*.

[6] See § 713*a*, *infra*.

[7] See § 713*a*, *infra*.

A single director has no power to contract for the corporation.[1] It is perfectly legal, however, for a board of directors to delegate to an agent the power to make a contract,[2] and this agent may, of course, be a director as well as a third person.[3] The board of directors and the corporation are bound also by the contracts of a person who has assumed to contract for the company, and for some time has been allowed by the board to so act and contract.[4] So also the board of directors and the

[1] See the cases under § 716, *infra*, where the president even, who is nearly always a director, was held not to have power to contract. A director has no authority to contract. Noblesville, etc. Co. *v.* Loehr, 124 Ind. 79 (1890); Allemong *v.* Simmons, 124 Ind. 199 (1890); Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892); New, etc. Co. *v.* Upton, 36 Atl. Rep. 366 (N. H., 1893). See also Chicago, etc. R. R. *v.* James, 22 Wis. 194 (1867); Trundy *v.* Hartford, etc. Co., 6 Rob. (N. Y.) 312 (1868), where a director employed a broker; New Haven, etc. Co. *v.* Hayden, 107 Mass. 525 (1871), where a director, stockholder, and overseer contracted to extend the business; Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874), where a director sold bonds; Lockwood *v.* Thunder, etc. Co., 42 Mich. 536 (1880); Bramah *v.* Roberts, 3 Bing. N. Cas. 963 (1837), where a director accepted a bill; Rice *v.* Peninsular Club, 52 Mich. 87 (1883), where a director said that a purchase was all right. But in Bradstreet *v.* Bank of Rutland, 42 Vt. 128 (1869), it was held that an employee who was employed by three directors might recover. If the corporation is only an intermediary of title, such as payee and indorser, the indorsee may recover against the maker without making strict proof as to the authority of the directors to indorse. Smith *v.* Johnson, 3 H. & N. 222 (1858). Where a director causes work to be done on the corporate property on an agreement that he will pay for the same, the corporation is not liable therefor. Ayers *v.* Green, etc. Co., 48 Pac. Rep. 221 (Cal., 1897). He is not an agent to discount paper. Washington Bank *v.* Lewis, 39 Mass. 24 (1839). Nor to agree to give extra pay. Stoystown, etc. Turnp. Co. *v.* Craver, 45 Pa. St. 386 (1863); Lindley, Companies, p. 155. See also § 726, *infra*.

[2] Spear *v.* Ladd, 11 Mass. 94 (1814); Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814), where a director was authorized to indorse a note; Bank Commissioner *v.* Bank of Brest, Harr. Ch. (Mich.) 106 (1840); Stevens *v.* Hill, 29 Me. 133 (1848); Lester *v.* Webb, 83 Mass. 34 (1861); Abbot *v.* American Hard Rubber Co., 33 Barb. 578 (1861); U. S. Bank *v.* Dana, 6 Pet. 51 (1832); Metropolis Bank *v.* Jones, 8 Pet. 12, 16 (1834); Percy *v.* Millaudon, 5 La. 568 (1833); Pennsylvania Bank *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256 (1825); Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843). As to delegation of discretionary powers, see § 715, *infra;* Sheridan, etc. Co. *v.* Chatham Nat. Bank, 52 Hun, 575 (1889).

[3] A director who is authorized to purchase and pay in stock cannot agree to pay in cash. Hayden *v.* Middlesex, etc. Co., 10 Mass. 403 (1813). Authority to a director to make contract for the sale of land does not authorize him to convey the land. Green *v.* Hugo, 81 Tex. 452 (1891).

[4] See many cases in the following sections. Also Beers *v.* Phœnix, etc.

corporation are bound by an unauthorized agent's contract when the contract is acquiesced in or the benefits of that contract are accepted;[1] or when the corporation expressly ratifies and confirms the contract.[2]

It is an important principle of law that a corporation is liable on a contract the benefit of which it accepts, even though such contract was not authorized by the board of directors. Thus, a contract signed in the corporate name, but without the authority of the board of directors, may be validated by the corporation acting under it for a year.[3]

Co., 14 Barb. 358 (1852), where a director and secretary borrowed money as he was accustomed to do. But unless the custom is known to the directors the corporation is not bound. Lawrence *v.* Gebhard, 41 Barb. 575 (1864). And the act must be *intra vires*. Women's, etc. Union *v.* Taylor, 8 Colo. 75 (1884).

[1] See many cases in subsequent sections herein. Also New York, etc. Co. *v.* Phœnix Bank, 3 N. Y. 156 (1849), where loans of the company's money were made by a director.

[2] See § 707, *supra*, on promoters' contracts. The ratification of an unauthorized mortgage may be by express resolutions. Purser *v.* Eagle Lake, etc. Co., 111 Cal. 139 (1896). An unauthorized note issued by a corporation may be ratified by the board of directors. Nebraska, etc. Co. *v.* Bell, 58 Fed. Rep. 226 (1893).

[3] Jourdan *v.* Long Island R. R., 115 N. Y. 380 (1889). Although a sale of property is not authorized by the board of directors, yet if they accept the pay the sale is valid. Beach *v.* Miller, 130 Ill. 162 (1889). Where a contractor does extra work upon the assurance of a director that the company will pay for it, and had agreed so to do at a meeting, and a majority of the directors knew of the extra work, the company is liable therefor. Tryon *v.* White, etc. Co., 62 Conn. 161 (1892). Ratification in the case of a land contract may have to be in writing to satisfy the statute of frauds. Salfield *v.* Sutter, etc. Co., 94 Cal. 546 (1892). It may be a question of fact for the jury as to whether the company accepted the contract or not. Chapin *v.* Cambria, etc. Co., 145 Pa. St. 478 (1891). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. Stainback *v.* Junk, etc. Co., 39 S. W. Rep. 530 (Tenn., 1897). An assessment by the directors to pay a mortgage does not legalize such mortgage if it was not properly authorized, even though signed by the president, secretary, and two-thirds of the stockholders. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). An unauthorized purchase of real estate and a mortgage thereon by a corporation may be ratified, but only by the same formalities as if original authority were being given. Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. Woodbury *v.* Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895). Bonds issued by a cemetery corporation, and signed and sealed and recognized at many meetings of the directors, are legal. Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895). Where the cor-

A corporation may be liable for an accident on a ferry operated in its name, where it knew of the operation and received the benefits of the same.[1] Where a corporation is a mere "dummy," the courts sometimes hold that the corporation is liable for the acts and on the contracts of its stockholders.[2] An express vote of the directors authorizing a note need not be proved where the corporation whose obligation is in ques-

poration has occupied premises under an unauthorized lease, the court may submit to the jury the question of whether it ratified the lease. Hayden *v.* Wheeler, etc. Co., 20 N. Y. Supp. 902 (1892). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage, where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. Warren *v.* Bigelow Blue Stone Co., 74 Hun, 304 (1893). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. Witter *v.* Grand Rapids, etc. Co., 78 Wis. 543 (1891). A board of directors may ratify and thereby validate a mortgage which may have been executed without authority. Allis *v.* Jones, 45 Fed. Rep. 148 (1891). A corporation is liable for work done, although the officer employing plaintiff had himself contracted to do the work for the corporation. Plaintiff had no notice of this agreement. Salt Lake, etc. Co. *v.* Mammoth Min. Co., 6 Utah, 351 (1890). If the corporation admits in its pleading that a contract was entered into, a judgment for plaintiff will not be disturbed although the pleading was not put in evidence. Teall *v.* Consolidated, etc. Co., 119 N. Y. 654 (1890). A reorganized company may, by accepting the benefits of a contract and liability of the old company, become liable therefor, although the meeting of the directors authorizing the contract was informal. Baker *v.* Harpster, 42 Kan. 511 (1889). That the corporation is liable if the work was ordered and done for its benefit, see Grier *v.* Hazard, 13 N. Y. Supp. 583 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892). Although a mortgage was not authorized, yet where the board of directors subsequently provide for payment of part of it, and do pay part of it, they ratify it. Seal *v.* Puget Sound, etc. Co., 5 Wash. St. 422 (1892). It is a ratification of a contract for the corporation to admit its execution in a pleading. Tingley *v.* Bellingham, etc. Co., 5 Wash. St. 644 (1893). Ratification by a company of an agent's contract is not binding on the other party, if the ratification rejected one provision of the contract. Crabtree *v.* St. Paul, etc. Co., 39 Fed. Rep. 746 (1889). Subsequent ratification of the contract *in toto* is not sufficient unless the other party assents. Crabtree *v.* St. Paul, etc. Co., 39 Fed. Rep. 746 (1889).

[1] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893).

[2] See §§ 663, 664, *supra*.

tion is engaged in a business the nature of which and the duties in relation to which require or justify the giving of negotiable instruments without the officers being authorized thereto by a special vote to that effect.[1] Where a mortgage recites that it was duly executed by authority of the corporation, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.[2] In California it is held that an unauthorized mortgage is not ratified nor is it made valid by estoppel *in pais* except in a manner in writing sufficient to authorize the mortgage.[3] Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same have priority over the mortgage.[4]

§ 713. *De facto directors and officers of a corporation — The validity of their contracts.*— A *de facto* officer is one who has the reputation of being the officer he assumes to be, and yet is not entitled to the office in point of law.[5] A *de jure* officer is one who has the lawful right to the office, but who has either

[1] Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

[2] Sioux City, etc. Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897). Where the seal of the company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. "None but the corporation and its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors; and then only by a direct action brought for that purpose." Castle *v.* Lewis, 78 N. Y. 131 (1879); Eno *v.* Crooke, 10 N. Y. 60 (1854).

[3] Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896).

[4] State Nat. Bank *v.* Union Nat. Bank, 48 N. E. Rep. 82 (Ill., 1897).

[5] "To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office is in itself insufficient." Moses *v.* Tompkins, 84 Ala. 613 (1888). See also Rex *v.* Bedford Level, 6 East, 356 (1805); Mechanics', etc. Bank *v.* Burnett, etc. Co., 32 N. J. Eq. 236 (1880); Hamlin *v.* Kassafer, 15 Oreg. 456 (1887). *Contra*, Litchfield Iron Co. *v.* Bennett, 7 Cow. 234 (1827); Clark *v.* Farmers' Mfg. Co., 15 Wend. 256 (1836); Wait *v.* Mining Co., 36 Vt. 18 (1863). See also Wait, Insolv. Corp., § 23. Officers are still *de facto* after judgment of ouster is rendered, but before its entry, even though they acted with knowledge of the decision. Mining

been ousted from it or has never actually taken possession of it. An officer is *de facto* when the statute under which he holds office is unconstitutional;[1] or when he was elected but was ineligible,[2] or was irregularly or illegally elected.[3] An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer.[4]

The contracts of an officer *de facto*, acting within the sphere of his office, are binding upon the corporation.[5]

Co. *v.* Anglo, etc. Bank, 104 U. S. 192 (1881); S. C. in U. S. C. Ct., 6 Rep. 705. *Cf.* Walker *v.* Flemming, 70 N. C. 483 (1874). In McCall *v.* Byram, etc. Co., 6 Conn. 428 (1827), it is held that a secretary is *de facto* only where there is at least a pretended election. See Hamlin *v.* Kassafer, 15 Oreg. 456 (1887). A demand on a corporation for certain property is not proved by showing a demand on those who afterwards became its incorporators and officers. McCallum *v.* Purssell Mfg. Co., 1 N. Y. Supp. 428 (1888). Directors whose title is contested are not *de facto* officers as against the old officers holding over. Ellsworth, etc. Co. *v.* Faunce, 79 Me. 440 (1887).

The following definitions have been given of an officer *de facto:* "One who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Parker *v.* Kett, 1 Ld. Raym. 658; Rex *v.* Bedford Level, 6 East, 368 (1805). "One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election." Brown *v.* Lunt, 37 Me. 428 (1854). "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer *de jure*." Brown *v.* O'Connell, 36 Conn. 451 (1870). "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure*." Mallett *v.* Uncle Sam, etc. Min. Co., 1 Nev. 197 (1865); Plymouth *v.* Painter, 17 Conn. 588 (1846). In State *v.* Curtis, 9 Nev. 325 (1874), the court held that in order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

[1] Leach *v.* People, 122 Ill. 420 (1887).

[2] Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). *Cf.* ch. XXXVII, *supra.*

[3] Baird *v.* Bank of Washington, 11 Serg. & R. 411 (1824), where a minority of the directors elected him; Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853), where the president was not a resident as required by statute.

[4] See § 624, *supra;* Thornton *v.* Gould, 59 Ala. 461 (1877). *Contra,* Curling *v.* Chalklen, 3 M. & S. 496, 510 (1833); Peppin *v.* Cooper, 2 B. & Ald. 431 (1819); People *v.* Twaddell, 18 Hun, 427 (1879).

[5] St. Luke's Church *v.* Matthews, 4 Dessaus. (S. C.) 578 (1815); Vernon Soc. *v.* Hills, 6 Cow. 23 (1826); All Saints Church *v.* Lovett, 1 Hall, 191 (1828); Lovett *v.* German Ref. Church, 12 Barb. 67 (1852); Riddle *v.* Bedford, 7 Serg. & R. (Pa.) 392 (1821); York County *v.* Small, 1 Watts & S. (Pa.) 315 (1841); Kingsbury *v.* Ledyard, 2 Watts & S. (Pa.) 41 (1841); Despatch

"Where persons have to deal for the first time with an established company, and with those who have been and are acting openly and without challenge as directors of that company, and whom they honestly believe to be directors, they certainly are not bound to inquire into the qualifications or validity of appointment of those *de facto* directors."[1] And the general rule

Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841); Smith *v.* Erb, 4 Gill (Md.), 437 (1846); Burr *v.* McDonald, 3 Gratt. (Va.) 206, 215 (1846); Granville Charitable Assoc. *v.* Baldwin, 42 Mass. 359 (1840); Green *v.* Cady, 9 Wend. 414 (1832); Elizabeth City Acad. *v.* Lindsey, 6 Ired. L. (N. C.) 476 (1846); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827); Lathrop *v.* Scioto Bank, 8 Dana (Ky.), 115 (1839); Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853); St. Mary's Bank *v.* St. John, 25 Ala. 566 (1854); Baird *v.* Washington Bank, 11 Serg. & R. 411 (1824); *Ex parte* Rogers, 7 Cow. 530, n. (1827); Doremus *v.* Dutch Reformed Ch., 3 N. J. Eq. 332 (1835); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* Chenango Ins. Co., 19 Wend. 635 (1838); Blandford *v.* School District, 56 Mass. 39 (1848); Sampson *v.* Bowdoinham Co., 36 Me. 78 (1853); Penobscot *v.* Dunn, 39 Me. 587 (1855); Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); Rex *v.* Bedford Level, 6 East, 356, 368 (1805); Parker *v.* Kett, 1 Ld. Raym. 658 (1701); Wild *v.* Passamaquoddy Bank, 3 Mason, 505 (1825); S. C., 29 Fed. Cas. 1215; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405 (1826); Minor *v.* Mechanics' Bank, 1 Pet. 46 (1828); Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124 (1845); M'Gargell *v.* Hazelton Coal Co., 4 Watts & S. (Pa.) 424 (1842), an action for a penalty, in which evidence was admitted to show that the person representing the company was an officer *de facto; Re* County, etc. Co., L. R. 5 Ch. 288 (1870); Mahoney *v.* East, etc. Co., L. R. 7 H. L. 869 (1875); Partridge *v.* Badger, 25 Barb. 146 (1857), where the treasurer was only *de facto;* Doremus *v.* Dutch, etc. Co., 3 N. J. Eq. 332 (1835), where seceding trustees made a mortgage; Mechanics', etc. Bank *v.* Burnet, etc. Co., 32 N. J. Eq. 236 (1880), and Charitable Assoc. *v.* Baldwin, 42 Mass. 359 (1840), where *de facto* directors brought suits; Clark *v.* Easton, 146 Mass. 43 (1888); Cooper *v.* Curtis, 30 Me. 488 (1849), holding that debtors to the corporation cannot set this up; Susquehanna, etc. Co. *v.* General Ins. Co., 3 Md. 305 (1852), holding that a president who executes an instrument is presumed to be president; Hackensack, etc. Co. *v.* De Kay, 36 N. J. Eq. 548 (1883), where *de facto* directors gave a mortgage. Directors who are elected at a stockholders' meeting not properly called cannot make and enforce calls. Hawbeach, etc. Co. *v.* Teague, 5 H. & N. 151 (1860). A board of directors who are ineligible cannot revoke an agreement to arbitrate a suit. Richards *v.* Attleborough Nat. Bank, 148 Mass. 187 (1889). See also § 624, *supra.* An exhibition corporation is liable for premiums, although the exhibition was conducted by *de facto* officers, whose title to office was held to be bad a month prior to the exhibition. Richards *v.* Farmers', etc. Inst., 154 Pa. St. 449 (1893).

[1] Webb *v.* Shropshire R'ys, 69 L. T. Rep. 533, 539 (1893); also holding such to be the rule where a quorum was not present when they were elected or where they were not qualified. Although a director is not qualified according to the by-laws, yet, if he is elected and permitted to act, his elec-

is that where corporations allow persons to act publicly as their officers, their right to act in the offices will be presumed in favor of third parties contracting with the corporations through them.[1]

tion is valid so far as his acts as director affect third persons. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). The fact that a contract of a Pennsylvania company is made by its president and managers, who are non-residents and not residents as required by statute, does not enable the other party to the contract to raise that objection. Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853). The eligibility of a director who has acted with the consent of all cannot be questioned on an application to have the company dissolved under the statute. *Re* Santa, etc. Co., 4 N. Y. Supp. 173 (1889). Although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners. Demarest *v.* Flack, 128 N. Y. 205 (1891). The qualification of a director cannot be questioned by a creditor who is seeking to enforce a statutory liability of officers. Wallace *v.* Walsh, 125 N. Y. 26 (1890). One who assumes the duties of a director cannot say that he never was a director. McDowall *v.* Sheehan, 129 N. Y. 200 (1891). The disqualified director is bound; he is liable as a director for breach of trust. Western Bank *v.* Baird, 11 Ct. of Sess. Cas., 3d series, 96, 121 (1872); Easterly *v.* Barber, 65 N. Y. 252 (1875). *Cf.* Craw *v.* Easterly, 54 N. Y. 679 (1873). The principle of law that the acts of an ineligible but *de facto* officer may bind the corporation arises often in municipal corporation cases. State *v.* Farrier, 47 N. J. L. 383 (1885); aff'd, 48 N. J. L. 613. Although the directors are not qualified, nevertheless the company cannot repudiate stock issued to a contractor in payment for work, where such work has been received, such contract being authorized by the disqualified directors. The company cannot accept the subscription, and at the same time repudiate the contract mode of payment. *Re* Staffordshire Gas, etc. Co., 66 L. T. Rep. 413 (1892). Directors may act as such before they acquire qualification shares. *Re* International Cable Co., 66 L. T. Rep. 253 (1892). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee having no knowledge of these facts is protected. Kuser *v.* Wright, 31 Atl. Rep. 397 (N. J., 1895), rev'g 28 Atl. Rep. 719.

[1] U. S. Bank *v.* Dandridge, 12 Wheat. 64 (1829); Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 392 (1827); Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 421 (1826); Wild *v.* Passamaquoddy Bank, 3 Mason, 505 (1825); S. C., 29 Fed. Cas. 1215; Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825); Troy Turnp. Co. *v.* M'Chesney, 21 Wend. 296 (1839); Doremus *v.* Dutch Reformed Church, 3 N. J. Eq. 332 (1835); Warren *v.* Ocean Ins. Co., 16 Me. 439 (1839); Badger *v.* Cumberland Bank, 26 Me. 428 (1846); Davidson *v.* Bridgeport, 8 Conn. 472 (1831); Selma, etc. R. R. *v.* Tipton, 5 Ala. 787 (1843); Detroit *v.* Jackson, 1 Doug. (Mich.) 106 (1843); Farmers' Bank *v.* Chester, 6 Humph. (Tenn.) 458 (1846); Hall *v.* Carey, 5 Ga. 259 (1848); Conover *v.* Albany Ins. Co., 1 Comst. 290

It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced.[1] The fact that some of the directors are not residents of the state, as required by statute, does not invalidate a mortgage given by them on land in another state.[2] But the acts of *de facto* directors cannot be invoked in behalf of themselves or stockholders. Only strangers can rely thereon.[3] The *de facto* director cannot avoid a liability by setting up that he was not a *de jure* director;[4] nor collect a salary as a *de facto* officer;[5] nor make a note to himself and claim that his office gave him the authority.[6] A *de facto* officer is ousted by a *quo warranto* proceeding,[7] and not by a suit in equity,[8] nor by an action in trespass,[9] nor a writ of prohibition.[10]

§ 713*a*. *Meetings of directors—Place—Notice—Action without meeting — Quorum.*— A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the board of directors held outside of the state are valid and enforceable.[11]

(1848); Lohman *v.* New York, etc. R. R., 2 Sandf. 39 (1848); Beers *v.* Phœnix Glass Co., 14 Barb. 358 (1852); Alabama Bank *v.* Comegys, 12 Ala. 772 (1848); Mead *v.* Keeler, 24 Barb. 20 (1857); Fryeburg Canal *v.* Frye, 5 Me. 38 (1827); Northern Liberties Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306 (1824).

[1] Savage *v.* Miller, 36 Atl. Rep. 578 (N. J., 1897).

[2] Wheelwright *v.* St. Louis, etc. Transp. Co., 56 Fed. Rep. 164 (1893).

[3] Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895).

[4] Keyser *v.* McKissam, 2 Rawle (Pa.), 139 (1828), involving a bond; Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854); West Bank of Scotland *v.* Baird and others, 11 Ct. of Sess. Cas. (3d series), pp. 96–121 (1872). A director who has acted as such cannot claim that the election was irregular. Hall *v.* West, etc. Pub. Co., 37 Atl. Rep. 106 (Pa., 1897). A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. Donnelly *v.* Pancoast, 15 N. Y. App. Div. 323 (1897). A director who acts, even though not qualified, is subject to the rule disqualifying him from selling property to the company. Stetson *v.* Northern Inv. Co., 73 N. W. Rep. 869 (Iowa, 1898).

[5] Riddle *v.* Bedford County, 7 Serg. & R. (Pa.) 386 (1821).

[6] Lebanon, etc. Co. *v.* Adair, 85 Ind. 244 (1882).

[7] See § 617, *supra*. A superintendent elected by *de facto* directors may be ousted. State *v.* Curtis, 9 Nev. 325 (1874).

[8] See § 618, *supra*.

[9] Kingsbury *v.* Ledyard, 2 Watts & S. (Pa.) 37 (1842).

[10] San Jose, etc. Bank *v.* Sierra, etc. Co., 63 Cal. 179 (1883).

[11] The first or organization meeting of the directors may be held out of the

There has been some controversy and doubt as to the necessity of giving notice of directors' meetings. Many cases apply to directors' meetings the same rules that apply to stockholders' meetings. Other cases hold that less formality and strict-

state. Glymont Imp. etc. Co. *v.* Toler, 80 Md. 278 (1894). A by-law that regular directors' meetings shall be held in the state does not prevent special meetings outside of the state. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896); Wright *v.* Bundy, 11 Ind. 398, 404 (1858), where a mortgage of a railway incorporated by Indiana was held valid though executed in Ohio; Bassett *v.* Monte Christo, etc. Co., 15 Nev. 293 (1880), where power to issue bonds and mortgage real property in Nevada was conferred at a meeting of directors held in New York, the corporation having been chartered by Pennsylvania — but here the charter authorized the corporation to meet and act at any place in the United States; Ohio, etc. R. R. *v.* McPherson, 35 Mo. 13 (1864), where calls for payment of subscriptions to stock made by a board of directors at meetings held outside of the state creating the corporation were held to be valid; Wood Hydraulic, etc. *v.* King, 45 Ga. 34 (1872), in which the minutes of a meeting of directors held out of the state chartering their company were held to be evidence of the acts of the board in making contracts in other states. A directors' meeting out of the state may authorize a mortgage on real estate. Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Galveston, etc. R. R. *v.* Cowdrey, 11 Wall. 459, 476 (1870), in which it was held that *bona fide* holders of railroad bonds could not be prejudiced by the fact that the mortgage by which they were secured was executed by virtue of a resolution of directors at a meeting held out of the state which chartered the road; Bellows *v.* Todd, 39 Iowa, 209, 217 (1874), where a conveyance of real estate was authorized; Armes *v.* Conant, 36 Vt. 744 (1864); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827); Smith *v.* Alvord, 63 Barb. 415 (1866). *Cf.* Ormsby *v.* Vermont, etc. Co., 56 N. Y. 623 (1874); Aspinwall *v.* Ohio, etc. R. R., 20 Ind. 492, 497 (1863). Corporations incorporated in New Jersey were formerly required by statute to hold their directors' meetings within that state. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). The president may call a meeting of the directors at a place other than the chief place of business. Corbett *v.* Woodward, 5 Sawyer, 403 (1879); S. C., 6 Fed. Cas. 531. A person who participates in a directors' meeting held out of the state cannot object to it on that ground. Wood *v.* Boney, 21 Atl. Rep. 574 (N. J., 1891). The directors may hold their meetings outside of the state. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). An assignment of a corporate mortgage may be executed in another state. Gray *v.* Waldron, 101 Mich. 612 (1894). In Brockway *v.* Gadsden, etc. Co., 102 Ala. 620 (1894), a meeting of the board of directors outside of the state was held to be illegal under the Alabama statute which regulates such meetings. A mortgage authorized by the board of directors' meeting held outside of the state is illegal, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors at a regular meeting in the state in accordance with the statute. State Nat. Bank *v.* Union Nat. Bank, 48 N. E. Rep. 82 (Ill., 1897). Special meetings of the directors may be held, although the

ness are required in calling a directors' meeting. The former rule is safer, although probably the latter rule will ultimately prevail.[1]

by-laws do not provide for such. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897).

[1] The following decisions will throw light upon this subject: "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings,—that is, such as are provided for by charter or the by-laws, fixing time and place,—then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting." Whitehead *v.* Hamilton Rubber Co., 52 N. J. Eq. 78, 82 (1893). An assignment of bank accounts by a corporation to its president, as collateral security, is not valid where no notice was given to all the directors of the meeting authorizing the assignment. Whitehead *v.* Hamilton Rubber Co., 52 N. J. Eq. 78 (1893). A special meeting of directors is void if no notice is given to absent directors. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). A person who is elected a director but does not accept need not be notified of a directors' meeting. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. First Nat. Bank *v.* Asheville, etc. Co., 116 N. C. 827 (1895). The fact that a director owns or controls a majority of the stock does not validate an illegally-called meeting of the directors, even though he favored their action. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). Where the directors of a bank are accustomed to hold directors' meetings at the bank whenever a quorum is present, this custom will be upheld, and a meeting is legal, although no notice thereof was given, there being no by-law or statute on the subject. American Nat. Bank *v.* First Nat. Bank, 82 Fed. Rep. 961 (1897). Directors are required to take notice of an annual meeting, and no notice need be given of an adjournment thereof. Western Imp. Co. *v.* Des Moines Nat. Bank, 72 N. W. Rep. 657 (Iowa, 1897). Even though no notice is given to a director of a meeting of the board, yet where the matter passed upon by the board is one which he would be disqualified from voting upon, the meeting is legal. Troy Min. Co. *v.* White, 74 N. W. Rep. 236 (S. D., 1898). An assignment for the benefit of creditors, authorized at a meeting of the board of directors where a part of the directors were absent and had no notice thereof, is not valid. Simon *v.* Sevier Assoc., 54 Ark. 58 (1890). Notice of a directors' meeting need not be given to a director who resides abroad, nor to another director who is traveling abroad. The court, however, refused to lay down the broad rule that no notice in any case need be given to directors who are abroad. Halifax, etc. Co. *v.* Francklyn, 62 L. T. Rep. 563 (1890). Notice of a directors' meeting cannot be waived in advance by a director where the time and purpose of the meeting have not yet been determined upon. *Re* Portuguese, etc. Mines, L. R. 42 Ch. D. 160 (1889). Where three of seven directors are non-residents, one having sold his stock, one traveling, and one inacces-

The law is inclined to tolerate more freedom in the notice and the calling and holding of directors' meetings, inasmuch as the meetings are more frequent, the absences more common, the acts less fundamental, and ratification by acting on the con-

sible for immediate notice, the four remaining directors may hold a meeting and authorize an assignment of the corporate property for the benefit of creditors. The assignment was held to be legal, the traveling director and the inaccessible director having subsequently voted in a meeting for the selection of an assignee. National Bank of Commerce *v.* Shumway, 49 Kan. 224 (1892). A mortgage authorized at a directors' meeting at which four were present and the other received no notice is illegal, the giving of notice being possible, and there being no necessity for immediate action. Bank of Little Rock *v.* McCarthy, 55 Ark. 473 (1892). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid, and no bar to a creditor's action to collect unpaid subscriptions. Doernbecher *v.* Columbia, etc. Co., 21 Oreg. 573 (1892). Where a directors' meeting, according to the by-laws, may be called by the president, or if there is no president by two directors, the two directors cannot call it, even if the president refuses to do so. The acts of a meeting of a board so called are illegal, a majority of the directors only being present. Smith *v.* Dorn, 96 Cal. 73 (1892). A director is entitled to notice of a meeting to elect a president. Undue haste and failure to give notice will suffice to set the election aside. A subsequent meeting of the board cannot ratify it. The election must be held over again. State *v.* Smith, 15 Oreg. 98 (1887); 53 Pac. Rep. 1024.

A notice of a school trustees' meeting need not be given to trustees out of the state who could not have attended any way. Porter *v.* Robinson, 30 Hun, 209 (1883). In Harding *v.* Vandewater, 40 Cal. 77 (1870), a note given for an assessment upon a subscription which was called at a special meeting of the board of trustees of a mining company, of which two of the trustees had no notice, was held to be void. In Farwell *v.* Houghton Copper, etc., 8 Fed. Rep. 66 (1881), it was held that one who had been a shareholder and purchased all the property of the company at a meeting of the directors held without notice, at which he was present and knew that one director was absent, was bound to know that notice to such absent director was necessary, and that he was not a *bona fide* purchaser without notice. Lane *v.* Brainerd, 30 Conn. 565 (1862), holding that the corporate record of a meeting at which a quorum was present was presumptive proof that all the directors had been duly notified, whether living in the state or elsewhere. Where the deed of settlement provided for special meetings, the time and place of which were to be fixed by notices countersigned by the secretary, it was held that a meeting of the requisite number of directors without previous agreement to meet on any fixed day or hour was not a meeting duly convened within the charter provision. Moore *v.* Hammond, 6 Barn. & C. 456 (1827). To same effect in municipal corporation cases, Smyth *v.* Darley, 2 H. L. Cas. 789 (1849); Rex *v.* Carlisle, 1 Stra. 385 (1720). An adjourned meeting of directors may act to the same extent that the original meeting might have acted. Smith *v.* Law, 21 N. Y. 296

tracts more certain and easy. Where five of eight members of the board of an insolvent company meet and authorize the sale of certain personal property, and such sale is carried out, other creditors cannot raise the objection that no notice was given to

(1860); Wills *v.* Murray, 4 Exch. 843 (1850). A by-law enacted by the directors in reference to the calling of a directors' meeting, even if not complied with, does not invalidate the meeting. Samuel *v.* Holladay, Woolw. 400 (1869); S. C., 21 Fed. Cas. 306. A quorum of directors may bind the corporation, although the other directors are not notified, there being no by-law or charter provision requiring notice. Edgerly *v.* Emerson, 23 N. H. 555 (1851). *Contra*, Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). An assessment made at an irregularly-called directors' meeting is void. Thompson *v.* Williams, 76 Cal. 153 (1888). Two out of three directors cannot authorize a chattel mortgage, the third not having been notified of the meeting. The mortgagee was one of the directors. Doyle *v.* Mizner, 42 Mich. 332 (1879). A corporate receiver cannot object to a contract on the ground that the directors' meeting authorizing it was not properly convened, but the receiver may avoid corporate notes issued contrary to express statute. Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843). Bonds issued under authority of a meeting of two commissioners of a town without notice to a third commissioner are not valid. Pike County *v.* Rowland, 94 Pa. St. 238 (1880). In Kersey, etc. Co. *v.* Oil, etc. R. R., 12 Phila. 374 (1877), a lease was declared void because it was authorized only by a meeting of directors of which part of the directors had no notice and were not present. A special meeting of an executive committee is irregular unless notice is given to each member. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 43 N. J. Eq. 626 (1888). Where a subsequent meeting of directors expressly ratifies the acts of a preceding meeting, any defect in the notice given of the latter meeting is cured. County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). Acts of a board of directors, no notice having been given to absent directors, may be valid by acquiescence. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally-called meeting. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890). A person who commits a trespass on the property of a corporation cannot question the regularity of a contract of such corporation, so far as such regularity turns on the action of a directors' meeting, or meeting of an executive committee, or assent of three-fifths of the stockholders, as required by statute. Farnsworth *v.* Western, etc. Co., 6 N. Y. Supp. 735 (1889). "The evidence that a day was fixed by common consent is sufficient to show notice to all of the meetings on that day." "It was wholly immaterial in what way the day of the regular meetings was fixed." Atlantic, etc. Ins. Co. *v.* Sanders, 36 N. H. 252, 269 (1858). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the

the remaining three members of the board.[1] If all the directors are present at a meeting, it is immaterial that notice was not given, even though the by-laws required it.[2] Where meetings of the directors can, by the by-laws, be called only by the president or majority of the board, the secretary cannot call one.[3] A party dealing with a corporation is not bound to inquire whether proper notice was given of a directors' meeting.[4] A general notice to directors of a corporation of a meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.[5]

meeting of the directors had ever been fixed. Moore *v.* Hammond, 6 B. & C. 456 (1827). If the board meeting be specially convened, the general rule is that notice must be served upon every member entitled to be present. Pike County *v.* Rowland, 94 Pa. St. 238 (1880). Mandamus lies to compel vestrymen to attend a meeting when by reason of dissensions they decline so to do. People *v.* Winans, 9 N. Y. Supp. 249 (1890). Notice to all is necessary, although a quorum is present. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), where the meeting was for the purpose of calling a stockholders' meeting. Concerning the differences between the position of municipal corporation officials and the officers of a private corporation, see Wallace *v.* Walsh, 125 N. Y. 26, 36 (1890). A recess may be taken by a board without formal action, and two meetings on the same day may be construed as one meeting with a recess. State *v.* Powell, 70 N. W. Rep. 592 (Iowa, 1897).

[1] Johnson Co. *v.* Miller, 174 Pa. St. 605 (1896).

[2] Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381 (1893).

[3] Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). Where the secretary has power to call a meeting of the directors, but instead of his doing so the president uses a rubber stamp to affix the secretary's name to the call, and it transpires that every director either received the notice or was present at the meeting, the informality is immaterial. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896).

[4] Kuser *v.* Wright, 52 N. J. Eq. 825 (1895). A mortgage authorized by a quorum of directors is valid, though the other directors were not present and were not notified. Bank *v.* Flour Co., 41 Ohio St. 552 (1885). See also § 713, *supra*.

[5] *Re* Argus Co., 138 N. Y. 557 (1893); New Haven Sav. Bank *v.* Davis, 8 Conn. 192 (1830), holding that a meeting of bank directors was legal for an ordinary transaction, although the notice did not specify its object, and that mortgaging its real estate to secure a debt was proper at such meeting. Where, a few days before a new board was to go in, a notice of a directors' meeting states that it is to hear the treasurer's report and transact other business that might come before the board, it is illegal for the board, at such meeting, to make a perpetual lease of all the corporate property. Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 173 Pa. St. 30 (1896). A notice of a special meeting of the board of directors need not specify the business which is to be considered. Wills *v.* Murray, 4 Exch. 843 (1850); *Re*

The notice must be given a reasonable time before the hour of the meeting, and the mode of giving or serving the notice must be reasonable. All this turns on the circumstances and facts in each case.[1] Where no special method of serving notice of directors' meetings is prescribed, and the notice is served by mail, upon proof of mailing, the receipt of the notice is pre-

Argus Co., 138 N. Y. 557 (1893). A notice of a special meeting of the trustees of a religious corporation must state the object of the meeting. Maclaury *v.* Hart, 10 N. Y. Supp. 125 (1890). It is not necessary to state in the notice convening a meeting of the directors of a company the business to be transacted at the meeting, even if it is of an extraordinary character; and any decision come to at such meeting cannot afterwards be questioned on the ground that no notice of such business was given. Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.

[1] A notice of a directors' meeting sent out in the afternoon for the evening is sufficient, if delivered to a servant at a director's residence, even though such director was absent from home, his absence not being known to the party calling the meeting until such notice was delivered. *Re* Argus Co., 138 N. Y. 557 (1893). Notice of a directors' meeting, received on the morning of the day of the meeting, is insufficient although the meeting was to be at four o'clock in the afternoon. The court said: "*Prima facie* this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs and attend offhand on such a notice. One full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short." The court said, however, that a by-law or the practice of the board might vary this rule. Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 173 Pa. St. 30 (1896). A meeting of directors called in the morning for two o'clock that day is invalid where one director could not come until three o'clock and another received the notice next morning. A quorum was present. *Re* Homer, etc. Mines, L. R. 39 Ch. D. 546 (1888). Leaving notice of a directors' meeting at a director's business place suffices, even though he is known to be ill. Corbett *v.* Woodward, 5 Sawyer, 403 (1879). Notice to a director is sufficient if given orally to the director's brother at the director's place of business, where a by-law allowed notice to be given by mail or in other ways. Williams *v.* German, etc. Ins. Co., 68 Ill. 387 (1873). Notice by postal card of a directors' meeting suffices where it is customary and all received it. People *v.* Albany Med. Coll., 26 Hun, 348 (1882); aff'd, 89 N. Y. 635. Notice to directors, sent by mail, is sufficient if sent in time so that the director, after receiving it, would have time to reach the place of meeting. Covert *v.* Rogers, 38 Mich. 363 (1878). A meeting of the directors may be valid although two of them, being absent from the state, did not receive the notice. Chase *v.* Tuttle, 55 Conn. 455 (1888). Telegraphic notice to two directors out of the state, of a meeting to make an assignment, is sufficient, though not received by them, a majority having met and ordered the assignment. Chase *v.* Tuttle, 55 Conn. 455 (1888).

sumed, even as against a director's doubt as to his having received it.[1] Notice to all the directors is presumed.[2]

There has been a question whether directors could vote and act as a board without coming together. Many attempts have been made to sustain a vote of the directors which they had separately and singly agreed to. The law, however, is now clear that such separate assent is void. Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner.[3]

[1] Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896). Where written notices of a special directors' meeting, properly addressed, are sent by mail to them, it is presumed that such notices were received, though there is no by-law that notice may be given by mail. Stockton, etc. Works *v.* Houser, 41 Pac. Rep. 809 (Cal., 1895).

[2] Ross *v.* Crockett, 14 La. Ann. 811 (1859); Chouteau Ins. Co. *v.* Holmes, 68 Mo. 601 (1878). Notice of a meeting of directors is presumed. Hardin *v.* Iowa, etc. Co., 78 Iowa, 726 (1889); Stockton, etc. Works *v.* Houser, 109 Cal. 1 (1895). Where the corporate record shows that a quorum of the directors was present, this is *prima facie* evidence that all had notice. Fletcher *v.* Chicago, etc. R'y, 69 N. W. Rep. 1085 (Minn., 1897).

[3] Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634 (1895). The verbal assent of directors to the execution of a mortgage is not good. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets, and the fact that the authority was not given at a regular directors' meeting is immaterial. Jordan *v.* Collins, 107 Ala. 572 (1895). A mere street conversation between the directors, by which they "agree" that subscriptions shall be called, is not a sufficient call. Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895). A separate assent of a township committee to the construction of a street railway is illegal. West Jersey Traction Co. *v.* Camden Horse R. R., 53 N. J. Eq. 163 (1895). Separate action of the directors without a meeting is not good. Limer *v.* Traders' Co., 28 S. E. Rep. 730 (W. Va., 1897). Separate acquiescence of the directors is not sufficient. Sanderson *v.* Tinkham, etc. Co., 83 Iowa, 446 (1891). The directors of a religious corporation cannot act as a board by the separate assents of the members to the act in question. Columbia Bank *v.* Gospel Tabernacle, 127 N. Y. 361 (1891). The separate assent of the directors to a mortgage is not good. Duke *v.* Markham, 105 N. C. 131 (1890). Directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only. Buttrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882). Directors cannot act except as a board. North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892). Directors can act as such in meeting only. Their individual assent is not sufficient. State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885); Junction R. R. *v.* Reeve, 15 Ind. 236 (1860); Stoystown, etc. Turnp. Co. *v.* Craver, 45 Pa. St. 386 (1863). A bargain and sale deed of corporate

Many of the cases to the contrary may be reconciled by the principle of law that the acts of a board of directors may be validated by subsequent acquiescence, even though the board was summoned irregularly or proceeded irregularly.

property, authorized and executed separately and singly by all the directors without a board meeting, is void. Baldwin *v.* Canfield, 26 Minn. 43 (1879); Gashwiler *v.* Willis, 33 Cal. 11 (1867). Separate and single consent of a quorum of directors to the secretary's execution of a bond is void. D'Arcy *v.* Tamar, etc. R'y, L. R. 2 Exch. 158 (1867). The assent of a mere majority of the board, given singly and separately, gives no authority to a cashier to do an act outside of his customary duties. Elliot *v.* Abbot, 12 N. H. 549 (1842). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re* St. Helen Mill Co., 3 Sawy. 88 (1874). A pledge of corporate securities to raise money is legal where six of the eight directors consented, even though no meeting was held. Hubbard *v.* Camperdown Mills, 26 S. C. 581 (1887). Directors may bind the corporation by their separate approval of claims when they have been accustomed so to do. Longmont, etc. Co. *v.* Coffman, 11 Colo. 551 (1888). The separate assent of the board of trustees of a religious corporation to the execution of a note is void. They must meet. People's Bank *v.* St. Anthony's, etc. Church, 109 N. Y. 512 (1888). An assignment for the benefit of creditors authorized by the directors acting separately and not as a board is invalid. Calumet Paper Co. *v.* Haskell, etc. Co., 45 S. W. Rep. 1115 (Mo., 1897).

Where an officer is sued for malfeasance in office, it is no defense that his acts were authorized by directors who did not meet as a board, but separately and singly assented to acts. Directors bind the corporation by their votes only when they meet as a board. "The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members." National Bank *v.* Drake, 35 Kan. 576 (1886). A tax which is assessed by two trustees in meeting assembled, who then obtain the separate and private assent of the third trustee, is void. Keeler *v.* Frost, 22 Barb. 400 (1856); Schumm *v.* Seymour, 24 N. J. Eq. 143 (1873). The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. Taymouth *v.* Koehler, 35 Mich. 22 (1876). The majority of a school board cannot act separately and singly, no meeting being held. Harrington *v.* District, etc., 47 Iowa, 11 (1877). The separate consent of three directors was held not good in Bosanquet *v.* Shortridge, 4 Exch. 699 (1850). A due-bill running from the corporation to a person and signed by the directors cannot be defeated by showing that the directors did not meet, but signed it separately and singly. Sampson *v.* Bowdoinham, etc. Corp., 36 Me. 78 (1853); Collins's Claim, L. R. 12 Eq. 246 (1871). The execution of a replevin bond by the president for the corporation is legal, a

A director cannot obligate himself to vote in a certain way, even as to the election of president.[1] Directors, of course, cannot act or vote by proxy.[2]

A majority of the whole board of directors constitute a quorum. When the meeting is properly called and a majority attend, that majority may proceed to transact business. If a majority are present, a majority of that majority bind the

majority of the directors singly and separately assenting thereto. Bank of Middlebury *v.* Rutland, etc. R. R., 30 Vt. 159 (1858), where Redfield, Ch. J., said: "The cases are numerous where the consent of a majority of the directors given separately has been held binding upon the company." Probably in these last cases the contract would have been binding, even if the directors had not acted at all. See also Cammeyer *v.* United, etc. Churches, 2 Sandf. Ch. 186, 229 (1844), holding that the trustees must meet in order to act, and that their affirmative vote in a stockholders' or general assemblage is not sufficient. Collective action as a board, and not individual action as members of the board, is necessary to bind the corporation. Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408 (1880); Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 273 (1883). Where there are but two stockholders, and they are directors, and no directors' or stockholders' meeting has been held since the organization meeting, and these two have carried on the business as though it was a partnership concern, a *bona fide* assignment by these two persons in the name of the corporation to secure preferred creditors of the corporation is good, although no corporate seal was used and no meetings were held authorizing the act. Teitig *v.* Boesman, 12 Mont. 404 (1892). When all the officers assent to a money obligation being given in the corporate name by the chief officer, the prioress, the educational corporation is bound. Louisville, etc. R. R. *v.* St. Rose Literary Soc., 91 Ky. 395 (1891). See also *Re* Great Northern, etc. Works, L. R. 44 Ch. D. 472 (1890), drawing a distinction where *all* of the directors assent. Directors cannot act singly. Morrison *v.* Wilder Gas Co., 40 Atl. Rep. 542 (Me., 1898). Where some of the directors agree privately among themselves to pay for certain things needed by the corporation, and the latter uses them, they alone are liable for the price thereof. Lyndon, etc. Co. *v.* Lyndon, etc. Inst., 22 Atl. Rep. 575 (Me., 1891).

[1] Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894).

[2] Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891); Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891); *Re* Portuguese, etc. Co., L. R. 42 Ch. D. 160 (1889); McLaren *v.* Fisken, 28 Grant, Ch. (Can.) 352 (1881); Attorney-General *v.* Scott, 1 Vesey, 413 (1749), where the election of a minister was committed to trustees. It was held that they could not delegate to proxies their right to vote. A vote by letter on a particular question would, of course, be the same as voting separately and singly. Although one of the directors illegally voted by proxy, and his vote was necessary, yet the court, in Dudley *v.* Kentucky High School, 9 Bush (Ky.), 576 (1873), refused to set the vote aside, the court saying that only one stockholder objected, and that the majority might ratify.

board and the corporation, although they are a minority of the whole board.[1]

Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the

[1] Wells *v.* Railway, etc. Co., 19 N. J. Eq. 402 (1869); Cram *v.* Bangor, etc., 12 Me. 354 (1835); Cahill *v.* Kalamazoo, etc. Ins. Co., 2 Doug. (Mich.) 124 (1845); *Ex parte* Willcocks, 7 Cow. 402 (1827); People *v.* Walker, 2 Abb. Pr. 421 (1856); Sargent *v.* Webster, 54 Mass. 497 (1847). If only a minority of the board are present the acts are not valid. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); Ernest *v.* Nicholls, 6 H. L. Cas. 401, 417 (1857); Price *v.* Grand, etc. R. R., 13 Ind. 58 (1859); Ridley *v.* Plymouth, etc. Co., 2 Exch. 711 (1848). A director who is present but does not vote is counted in the negative. Commonwealth *v.* Wickersham, 66 Pa. St. 134 (1870). See also § 608, note 8 (*supra*), on this subject. The majority of a board of directors constitute a quorum, and a majority of the quorum decide the action of the board. Leavitt *v.* Oxford, etc. Co., 3 Utah, 265 (1883). A majority of a quorum of directors bind the corporation. Buell *v.* Buckingham, 16 Iowa, 284 (1864). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. Holcomb *v.* Bridge Co., 9 N. J. Eq. 457 (1853). A quorum of the directors is presumed to have been present. Sargent *v.* Webster, 54 Mass. 497 (1847). A majority of the trustees are necessary to constitute a quorum. State *v.* Porter, 113 Ind. 79 (1888). A by-law cannot authorize less than a majority to act when the charter requires a majority. State *v.* Curtis, 9 Nev. 325 (1874). A by-law of the corporation authorizing a quorum of five directors, with the president, to transact ordinary business, is valid, though there are twenty-three directors. Hoyt *v.* Thompson, 19 N. Y. 207 (1859). Where by resolution of the board four constitute a quorum, an act at a board of three is not binding. Ducarry *v.* Gill, 4 Car. & P. 121 (1830). Where there are eight vestrymen and the statute requires five to constitute a quorum, four cannot act, although there are three vacancies in the board. Moore *v.* Rector, etc., 4 Abb. N. Cas. 51 (1873). When the presence of the president is by law necessary to the meeting of an executive committee, a meeting without him cannot bind the corporation. Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. 436 (1857). Where two out of six directors have been accustomed to act as a quorum, a forfeiture of stock by two is legal. Lyster's Case, L. R. 4 Eq. 233 (1867). The acts of less than a quorum are valid if they are subsequently ratified by a quorum. Austin's Case, 24 L. T. Rep. (N. S.) 932 (1871). A lease taken by a meeting of a board of directors at which no quorum was present is ratified by the acquiescence of two boards elected in subsequent years, with knowledge and no objection. Oregon R'y *v.* Oregon R'y & Nav. Co., 28 Fed. Rep. 505 (1886). "Where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when any act is to be done by them, but a majority of that body must attend the assembly where such act is done." Rex *v.* Miller, 6 T. R. 268 (1795), per Lord Kenyon. A custom is legal which allows three to constitute a quorum of a board of nine directors. *Re* Regents', etc. Co., W. N. 1867,

stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.[1] The president is not entitled to a casting vote, in case of a tie,

p. 79 (1867). An allotment of shares by a board of two when the statute requires three is void. The subscription is not collectible. *Re* British, etc. Co., 59 L. T. Rep. 291 (1888). Where the charter makes a majority of directors a quorum, a minority cannot fill a vacancy in the board. State *v.* Curtis, 9 Nev. 325 (1874). Although a meeting of directors is legally called, yet, if a quorum does not attend, those who do attend cannot adjourn to another day. It requires a quorum to adjourn. McLaren *v.* Fisken, 28 Grant, Ch. (Can.) 352 (1881). A managing committee of eight cannot act at a meeting of six only. Brown *v.* Andrew, 13 Jur. 938 (1849). A quorum of the directors must be present to act, and this quorum consists of a majority. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). In a municipal corporation, if all the board are present and four vote one way, while the other four do not vote at all, the vote prevails. It is a majority of a quorum. State *v.* Dillon, 125 Ind. 136 (1890). Where the record shows that two of the four directors present voted aye and one nay, and the other director was in the chair, and the motion was declared carried, the law presumes that the chairman voted aye. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). If all six members of a city council are present, three may pass a resolution, although the other three do not vote. Rushville Gas Co. *v.* Rushville, 121 Ind. 206 (1889). A director who is chosen by the board when less than a quorum is present may be treated as not a director, even though he has met with the board frequently when a majority was present. His remedy is not mandamus. People *v.* New York, etc. Asylum, 7 N. Y. St. Rep. 277 (1887). A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 638 (1892). The confirmation by the board of directors of resolutions passed by a meeting not containing a quorum relates back, and is as if the resolutions were regularly passed in the first place. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890). Two directors cannot transact business when there are four directors. *Re* Portuguese, etc. Co., L. R. 42 Ch. D. 160 (1889). A by-law may make five a quorum out of twenty-three directors where the statute is silent on the subject. Hoyt *v.* Shelden, 3 Bosw. 267 (1858). In an action by an insurance company to collect an assessment, it is no defense that losses were allowed at meetings of the directors where no quorum was present. Atlantic, etc. Ins. Co. *v.* Sanders, 36 N. H. 252, 269 (1858). A majority of the quorum may decide a question, and a plurality may elect any officer, unless otherwise provided by charter or by-laws or by law. *Ex parte* Willcocks, 7 Cow. 410 (1827); Cooley, Const. Lim. (4th ed.) *141; Oldknow *v.* Wainwright, 2 Burr. 1017 (1760); Booker *v.* Young, 12 Gratt. (Va.) 303 (1855). Where twelve are present, and one candidate receives six votes, another four, and another one, and one blank, there is no election. People *v.* Conklin, 7 Hun, 188 (1876).

[1] Southern, etc. Bank *v.* Rider, 73 L. T. Rep. 374 (1895).

where he has already voted once.[1] Although there are less stockholders and less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.[2] A corporate creditor attaching property of the company which has already been assigned to another creditor cannot attack such assignment on the ground that, while the statute required three directors, only two directors existed, the third one having resigned.[3]

The question of whether the directors may delegate their au-

[1] A by-law cannot give him this right. State *v.* Curtis, 9 Nev. 325 (1874). The president does not have, in addition to his first vote, a casting vote as president. Toronto, etc. Co. *v.* Blake, 2 Ont. (Can.) 175 (1882).

[2] Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890); Wallace *v.* Walsh, 125 N. Y. 26 (1890). An attaching creditor of a corporation cannot claim that a certain vote of the directors to pay another debt was void because there were less directors than the charter required. Castle *v.* Lewis, 78 N. Y. 131 (1879). Where the charter provided that two directors might act, although vacancies existed in the board, it is immaterial that the number of directors is less than the minimum charter number. *Re* Scottish, etc. Co., L. R. 23 Ch. D. 413 (1883). Although the statutes require three directors who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), rev'g Wright *v.* First Nat. Bank, 52 N. J. Eq. 392 (1894). Where the charter requires three directors who shall be and continue to be stockholders, and one of them sells his stock, the remaining two cannot act. Toronto, etc. Co. *v.* Blake, 2 Ont. (Can.) 175 (1882). Even though on account of vacancies in the board of directors it cannot act, yet the remaining directors may call a stockholders' meeting to hold an election. Toronto, etc. Co. *v.* Blake, 2 Ont. (Can.) 175 (1882). It is held in Faure, etc. Co. *v.* Phillipart, 58 L. T. Rep. 525 (1888), that where the board of directors was to consist of from three to seven, but the quorum to consist of two, and where by resignation the whole board is reduced to two, these two cannot act; nor can they elect one or more to fill the vacancies. The quorum can act only when the board consists of the requisite number. This objection, however, cannot be raised by one who takes part as director. Where by charter the board of directors is to be from five to seven, and three may act, three cannot act when there are but four directors. The act is not binding on the corporation. Kirk *v.* Bell, 16 Q. B. 290 (1851). See also Bottomley's Case, L. R. 16 Ch. D. 681 (1880); Lindley, Companies, p. 157. A company whose directors are to be twelve may act, although by resignation or death the number is less than twelve. Thames, etc. R'y *v.* Rose, 4 Man. & G. 552 (1842). Where a majority of the directors may fill vacancies, and of seven directors only two remain, they cannot fill the vacancies. Moses *v.* Tompkins, 84 Ala. 613 (1888).

[3] Castle *v.* Lewis, 78 N. Y. 131 (1879). Where the charter requires three directors, who shall be and continue to be stockholders, and one of them sells

thority to an executive committee has given rise to much controversy. Such a delegation of authority has become very common, and will be sustained by the courts. This question is discussed elsewhere.[1]

§ 714. *Minute-book of directors' meetings and other books of the corporation as evidence of acts and contracts of the corporation and authorization of agents.*— The minute-book of the proceedings of the directors' meetings is the proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it.[2] A director has a right to examine all the books and papers of the company.[3]

his stock, the remaining two cannot act. Toronto, etc. Co. *v.* Blake, 2 Ont. (Can.) 175 (1882).

[1] See § 715, *infra*.

[2] Where the appointment of an agent is by resolution of the directors, or in any other manner requiring a record of the matter, the entry upon the minutes or books of the corporation may be introduced in evidence of the appointment. Buncombe Turnp. Co. *v.* McCarson, 1 Dev. & B. (N. C.) 306 (1835); Owings *v.* Speed, 5 Wheat. 420, 424 (1820); Thayer *v.* Middlesex Ins. Co., 27 Mass. 326 (1830); Narragansett Bank *v.* Atlantic Silk Co., 44 Mass. 282 (1841); Clark *v.* Farmers' Mfg. Co., 15 Wend. 256 (1836); Methodist Chapel *v.* Herrick, 25 Me. 354 (1845); Haven *v.* New Hampshire Asylum, 13 N. H. 532 (1843). Where a corporate agent is appointed by a resolution, his authority cannot be proved by parol. The extent of the authority in such a case is a question of law for the court. McCreery *v.* Garvin, 39 S. C. 375 (1893). In order to make the corporate books admissible, proof must be given as to who kept them, and that the entries were made at the proper time or by the proper directors, and that the entries were properly made. Powell *v.* Conover, 75 Hun, 11 (1894). A contract duly accepted and agreed to in a directors' meeting and entered on the minutes, which are duly signed, is a contract in writing. Texas, etc. R'y *v.* Gentry, 69 Tex. 625 (1888). An entry on the corporate minutes of a resolution to form a corporate contract is sufficient on notice of the same to the other party, and suffices to form the contract. It satisfies the statute of frauds. Argus Co. *v.* Mayor, etc., 55 N. Y. 495 (1874). An entry on the directors' minute-book, duly signed, is sufficient to prevent a contract being void by the statute of frauds. Jones *v.* Victoria, etc. Co., L. R. 2 Q. B. D. 314 (1877). Directors' minutes are evidence of a contract, though written up after the meeting. Wells *v.* Railway, etc. Co., 19 N. J. Eq. 402 (1869). A person purchasing a mortgage from a savings bank through its treasurer and secretary may rely upon a copy of a resolution passed by the trustees authorizing such sale, and duly signed by the secretary. So though the secretary had intentionally made the copy different from the original. Whiting *v.* Wellington, 10 Fed. Rep. 810 (1882). In a suit by an employee of a corporation for pay for services, the defendants' books, properly kept by its proper officers, are admissible in evidence to prove payments to plaintiff on account of services. Ganther *v.* Jenks, etc. Co., 76 Mich. 510

[3] See § 511, *supra*.

A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient.[1] But a stockholder

(1889). A resolution of the board of directors authorizing an assignment for the benefit of creditors is sufficient. Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383 (1891). The minutes of directors' meetings as they appear in a corporate book will not be excluded as evidence merely because the secretary swears that they were written up several years after the meetings and were made partially from the recollections of the president. McIlhenny *v.* Binz, 80 Tex. 1 (1890). In proving a *de facto* corporation, the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. Johnson *v.* Schulin, 73 N. W. Rep. 147 (Minn., 1897).

[1] Zihlman *v.* Cumberland Glass Co., 74 Md. 303 (1891). "The entry of a resolution in a minute is not essential to the validity of the resolution, which is proved *aliunde*." *Re* Great Northern, etc. Works, L. R. 44 Ch. D. 472 (1890). Although a resolution is not inserted in the minutes of the meeting, it may be proved by other evidence. So held as to a resolution authorizing the secretary to borrow money. Bank of Yolo *v.* Weaver, 31 Pac. Rep. 160 (Cal., 1892). "Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it." Allis *v.* Jones, 45 Fed. Rep. 148 (1891). "Where a corporation consists of a small number of persons, like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce." Melledge *v.* Boston, etc. Co., 59 Mass. 158, 179 (1849). Parol evidence may be given to prove a vote of a salary to an officer where the secretary is dead and the minute-book does not contain a record of the vote. Pickett *v.* Abney, 84 Tex. 65 (1892). A vote of the directors employing a person is not a contract. It must be known to and accepted by the person employed. It may be shown by parol that the contract was to be binding only in case certain negotiations were carried out. A statement by the treasurer, showing the liabilities and making no mention of his salary, is admissible as evidence. Sears *v.* King's, etc. R. R., 152 Mass. 151 (1890). See also, on this subject, U. S. Bank *v.* Dandridge, 12 Wheat, 64, 95 (1827); Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 425 (1827); St. Mary's Church *v.* Cagger, 6 Barb. 576 (1849); Maxwell *v.* Dulwich College, 1 Fonbl. Eq. 296 (1834); Magill *v.* Kaufman, 4 Serg. & R. (Pa.) 317 (1818); Brady *v.* Brooklyn, 1 Barb. 584 (1847); Essex Turnp. Corp. *v.* Collins, 8 Mass. 292, 298 (1811); Marshall *v.* Queensborough, 1 Sim. & S. 520 (1823); Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392 (1849); Garvey *v.* Colcock, 1 Nott & McC. (S. C.) 231 (1815); Bates *v.* Bank of Alabama, 2 Ala. 452 (1841). The corporate secretary's letters to a vendor are admissible as evidence. Scott *v.* Middleton, etc. R. R., 86 N. Y. 200 (1881). The minutes of a directors' meeting may by parol be shown not to include the whole agreement where the party being contracted with was present at the meeting and discussed the matter with the board. Tibbals *v.* Mount Olympus Water Co., 10 Wash.

cannot prove by parol that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.[1]

The question of whether the books are evidence against offi-

329 (1894). A verbal agreement of the directors in meeting assembled to pay the treasurer a certain salary is binding on the company, although no written resolution thereof is entered in the minutes. Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Supp. 980 (1892). When there are but a few persons interested in a corporation, "ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes." Hall *v.* Herter, 83 Hun, 19 (1894). The resolutions of directors need not be reduced to writing in order to be valid. Columbia, etc. Co. *v.* Vancouver, etc. Co., 52 Pac. Rep. 513 (Oreg., 1898). Corporate minutes need not be written out by the secretary himself. It is sufficient that he sign them. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897). A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). Authority to an agent, given by the board of directors, may be proved by oral evidence, there being no record of the same in the corporate books. There is no law requiring a board of directors to keep a record of their proceedings. Morrill *v.* C. T. Segar Mfg. Co., 32 Hun, 543 (1884). *Contra*, Andover, etc. Turnp. Co. *v.* Hay, 7 Mass. 102, 107 (1810); Garvey *v.* Colcock, 1 Nott & McC. (S. C.) 231 (1815); Peek *v.* Detroit, etc. Works, 29 Mich. 313 (1874); but see Taymouth *v.* Koehler, 35 Mich. 22 (1876). The acts of the directors need not be formally entered on the corporate minutes. Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821 (1886); Morrill *v.* Segar, etc. Co., 32 Hun, 543 (1884); Moss *v.* Averell, 10 N. Y. 449 (1853). Parol evidence may show that the corporate records have been burned. Baptist House *v.* Webb, 66 Me. 398 (1877). Or lost. Wallace *v.* First Parish, etc., 109 Mass. 263 (1872); Prothro *v.* Minden Sem., 2 La. Ann. 939 (1847). It may be proved by parol that the board of directors authorized an agent to draw a bill of exchange. No corporate seal or record evidence are necessary. Preston *v.* Missouri, etc. Co., 51 Mo. 43 (1872). The directors' votes may be proved by parol when they were not recorded. Edgerly *v.* Emerson, 23 N. H. 555 (1851); Wait, Insolv. Corp., § 529. It may be for the jury to say whether a subsequent meeting changed the minutes. Delano *v.* Smith Charities, 138 Mass. 63 (1884). The company is not bound by fraudulent insertions, at least where strangers have not relied thereon. Holden *v.* Hoyt, 134 Mass. 181 (1883). Where all the stockholders, being directors, agree informally and without meeting that a certain person shall be the corporate agent and take entire control, he is authorized to bind the corporation by his acts. Wood *v.* Wiley, etc. Co., 56 Conn. 87 (1888). See also Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825); Hoag *v.* Lamont, 60 N. Y. 96 (1875); Fleckner *v.* Bank of U. S., 8 Wheat. 338 (1823); Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392 (1849), holding that an appointment need not be entered upon the records of the corporation. See also note 3, p. 1499.

[1] Dennis *v.* Joslin, etc. Co., 36 Atl. Rep. 129 (R. I., 1896).

cers, and whether the officers are conclusively presumed to have notice of all that is contained in the corporate books, is considered elsewhere.[1] The books, of course, are not admissible as evidence against strangers dealing with the corporation.[2]

Proof of corporate resolutions or votes, and of votes of the directors, is made by producing the original minutes or record-book of the corporation. But where the record-book is lost, or no record was ever made, secondary evidence may be resorted to.[3] Where there is no statute or by-law requiring a private

[1] See § 727, *infra*.

[2] See § 727, *infra*.

[3] Secondary evidence of the records is not admissible unless the officers are first examined and the originals are not to be found. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 635 (1891). Entries in the corporate books should be proved by the books themselves, and not by the clerk, unless an excuse is given for their non-production. National Bank *v.* Navassa, etc. Co., 56 Hun, 136 (1890). Where the original minutes have been destroyed, the minutes as they have been copied into the minute-book are admissible. Brower *v.* East, etc. Co., 84 Ga. 219 (1890). The books of the company are the best evidence, and not the testimony of officers as to what they had seen on the books. Dial *v.* Valley, etc. Assoc., 29 S. C. 560 (1888). A copy of a resolution of the directors of an alien corporation is not evidence until proof of a reasonable effort to obtain the original is given. Bowick *v.* Miller, 21 Oreg. 25 (1891). Sworn copies taken from corporate books are incompetent unless evidence is given of the loss of the book itself. Latourette *v.* Clark, 51 N. Y. 639 (1872). A copy of the directors' resolution is evidence, not when merely certified to by the secretary, but when sworn to by him. Hallowell, etc. Bank *v.* Hamlin, 14 Mass. 178 (1817). Entries need not be proven by the clerk who made the entries. First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881). Books of the board of directors, in which their proceedings are recorded, proved by proving the handwriting of the clerk and president, are competent evidence to prove the facts therein recorded. Owings *v.* Speed, 5 Wheat. 420 (1820). Acts of a board of directors may be shown by parol when no record of them has been made. Zalesky *v.* Iowa, etc. Co., 70 N. W. Rep. 187 (Iowa, 1897). In an action by a foreign corporation, oral proof of the corporate books, papers, and records, in the possession of the corporation outside the state, is not admissible in its behalf. Mandel *v.* Swan, etc. Co., 154 Ill. 177 (1895). Query, whether, under the statutes of Tennessee requiring the board of directors to keep a full and true record of all their proceedings, an authorization of a mortgage is legal where no such record of the authorization is made? Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage. Boggs *v.* Lakeport, etc. Assoc., 111 Cal. 354 (1896). Where the secretary is dead, and his memoranda of the minutes cannot be found, and no record has been made, the minutes may be proved by parol. New Boston, etc. Co. *v.* Saunders, 34 Atl. Rep. 670 (N. H., 1892). Resolutions of the board may be shown by parol where

corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation.[1]

only a part of the business has been entered in the minutes. Cameron *v.* First, etc. Bank, 34 S. W. Rep. 178 (Tex., 1896). The acts and resolutions of the directors, if not recorded, may be proved by parol. Langsdale *v.* Bonton, 12 Ind. 467 (1859); Bay, etc. Assoc. *v.* Williams, 50 Cal. 353 (1875). Minutes not signed by the chairman are not evidence of a call; nor is a subsequent ratification of those minutes. Cornwall, etc. Co. *v.* Bennett, 5 H. & N. 423 (1860). After notice to the corporation to produce its records is given, secondary evidence may be introduced. Thayer *v.* Middlesex, etc. Co., 27 Mass. 325 (1830); Elems *v.* Ogle, 15 Jur. 180 (1850); Lohman *v.* New York, etc. R. R., 2 Sandf. 39 (1848), holding that the failure to produce may send the question to the jury. To same effect, Narragansett Bank *v.* Atlantic Silk Co., 44 Mass. 282 (1841). The presumption is that a suit in the corporate name was authorized by it. Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859). In proving employment, notice to produce must be given. Haven *v.* New Hampshire Asylum, 13 N. H. 532 (1843). So also in proving agency. Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836); Montgomery R. R. *v.* Hurst, 9 Ala. 513 (1846). As to proving subscription to stock, see ch. IV, *supra*. Parol evidence cannot explain the minutes. Gould *v.* Norfolk, etc. Co., 63 Mass. 338 (1852). The rough minutes are evidence if not subsequently written out. Waters *v.* Gilbert, 56 Mass. 27 (1848). It may be shown that the minutes are incorrect. Van Hook *v.* Somerville, etc. Co., 5 N. J. Eq. 137, 169 (1845). If on production of the books no resolution is found, proof of acts, etc., may be given. Boston, etc. Co. *v.* Barton, 59 Mass. 158, 179 (1849). See also § 721, and note 1, p. 1499. Proof that the book is a corporate record is made by the person having custody of the book. Smith *v.* Natchez, etc. Co., 2 Miss. 479, 492 (1837). It must be proved that it is a corporate book, kept as such, and by the proper officer. Highland Turnp. Co. *v.* McKean, 10 Johns. 154 (1813); Whitman *v.* Granite Church, 24 Me. 236 (1844). Proof may be by the secretary. Stebbins *v.* Merritt, 64 Mass. 27 (1852). The book-keeper may prove his entries. Union Bank *v.* Knapp, 20 Mass. 96 (1825). Or, if he is dead, his handwriting may be proved. Union Bank *v.* Knapp, 20 Mass. 96 (1825); also Chenango, etc. Co. *v.* Lewis, 63 Barb. 111 (1872). Where a corporation is disproving agency it is held to strict proof. Its records are inadmissible unless proof is given that they were kept by the proper officer, and unless he testifies to them. Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875). See Gafford *v.* American, etc. Co., 77 Iowa, 736 (1889). For a very full note on the admissibility of corporate books as evidence, see 23 Cent. L. J. 468–473. An examination before trial, to ascertain whether the defendant corporation authorized a person to make a contract for it, was granted in Bloom *v.* Pond's Extract Co., 18 N. Y. Supp. 179 (1891).

[1] Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 234 (1894). A certified copy of resolutions sent to a mortgagee, and authorizing a mortgage, are sufficient proof without proving loss of the corporation records. Purser *v.* Eagle Lake, etc. Co., 111 Cal. 139 (1896).

A resolution adopted at a stockholders' meeting is valid, although only a pencil memorandum was made of it and no formal record made until long afterwards. The proceedings may be proved by parol.[1]

§ 715. *Executive committee.*— There formerly was some doubt as to whether the powers of a board of directors might be delegated to an executive committee. The right of the board of directors to delegate to agents the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary.[2] But in matters involving discretion there are decisions to the effect that the directors cannot delegate that discretion.[3] The clear weight of authority,

[1] Handley *v.* Stutz, 139 U. S. 417 (1891). The records of the stockholders' meetings may be used to show the purpose of a stockholder's resolution. Wiley *v.* Athol, 150 Mass. 426 (1890).

[2] Directors may authorize two of their number to execute corporate notes to a person. Leavitt *v.* Oxford, etc. Co., 3 Utah, 265 (1883). Or appoint an agent to execute a deed. Arms *v.* Conant, 36 Vt. 744 (1864). Where various corporations appoint a committee to carry on litigation, they are each liable for the attorney's fees, the attorneys having no knowledge of a limitation of the powers of the committee in the matter. Prindle *v.* Washington L. Ins. Co., 73 Hun, 448 (1893). Directors having power to fix the rates of their railroad may delegate that power to agents. Manchester, etc. R. R. *v.* Fisk, 33 N. H. 297 (1856). See also many cases in the following sections of this work. The corporation may authorize its president to sell and assign its negotiable paper. Stevens *v.* Hill, 29 Me. 133 (1848); Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814). Nearly all corporate acts are done by means of subordinate agents. Such delegations of authority are necessary. See Manchester R'y *v.* Fisk, 33 N. H. 297 (1856). Difficulty occurs in defining the line which separates powers that may be delegated from those which may not be. See Lyon *v.* Jerome, 26 Wend. 485 (1841); Gillis *v.* Bailey, 21 N. H. 149 (1850). A corporation owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one and the profits to be divided equally. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). See also § 712, *supra*.

[3] The directors' duty to pass on paper offered for discount cannot be delegated in Louisiana. Percy *v.* Millaudon, 3 La. 568 (1832). *Cf.* Morse, Banks and Banking, 108. Directors having power to purchase stock cannot delegate that power to a general manager. No ratification arises from the fact that the purchase was entered on the books. Cartmell's Case, L. R. 9 Ch. 691 (1874). Directors cannot delegate to two of their number the question of whether a conditional subscription to shares should be accepted. Howard's Case, L. R. 1 Ch. 561 (1866). Two directors acting as agents to receive calls have no power to waive a forfeiture of stock and receive the calls thereon. Card *v.* Carr, 1 C. B. (N. S.) 197 (1856). Directors

however, holds that the powers of a board of directors may be delegated to an executive committee of that board, and the acts and contracts of such a committee may be made binding on the corporation.[1]

cannot delegate to a committee the power to forfeit and sell stock for non-payment of calls. York, etc. R. R. *v.* Ritchie, 40 Me. 425 (1855). A Pennsylvania railroad corporation cannot authorize its board of directors to delegate to an executive committee the location of the route. Weidenfeld *v.* Sugar, etc. R. R., 48 Fed. Rep. 615 (1892). In Gillis *v.* Bailey, 21 N. H. 149 (1850), it was held that a board of directors could not delegate to an agent the power to lease various pieces of property owned by the corporation. Power to make assessments cannot be delegated by the directors. Farmers', etc. Ins. Co. *v.* Chase, 56 N. H. 341 (1876); Silver Hook Road *v.* Greene, 12 R. I. 164 (1878), where the delegation was to the treasurer. But see Read *v.* Memphis, etc. Co., 9 Heisk. (Tenn.) 545 (1872), where such delegation to the president was upheld. *Cf.* Lindley, Companies, p. 156. In Tempel *v.* Dodge, 89 Tex. 68 (1895), it was held that a corporation had no right to create by its by-laws an executive committee to exercise the powers of the board of directors.

[1] An executive committee may be appointed under the statutory power of the company "to appoint such subordinate officers and agents as the business of the corporation shall require." The executive committee may delegate to one of their number the indorsing of checks, etc. Sheridan, etc. Light Co. *v.* Chatham Nat. Bank, 127 N. Y. 517 (1891). A contract between two railroads, by which one was given the right to run over the tracks of the other, is legal, although it is executed by the authority only of the executive committee and of a meeting of the stockholders, the court saying the determination of the management of the corporate affairs rests with its stockholders, and that the stockholders had the power to authorize the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. Union, etc. R'y *v.* Chicago, etc. R'y, 163 U. S. 564, 597 (1896). Where a by-law gives to the directors the "whole charge and management of the property," and the directors are also authorized to have an executive committee to do any business which the board itself might do, and the board authorizes the executive committee to exercise all the powers of the board when the board is not in session, a contract of the executive committee, ratified at a meeting of the stockholders, to allow another railroad to have the joint use of the company's bridge and terminals, is legal and binding. Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892); Chicago, etc. R'y *v.* Union Pac. R'y, 47 Fed. Rep. 15 (1891). See also Black River Imp. Co. *v.* Holway, 85 Wis. 344 (1893), and Hoyt *v.* Thompson's Executor, 19 N. Y. 207 (1859), where the committee consisted of any five or more directors who attended meetings of which notice was given to all. See also Hoyt *v.* Shelden, 3 Bosw. 267 (1858).

The right of a board of directors to delegate its powers to an executive committee was raised but not fully passed upon in Metropolitan, etc. Co. *v.* Domestic, etc. Co., 43 N. J. Eq. 626 (1888), where it was remarked that the rigidity of the old rule prohibiting such delegation has been

The majority of the directors cannot, however, exclude the minority from the meetings and from being heard, by delegating power to a committee, and "even if the minority had a voice given to them, still, if there existed a combination among

somewhat relaxed. "The managers might, undoubtedly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company." But it seems that this executive committee cannot delegate its power to one of their number. Olcott *v.* Tioga R. R., 27 N. Y. 546, 558 (1863). The by-laws may authorize the directors to delegate their powers to a committee. Harris's Case, L. R. 7 Ch. 587 (1872), where the committee allotted shares. Directors may delegate to a committee power to sell corporate property, and a mortgage given by the committee is valid. Certainly so where the board of directors subsequently accepted the papers connected with it. Burrill *v.* Nahant Bank, 43 Mass. 163 (1840). In Andres *v.* Fry, 45 Pac. Rep. 534 (Cal., 1896), the contract of the executive committee authorized to purchase patent-rights was declared legal. The constitution of an incorporated camp-meeting association may authorize an executive committee and give it power to make regulations as to the use of the grounds. Round Lake Assoc. *v.* Kellogg, 141 N. Y. 348 (1894). Where the by-laws authorize the directors to transact business through a committee, that committee may consist of one person. *Re* Tourine Co., L. R. 25 Ch. D. 118 (1883). An employee of a company who sues for services, under a written contract made with the "chairman" and "managing director," may collect; their authority is presumed as agents or executive committee. Totterdell *v.* Fareham Brick Co., L. R. 1 C. P. 674 (1866). In New York it is clearly held that the directors of a banking or loan and trust company may appoint an executive committee and authorize it to act for the board of directors, and that the acts of this committee are as binding, valid, and effective as though they had been authorized by the board of directors directly. Palmer *v.* Yates, 3 Sandf. 137 (1849). *Cf.* Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 497 (1837). In Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299 (1813), the right of the directors to delegate their power to contract to a committee was not questioned. Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters. Boot, etc. Co. *v.* Dunsmore, 60 N. H. 85 (1880). It is fraudulent for an executive committee to vote large compensation to themselves for services as promoters. Blatchford *v.* Ross, 54 Barb. 42 (1869). In St. Louis, etc. Assoc. *v.* Augustin, 2 Mo. App. 123 (1876), a loan committee contracted for the corporation. Where the executive committee can act only when the president is present, action without his presence is void. Corn, etc. Bank *v.* Cumberland, etc. Co., 1 Bosw. 436 (1857). As to committees of municipal corporations, see Dillon, Mun. Corp., §§ 60, 374. Contracts, etc., by an executive committee have often been recognized as valid. See Tracy *v.* Guthrie, etc. Soc., 47 Iowa, 27 (1877). A stockholder's request to such a committee to bring an action to remedy a corporate wrong is sufficient. Hazard *v.* Durant, 11 R. I. 196 (1875). The committee's consent to an arbitration may be ratified by the company.

the majority, before that voice was heard, to overbear it," the acts of such a body would be illegal.[1] Where the board of directors delegates to a committee the power to act for it, due notice of meetings of the executive committee must be given to all its members, but a majority of the committee suffices to constitute a meeting and proceed to business, and a majority of that majority binds the committee, the directors, and the corporation by its vote.[2] An auditing committee with the

Fryeburg Canal *v.* Frye, 5 Me. 38 (1827). Although a contract is irregularly made by the executive committee of a corporation, there being no notice and no quorum, yet, by accepting the benefits of the contract afterwards, the company is bound. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 43 N. J. Eq. 626 (1888). In Curtiss *v.* Leavitt, 15 N. Y. 1 (1857), a finance committee had authorized the issue of bonds. The charter required a resolution of the board of directors. The court held that acquiescence cured the defect. In Taylor *v.* Agricultural Assoc., 68 Ala. 229 (1880), the executive committee was provided for by charter. A committee authorized to settle with a person cannot also settle with a firm in which he is interested, but the company may ratify. Merchants', etc. Co. *v.* Rice, 70 Iowa, 14 (1886). The acts of the executive committee may be construed to be subject to the approval of the next meeting of the board of directors. Indianapolis, etc. R. R. *v.* Hyde, 122 Ind. 188 (1890). An executive committee having the general direction and superintendence of the affairs of the company have no power to issue stock, the whole capital stock being already issued. Ryder *v.* Bushwick R. R., 134 N. Y. 88 (1892). A person sued on a tort cannot raise the objection that the proceedings of an executive committee or board of directors were irregular, or that stockholders did not consent to a contract. Farnsworth *v.* Western, etc. Co., 6 N. Y. Supp. 735 (1889). See also Black River Imp. Co. *v.* Holway, 85 Wis. 344 (1893).

[1] Great Western R'y *v.* Rushout, 5 De G. & Sm. 290, 310 (1852).

[2] Burleigh *v.* Ford, 61 N. H. 360 (1881); Metropolitan, etc. Co. *v.* Domestic, etc. Co., 43 N. J. Eq. 626 (1888). Such also is the case with municipal corporations. State *v.* Jersey City, 27 N. J. L. 493 (1859); Junkins *v.* Doughty Falls, etc. Dist., 39 Me. 220 (1855). The directors may delegate to a committee the power to procure plans and let a contract. A majority of that committee may act and bind the corporation. A third party is justified in acting on the ostensible authority of the committee. McNeil *v.* Boston Chamber of Com., 154 Mass. 277 (1891). A committee appointed by the directors cannot act unless all are present, although a majority may govern. *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890). Where many persons authorize eight to act as a managing committee, those persons are not liable for debts contracted by a meeting of six of that committee. Brown *v.* Andrews, 13 Jur. 938 (1849). Power to an executive committee of directors "to do all acts necessary for the prosperity" does not authorize the purchase of real estate by a majority of the executive committee. The company is not bound by same majority improving the land. Tracy *v.* Guthrie, etc. Soc., 47 Iowa, 27 (1877). The minority of the committee certainly cannot act. Trott *v.* Warren,

power to pay or reject claims have no power to rescind or settle contracts, or determine the future action of the company.[1]

§ 716. *President — His power to contract for the corporation.* The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management. This is a rule which prevails everywhere, excepting possibly the state of Illinois. Both the decisions and the reasoning of the Illinois courts tend to relax the rule given above.[2]

It is true that the board of directors may expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is

11 Me. 227 (1834). The managing committee of an unincorporated association may legally resolve that checks signed by any three of them shall bind all. Maitland's Case, 4 De G., M. & G. 769 (1853). The executive committee cannot delegate their powers to one of their number. Cook *v.* Ward, L. R. 2 C. P. D. 225 (1877). See also Lyon *v.* Jerome, 26 Wend. 485 (1841), where canal commissioners delegated their powers to an engineer. One of two supervisors cannot contract. Cooper *v.* Lampeter, 8 Watts (Pa.), 125 (1839).

[1] Skinner *v.* Walter, etc. Co., 140 N. Y. 217 (1893).

[2] The president and general manager may together bind an insurance company to an agreement that its mortgagor may redeem even after foreclosure. Union Mut. etc. Ins. Co. *v.* White, 106 Ill. 67 (1883). The president of a railroad company has power to contract for the transportation of railroad iron. Chicago, etc. R. R. *v.* Coleman, 18 Ill. 297 (1857). A deed of land executed by the president and secretary is valid where all the stockholders join also in the deed. Hull *v.* Glover, 126 Ill. 122 (1888). The president of a railroad company may assign notes and mortgages given to it to aid in constructing the road. Irwin *v.* Bailey, 8 Biss. 523 (1879); S. C., 13 Fed. Cas. 114. A judgment note of a corporation may be executed by its president and secretary. It is good as a mere note, even though not as a judgment note. Matson *v.* Alley, 141 Ill. 284 (1892). A corporate note signed by the president and secretary, giving the payee the right to enter judgment, is sufficient to sustain such a judgment although the note was not under seal. Snyder Bros. *v.* Bailey, 46 N. E. Rep. 452 (Ill., 1896). A duly executed contract of a corporation to give a judgment note is authority to the president to give that note. McDonald *v.* Chisholm, 131 Ill. 273 (1890). The president has no power to agree that an absolute subscription for stock shall be changed so as to be conditional. Morgan County *v.* Thomas, 76 Ill. 120 (1875). A bank president may assign a judgment held by a bank. Guernsey *v.* Black, etc. Co., 68 N. W. Rep. 777 (Iowa, 1896). The president has power to offer a reward for the arrest of a defaulting teller. Bank *v.* Griffin, 48 N. E. Rep. 154 (Ill., 1897). The president is presumed to have authority to assign a chattel mortgage. Anderson *v.* South, etc. Co., 50 N. E. Rep. 655 (Ill., 1898).

that the president cannot act or contract for the corporation any more than any other one director. This question has frequently been before the courts, and many decisions have been rendered in regard to it.[1]

[1] "In the absence of anything in the act of incorporation bestowing special power upon the president, he he has from his mere official station no more control over the corporate property and funds than any other director." Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874). The president has no authority to direct the treasurer to refuse to receive payments of subscriptions. Potts *v.* Wallace, 146 U. S. 689 (1892). The president has no power to employ an architect to prepare plans, and the company is not liable therefor. Wait *v.* Nashua, etc. Assoc., 23 Atl. Rep. 77 (N. H., 1891). A president has no inherent power to execute a mortgage. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). The president has no implied power to mortgage the corporate property. National State Bank *v.* Vigo, etc. Bank, 141 Ind. 352 (1895). The president has no power to mortgage, even though he has been given power to pledge notes and contracts. Currie *v.* Bowman, 25 Oreg. 364 (1894). The president has no inherent authority. Brush. etc. Co. *v.* City, etc. Montgomery, 21 S. Rep. 960 (Ala., 1897). The president has no authority to increase the price of construction work. Grant *v.* Duluth, etc. R'y, 69 N. W. Rep. 23 (Minn., 1896). The president and secretary have no inherent power to execute notes in the name of the corporation. Estes *v.* German Nat. Bank, 62 Ark. 7 (1896). The president has no power to assign a patent-right belonging to the company to pay a corporate debt, where there is no meeting of the board of directors to authorize the same. Kansas, etc. Co. *v.* Devol, 72 Fed. Rep. 717 (1896). The president has no power to confess judgment for the corporation. Raub *v.* Blairstown Creamery Assoc., 56 N. J. L. 262 (1893). A president and secretary have no implied power to give a corporate note. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). The president cannot bind the corporation by his agreement that it will pay the debts of a person. Hamilton *v.* Bates, 35 Pac. Rep. 304 (Cal., 1893). The president has no power to sell treasury stock. *Re* Utica, etc. Co., 154 N. Y. 268 (1897). In Powers *v.* Schlicht, etc. Co., 23 N. Y. App. Div. 380 (1897), the court stated that the president of a business corporation has implied power to make contracts in its behalf. The president of a railroad company has no inherent authority to negotiate a loan of $150,000 and agree to pay ten per cent thereof as brokerage. Tobin *v.* Roaring, etc. R. R., 86 Fed. Rep. 1020 (1898). The fact that a person buying land is president of a company and gives a draft on the company in part payment does not make it a purchase by the company for which it is liable. *Re* Seymour, 83 Mich. 496 (1890). The president of a literary and biblical institution has no power to buy lumber for it, and it is not liable therefor although it has used it, where some of the directors had agreed among themselves to pay for the lumber. Lyndon Mill Co. *v.* Lyndon, etc. Inst., 22 Atl. Rep. 575 (Vt., 1891). A president of a bank cannot agree that sureties on paper given to the bank will not be held liable. First Nat. Bank *v.* Bennett, 33 Mich. 520 (1876). "It is not within the authority of the president of a bank, when he discounts paper for the

A large number of the cases are given in the notes below. The question seems to have arisen in many forms, and the great weight of authority holds that a president has no inherent power

bank, to promise the maker that he need not pay it." First Nat. Bank *v.* Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y. 655. The president cannot borrow money for the company unless the charter or the board of directors authorizes him. Life & F. Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31 (1831).

Although a note is signed by the president, secretary, and treasurer of a religious corporation, yet it may be shown that they were not authorized by the board of trustees to sign. People's Bank *v.* St. Anthony's, etc. Church, 109 N. Y. 512 (1888). The president and cashier cannot agree with an indorser that he will not be held liable. Bank of U. S. *v.* Dunn, 6 Pet. 51 (1832); Bank of Metropolis *v.* Jones, 8 Pet. 12 (1834). The president of a bank has no power to release a claim. Olney *v.* Chadsey, 7 R. I. 224 (1862); Hodges *v.* First Nat. Bank, 22 Gratt. (Va.) 51 (1872). The president and cashier have no power to execute a mortgage. Leggett *v.* New Jersey, etc. Co., 1 N. J. Eq. 541 (1832). Nor has the president alone that power. Corbett *v.* Woodward, 5 Sawyer, 403 (1879); S. C., 6 Fed. Cas. 531. The president of a bank has no power to sell and assign a note held by it. Hallowell, etc. Bank *v.* Hamlin, 14 Mass. 178 (1817). The president of a national bank cannot bind it by his purchase of bonds and stock for it. First Nat. Bank *v.* Hoch, 89 Pa. St. 324 (1879). The president of a railroad corporation has no power to let a construction contract. Templin *v.* Chicago, etc. R'y, 73 Iowa, 548 (1887); Griffith *v.* Chicago, etc. R. R., 74 Iowa, 85 (1888). The president and a director of a miner's water supply company have no power to purchase land for an extension of the works, but the board of directors may ratify the purchase. Blen *v.* Bear, etc. Co., 20 Cal. 602 (1862). The president of a ditch company has no power to exchange half of its ditch for half of the ditch of another company. Bliss *v.* Kaweah, etc. Co., 65 Cal. 502 (1884). A railroad president cannot sell its ties. Walworth, etc. Bank *v.* Farmers', etc. Trust Co., 14 Wis. 325 (1861). The president cannot execute a note for the company. Bacon *v.* Mississippi Ins. Co., 31 Miss. 116 (1856). The president of a railroad company cannot give a chattel mortgage on one of its engines, even though he is also its "business and financial agent." Luse *v.* Isthmus, etc. R'y, 6 Oreg. 125 (1876). If the president of a bank sells its securities he is liable to it for any loss incurred thereby. First Nat. Bank *v.* Lucas, 21 Neb. 280 (1887). The president of a bank has no power to compromise a debt due to it from an insolvent firm. Wheat *v.* Bank of Louisville, 5 S. W. Rep. 305 (Ky., 1887). The president of a lumber company has no power to employ a general agent in another part of the country. The latter can hold the company liable for his salary only by proving that at least a majority of the directors knew thereof and acquiesced. Murray *v.* Nelson Lumber Co., 143 Mass. 250 (1887). The president of a railroad cannot sell its bonds. Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874). The president has no power to sell goods unless he is specially authorized or has made similar sales without objection. Pittsburgh Melting Co. *v.* Reese, 118 Pa. St. 355 (1888). The president of a company cannot agree for it to redeem certain outstanding claims against it — "labor tickets." Stanley *v.* Sheffield, etc. Co., 83 Ala. 260 (1888). The president

to represent or contract for the corporation. His duties are confined to presiding and to voting as a director. The fact, however, that he is almost always the corporate officer who is

cannot increase the pay allowed to a director by a vote of the directors. Hodges *v.* Rutland, etc. R. R., 29 Vt. 220 (1857); Bailey *v.* Buffalo, etc. R. R., 14 Hun, 483 (1878). A president authorized to execute a mortgage cannot insert unusual terms — such as that the principal sum should become due at the option of the bondholder in case of non-payment of interest. Jesup *v.* City Bank, etc., 14 Wis. 331 (1861). The president and secretary cannot issue drafts in the company's name. Dabney *v.* Stevens, 40 How. Pr. 341 (1870). Misrepresentations of the president as to property which the company sells are not binding upon it. Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851). The president and cashier cannot even conjointly sell the safe of a bank. Asher *v.* Sutton, 31 Kan. 286 (1884). One who is president, treasurer, and general manager cannot confess judgment for the company, even though he owns all but two shares of the stock. Stokes *v.* New Jersey, etc. Co., 46 N. J. L. 237 (1884). Nor give a mortgage. England *v.* Dearborn, 141 Mass. 590 (1886). Nor give accommodation or renewal notes. McClellan *v.* Detroit, etc. Works, 56 Mich. 579 (1885). The president of a bank has no power to transfer its paper. Smith *v.* Lawson, 18 W. Va. 212, 228 (1881). The president of a manufacturing company cannot buy goods for it. Westerfield *v.* Radde, 7 Daly, 326 (1877). *Cf.* Silva *v.* Metropolitan, etc. Co., 42 N. Y. Super. Ct. 307 (1877). Where a contract to build a railroad is made by contractors with a committee of directors duly authorized to make it, a provision against subletting cannot be waived by the president of the railroad and a director. Western R. R. *v.* Bayne, 11 Hun, 166 (1877); affirmed, 75 N. Y. 1. A director is liable to his bank on a note given to it by him, although the president, who has purchased stock of the director, cancels the note in payment for the stock and considers himself indebted to the bank for that amount. There was no ratification by the bank. Rhodes *v.* Webb, 24 Minn. 292 (1877). A bank receiving funds from its president in payment of his debts to it, which funds he had fraudulently obtained from another bank by using his standing as president of the former, is bound to pay over the same to the defrauded bank, where such president had complete control of the former bank. City Nat. Bank *v.* National Park Bank, 32 Hun, 105 (1884).

Brokers employed by the president cannot hold the corporation liable, even though the corporation has had the benefit of their services, the board of directors having no knowledge thereof. Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269 (1883); De Bost *v.* Albert Palmer Co., 35 Hun, 386 (1885); Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408 (1880); in the last case the superintendent joined in employing the broker. Not even the president, secretary, and treasurer can give a note in the name of a religious corporation. People's Bank *v.* St. Anthony's, etc. Church, 39 Hun, 498 (1886). A president authorized by resolution of the board of directors to sell bonds cannot loan them; if he does so it is a conversion of the property of the corporation. Second Ave. R. R. *v.* Mehrback, 46 N. Y. Super. Ct. 267 (1883). The president of an insurance company cannot indorse and transfer notes. Marine Bank, etc. *v.* Clements, 3 Bosw. 600 (1858). But in an earlier case it

directed to sign the corporate contracts that have been authorized by the board of directors has led to an enlargement of his importance as a corporate officer. Hence the rule has arisen

was held that the indorsee in good faith was protected. Caryl *v.* McElrath, 3 Sandf. 176 (1849). A bank president has no implied authority from the bank to agree to pay interest on a particular deposit, there being no evidence of special authority nor of a bank custom to that effect. The president of a corporation has no implied authority to check corporate funds out of the bank unless there is an established usage to that effect. Fulton Bank *v.* New York, etc. Canal Co., 4 Paige, 127 (1833). The president, secretary, and general agent cannot issue the corporate notes. McCullough *v.* Moss, 5 Denio, 567 (1846). *Cf.* Moss *v.* Rossie, etc. Co., 5 Hill, 137 (1843). A railroad president cannot contract to pay a commission to a promoter who induces a contractor to build the road. Risley *v.* Indianapolis, etc. R. R., 1 Hun, 202 (1874); rev'd on other points, 62 N. Y. 240. The president cannot employ workmen. Mt. Sterling, etc. Co. *v.* Looney, 1 Metc. (Ky.) 550 (1858). Nor agree to pay a salary. Murray *v.* Nelson Lumber Co., 143 Mass. 250 (1887); Wood, Railw. Law, pp. 436–439. The president may accept a conditional subscription to stock. Pittsburgh, etc. R. R. *v.* Stewart, 14 Pa. St. 54 (1861). A president of a bank may bind it by his agreement with an indorser of a note that the maker of a note will not give a mortgage, and that the indorser will not be held liable. Cake *v.* Pottsville Bank, 116 Pa. St. 264 (1887). A tender of calls on stock may be made to the president in order to avoid a forfeiture. Mitchell *v.* Vermont, etc. Co., 67 N. Y. 280 (1876). Where the corporation is merely an intermediary of title to a note, less strict proof is required. Brown *v.* Donnell, 44 Me. 421 (1860). The company is liable to an architect who has done work at the instance of the president and two directors. Hooker *v.* Eagle Bank, 30 N. Y. 83 (1864). The president cannot lease land. Yellow, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). A telegram from the president authorizing an agent to contract is insufficient proof of authority. Felton *v.* McClane, 46 N. Y. Super. Ct. 53 (1880). Where he is authorized to discharge one mortgage, the company is not bound by his mistake in discharging two mortgages. Smith *v.* Smith, 117 Mass. 72 (1875); Mobile, etc. R'y *v.* Gilmer, 85 Ala. 422 (1888). The president of a national bank has no power inherent in his office to execute a note in the name of the bank. National Bank, etc. *v.* Atkinson, 55 Fed. Rep. 465 (1893). The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give the order is shown. Johnson *v.* Armstrong, 83 Tex. 325 (1892). The president has no power to modify a resolution of the board that certain notes shall be subject to the joint order of himself and the secretary. Tradesmen's Nat. Bank *v.* Manhattan Lumber Co., 18 N. Y. Supp. 920 (1892). The president of a national bank has power to take property in payment of a debt and bind the bank to pay off a lien on it. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). The president of a national bank has no power to bind it to accept drafts in the future drawn by a railroad company, where the party relying thereon knew that the bank directors objected. Stallcup *v.* National Bank, 15 N. Y. St. Rep. 39 (1888). The president and

in New York that a contract, which apparently is a corporate contract, being duly signed by the president, is presumed to be

managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Where an executor is president of a corporation, no formal demand for payment of a claim by the corporation against the estate need be made. Brown *v.* Brown, 58 Conn. 85 (1889).

The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof. American, etc. Bank *v.* Oregon, etc. Co., 55 Fed. Rep. 265 (Oreg., 1892). A bank may reclaim money paid by the cashier on overdrafts of the president to pay his private debts, such overdrafts not having been authorized by the board of directors. Dowd *v.* Stephenson, 105 N. C. 467 (1890). A corporate deed by the president conveying what he owns personally does not estop him from claiming the property. Carothers *v.* Alexander, 74 Tex. 309 (1889). Where the president of a bank receives money on deposit from himself as attorney and subsequently withdraws it and misappropriates it, the bank is liable. Smith *v.* Anderson, 57 Hun, 72 (1890). An offer of a corporation to sell out in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc. Co. *v.* Acme Mfg. Co., 153 Mass. 404 (1891). The president of a bank has no implied power to borrow money for it. Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893). As to the declarations or admissions of the president, see § 726, *infra*. The president has no power to employ an architect. Mathias *v.* White S. S. Assoc., 48 Pac. Rep. 624 (Mont., 1897). The president and secretary have no power to buy machinery for the corporation. Des Moines, etc. Co. *v.* Tilford, etc. Co., 70 N. W. Rep. 839 (S. D., 1897). In Ford *v.* Hill, 92 Wis. 188 (1896), the court held that the president had no inherent power to confess judgment, but that under the circumstances of the case the court would not set the judgment aside. The president and secretary have no power to sell the property of the corporation or to authorize anybody else to sell it. Johnson *v.* Sage, 44 Pac. Rep. 641 (Idaho, 1896). The president has no power to waive the purchase-money mortgage of the corporation upon land sold by the corporation. Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416 (1893). A resolution authorizing the president to sign checks, drafts, etc., does not authorize an indorsement of commercial paper by him in the company's name and in its behalf. Hitchings *v.* St. Louis, etc. Co., 68 Hun, 33 (1893). A corporation is not liable for commissions promised by its president to a broker, even though a sale resulted. Bright *v.* Canadian, etc. Co., 83 Hun, 482 (1895).

a corporate contract until the want of authority of the president is shown by the corporation.[1]

A person taking a company's note from the president in payment of an individual debt is bound to inquire into the regularity of the issue of the note.[2]

A president, however, may employ an attorney for the company, and authorize him to prosecute or defend a case.[3] And in all cases the president binds the corporation by his acts and

[1] "Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." Patterson *v.* Robinson, 116 N. Y. 193 (1889); Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 (1881); Lee *v.* Pittsburgh Coal, etc. Co., 56 How. Pr. 373 (1877); aff'd, 75 N. Y. 601. Where a bank and a mill company have the same individual as president, his action as representing the bank in regard to the application of moneys to particular paper due from the mill to the bank is valid and binding on the bank, if fair and reasonable. Patterson *v.* Robinson, 116 N. Y. 193 (1889). The signature of the president and secretary of a religious corporation does not raise any presumption as to its being the vote of the corporation. Columbia Bank *v.* Gospel Tabernacle, 127 N. Y. 361 (1891); People's Bank *v.* St. Anthony's, etc. Church, 109 N. Y. 512 (1888).

[2] Wilson *v.* Metropolitan, etc. R'y, 120 N. Y. 145 (1890). See also § 293, *supra*.

[3] American Ins. Co. *v.* Oakley, 9 Paige, 496 (1842); Mumford *v.* Hawkins, 5 Denio, 355 (1848); Potter *v.* New York Inf. Asylum, 44 Hun, 367 (1887). He may also employ special counsel. Davis *v.* Memphis, etc. R'y, 22 Fed. Rep. 883 (1883); Recamier Mfg. Co. *v.* Seymour, 5 N. Y. Supp. 648 (1889), holding that he may do so, though the suit is by the corporation against the board for fraud. *Contra*, Bright *v.* Metairie Cem. Assoc., 33 La. Ann. 58 (1881). The president may bring a writ of entry to foreclose a mortgage. Smith Charities *v.* Connolly, 157 Mass. 272 (1892). The president cannot authorize an attorney to accept service where the board of directors were accustomed to vote on the employment of attorneys. Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556 (1859). The president and secretary authorized to execute a mortgage have no authority to insert a provision to pay the attorney fee in case of foreclosure. Ratification of the mortgage by the directors without knowledge of such provision is not ratification thereof. Pacific, etc. Mill *v.* Dayton, etc. R'y, 5 Fed. Rep. 852 (1881). The case of Ashuelot, etc. Co. *v.* Marsh, 55 Mass. 507 (1848), holds that the president cannot cause an action to be commenced. Where the president is dead the vice-president may employ an attorney. Coleman *v.* West, etc. Co., 25 W. Va. 148 (1884). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co. *v.* Abraham, 26 Oreg. 282 (1894). The president and general manager may engage an attorney to give advice in company's matters. Dallas, etc. Co. *v.* Crawford, 44 S. W. Rep. 875 (Tex., 1898). A bank president has no power to employ an attorney. Pacific Bank *v.* Stone, 53 Pac. Rep. 634 (Cal., 1898).

contracts when he is expressly authorized to so act or contract,[1] or when he has been permitted by the corporation for some time to act and contract for it.[2] Thus, where the president

[1] Under express power to have full control of the business, the president may purchase materials. Castle *v.* Belfast, etc. Co., 72 Me. 167 (1881). Under power to adjust and pay losses he may transfer papers. Baker *v.* Cotter, 45 Me. 236 (1858); Aspinwall *v.* Meyer, 2 Sandf. 186; S. C., 3 N. Y. 290 (1850), where the express power was very general. Express authority, of course, may be given to the president to sell and assign the securities of the corporation. Mitchell *v.* Deeds, 49 Ill. 416 (1867). Authority to the president to borrow includes authority to give ordinary securities, *i. e.*, bonds, notes, acceptances, and collaterals. A person dealing with him may rely on it. He is not bound to know that the president's authority has been revoked. Hatch *v.* Coddington, 95 U. S. 48 (1877). Where the president has, by by-laws, authority to make a contract, and does make one, and it is signed by him as such, though no corporate seal and no resolution are recited, the president may compromise and release the same. Six months' delay by directors in repudiating the compromise after knowledge is a fatal delay. Rolling Mill *v.* St. Louis, etc. R. R., 120 U. S. 256 (1886). Parol authority to the president suffices to enable him to pay out money. New Orleans Bldg. Co. *v.* Lawson, 11 La. 34 (1837). Although the president is given power to make a contract, yet the directors may make it, and their action overrules his. East, etc. Co. *v.* Brower, 80 Ga. 258 (1888). Authority to sell gives authority to contract to sell. Augusta Bank *v.* Hamblet, 35 Me. 491 (1853). Officers authorized to give a note cannot agree to pay attorney fees. Hardin *v.* Iowa, etc. Co., 78 Iowa, 726 (1889). The authority of a president to sell or lease gives him power to point out and make representations as to the boundaries. Holmes *v.* Turner's Falls Co., 150 Mass. 535 (1890). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re* George T. Smith, etc. Co., 86 Mich. 149 (1891). The authority of the president to buy property gives authority also to buy on credit. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889). Under a by-law giving him authority, the president may purchase on credit. Siebe *v.* Joshua, etc. Works, 86 Cal. 390 (1890). An assignment of a corporate claim by the manager and president in the regular course of business, and with the knowledge and consent of the board of directors, is sufficient. Greig *v.* Riordan, 99 Cal. 316 (1893). Under a broad power given to the president to make contracts he may take a lease of property. Hawley *v.* Gray, etc. Co., 106 Cal. 337 (1895).

[2] Where the president of a construction company takes entire charge of its business, and is allowed so to do by the directors, the company is bound by notes given in the corporate name by him for the company's business. "The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it." Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 109 (1890). The president binds the company when he does all the business with

had been accustomed to act and contract for the company without express authority, and his acts had always been accepted,

the knowledge and consent of the directors. McComb *v.* Barcelona, etc. Assoc., 134 N. Y. 598, 608 (1892). Where for eight years the president has been allowed to manage and carry on the whole business of the company, and to indorse its name to notes in order to raise money for the business, and the company had no cash capital and no other way of obtaining money, it is for the jury to say whether the company is bound by such an indorsement by him. Fifth Nat. Bank *v.* Navassa, etc. Co., 119 N. Y. 256 (1890). *Cf.* National Bank *v.* Navassa Phosphate Co., 56 Hun, 136 (1890). Where for many years the president has managed a company, the company's note executed by him binds the company without special authority. Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890), aff'g 44 Hun, 130 (1887). Where the president for several years has run the company, borrowed money for it, and given its notes, etc., and the by-laws give him "general supervision over the property and affairs of the corporation," the company's note made by him, and an assignment of "$150,000 of such good and collectible accounts now existing or that shall hereafter accrue or be acquired in the conduct of the business," are valid. Preston Nat. Bank *v.* George T. Smith, etc. Co., 84 Mich. 364 (1890). A president who has been accustomed to issue corporate notes may bind the corporation by a similar note. McDonald *v.* Chisholm, 131 Ill. 273 (1890).

A general understanding that the president and secretary shall manage the business and make contracts, and their open and public assumption of that power, with the knowledge and acquiescence of the directors, are equal to a vote of the directors authorizing them to make contracts. Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890). Where the president and secretary of a mining company have for a long time signed checks, and they have been paid by a bank, they may continue to draw checks and the bank must pay them. The corporation is liable for overdrafts caused thereby. Mining Co. *v.* Angelo, etc. Bank, 104 U. S. 192 (1881). A uniform practice of a company for several months previous to the transfer of a corporate note by its president, in cases of notes negotiated for the purpose of raising money to carry on its legitimate business, where such notes were payable to the company, to have them indorsed by the president, is sufficient authority for his indorsement. Marine Bank *v.* Clement, 31 N. Y. 33 (1865). See also, in general, Chicago, etc. R'y *v.* James, 24 Wis. 388 (1869); First Nat. etc. Bank *v.* North, etc. Co., 86 Mo. 125 (1885), where the president and secretary were accustomed to make notes. Where the board of directors for three years relinquishes to the president the exclusive management of the business of the corporation and the purchase of all classes of articles, giving corporate notes, bills, and securities therefor; and then the directors took charge and for several years continued business without repudiating his acts, his purchase of locomotives and giving corporate notes therefor while he was in charge binds the corporation. Olcott *v.* Tioga R. R., 27 N. Y. 546 (1863). If accustomed so to do, the president may settle an account and take a due-bill in payment. Dougherty *v.* Hunter, 54 Pa. St. 380 (1867). Where the president has been accustomed to make and indorse paper, the corporation will be bound, even though

his order to a contractor to stop work binds the company.[1] So also the company is bound when it ratifies or accepts the contract after it is made, or accepts the benefit of the contract. Having knowingly received the benefit of a contract made and carried out by the president, even without authority, the corporation must perform on its part.[2] The authority of the

the directors supposed that all business had been stopped. National Park Bank *v.* German, etc. Co., 53 N. Y. Super. Ct. 367 (1886). Where the president has several times been authorized to pledge corporate securities, and now does so without special authorization, and a majority of the directors ratify the act, not in meeting, but separately, the pledge is legal. Bibb *v.* Hall, 101 Ala. 79 (1893). Where the president owns practically all the stock, and for years has managed the business without any meeting of the board of directors, a sale of the corporate property by him is legal. McElroy *v.* Minnesota, etc. Co., 71 N. W. Rep. 652 (Wis., 1897). The authority of the president to discharge mortgages may be shown by the fact that he has done so many times before. Swasey *v.* Emerson, 168 Mass. 118 (1897). The power of a president of a bank to rediscount paper may arise from his having done so for a long time to the knowledge of the board of directors. U. S. Nat. Bank *v.* First Nat. Bank, 79 Fed. Rep. 296 (1897). Where the president of a bank is practically manager, he may settle a claim by taking an assignment of a judgment. First Nat. Bank *v.* New, 146 Ind. 411 (1896). Long usage may give the president authority. Estes *v.* German Nat. Bank, 62 Ark. 7 (1896); Missouri Pac. R'y *v.* Sidell, 67 Fed. Rep. 464 (1895). Where the president, who is also general manager and financial agent, is accustomed to borrow money for the corporation, he binds the company by a loan, even though he misapplies the proceeds. Kraft *v.* Freeman, etc. Co., 87 N. Y. 628 (1881). If he has been accustomed for a long time to sign notes, a person taking a note without his signature is not protected. Davis, etc. Co. *v.* Best, 105 N. Y. 59 (1887). The president has no implied power to sell the lands of the company, and the power given by usage to former presidents to sell and take a purchase-money lien does not give power to sell without retaining that lien. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306 (1891). The president, even though he is also manager, head and majority stockholder, cannot bind the corporation by his statement that the corporation was to indemnify him from loss on certain indorsements made by him. Minneapolis Trust Co. *v.* Clark, 47 Minn. 108 (1891). Where the board of directors allow one of its officers the exclusive management of its affairs, the company is bound by its acts. Davies *v.* New York Concert Co., 13 N. Y. Supp. 739 (1891); Sparks *v.* Dispatch Transfer Co., 104 Mo. 531 (1891). Although the president has been accustomed to issue corporate notes, yet, if the bank taking the note in question knew that the proceeds were to be used by him in his private business, the note cannot be enforced. Third Nat. Bank *v.* Marine Lumber Co., 44 Minn. 65 (1890).

[1] Leroy, etc. R. R. *v.* Sidell, 66 Fed. Rep. 27 (1895).

[2] Pittsburgh, etc. R'y *v.* Keokuk Bridge Co., 131 U. S. 371 (1889). Where the president bought railroad iron without authority so to do, but the directors stood by and allowed

president of a railroad to take a lease of a hotel in behalf of the company may be inferred from the facts of his signing, sealing, and delivering the instrument, and of the company's

the corporation to use it, the company is liable for the price. Scott *v.* Middleton, etc. R. R., 86 N. Y. 200 (1881). If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable. Willis *v.* St. Paul Sanitation Co., 53 Minn. 370 (1893). A pledge of bonds by the president is ratified by the directors knowing thereof and accepting the proceeds. Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 224 (1894). A bank is liable for money received, and used by it in its business, even though the president was not authorized to borrow it. Blanchard *v.* Commercial Bank, 75 Fed. Rep. 249 (1896). A bank cannot enforce notes which its president obtains for it by misrepresentations inducing the maker of the notes to give them in exchange for the notes of a worthless party. Wilson *v.* Pauly, 72 Fed. Rep. 129 (1896). The president may release a mortgage where a majority of the directors separately authorized it, and the stockholders in meeting assembled gave him general authority. Smith *v.* Wells, etc. Co., 46 N. E. Rep. 1000 (Ind., 1897). By acquiescence of the board of directors, the president's contract employing an editor and manager of a newspaper may bind the company. Jones *v.* Williams, 39 S. W. Rep. 486 (Mo., 1897). Allowing the contract to be completed cures any defect of power on the part of the president to make the contract. Omaha, etc. Co. *v.* Burns, 49 Neb. 229 (1896). Accepting the benefit of the president's contract cures any defect in his authority. Davies *v.* Harvey Steel Co., 6 N. Y. App. Div. 166 (1896). By accepting a deed of a right of way a corporation accepts written covenants which its president made in connection therewith. Mobile, etc. R'y *v.* Gilmer, 85 Ala. 422 (1888). Where the president, as the financial manager, pledges the company's bonds, and for more than a year such pledge continues without objection, the pledge is ratified. Illinois T. & S. Bank *v.* Pacific R'y, 49 Pac. Rep. 197 (Cal., 1897). Although the by-laws require notes to be signed by the secretary, yet by acquiescence a note signed by the president alone may bind the corporation. Illinois T. & S. Bank *v.* Pacific R'y, 49 Pac. Rep. 197 (Cal., 1897). A chattel mortgage given by the president and treasurer, without previous authority from the directors, may be validated by the corporation accepting the benefit of the same. Edelhoff *v.* Horner, etc. Co., 39 Atl. Rep. 314 (Md., 1898). A contract made by the president without authority may be considered ratified by the fact that the directors individually knew of the same, although they did not act upon the matter as a board. Henry *v.* Colorado, etc. Co., 51 Pac. Rep. 90 (Colo., 1897). A railroad contractor may enforce his construction contract with a railroad corporation, although he made it with the president, and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the contract. Cunningham *v.* Massena, etc. R. R., 63 Hun, 439 (1892). Acquiescence in sales by the president, where a vendor's lien was retained, does not sustain a sale by him without retaining such a lien. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306 (1891). Although the president accepts in the corporate name a draft drawn on

entering into possession under the lease and exercising acts of ownership and control over the demised premises, even if the

him personally, yet where the bank of the corporation pays the draft and charges it to the corporation, and the latter acquiesces for nine months, it cannot hold the bank liable. McLaren *v.* First Nat. Bank, 76 Wis. 259 (1890). Ratification of the president's contract with an attorney. Merrill *v.* Consumers' Coal Co., 114 N. Y. 216 (1889). A transfer of all the property by the president is valid where the directors and all the stockholders knew of it and assented to it. Fort Worth Pub. Co. *v.* Hitson, 80 Tex. 216 (1890). The company, by accepting and using the property purchased by the president without authority, thereby ratifies the purchase. West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192 (1892). That stockholders may ratify and validate notes given by the president, see Martin *v.* Niagara, etc. Mfg. Co., 44 Hun, 130 (1887); aff'd, 122 N. Y. 165. The contracts of the president may be ratified subsequently by the board of directors. Wehrhane *v.* Nashville, etc. R. R., 4 N. Y. St. Rep. 541 (1886). For a clear statement of this principle, see Dabney *v.* Stevens, 40 How. Pr. 341 (1870). Rates as advertised by the president bind the railroad when it continues to accept them. Willard *v.* Gould, 32 N. H. 230 (1856). The president's unauthorized contracts, when known to and acted upon by the directors and corporation, are binding. Perry *v.* Simpson, etc. Co., 37 Conn. 520 (1871).

Where the president of a bank instructs its correspondent bank to charge to the former a debt due by him to the latter bank, and the accounts of the latter to the former bank showed to that effect, and no objection is made, the former bank is bound. Burton *v.* Burley, 9 Biss. 253 (1880). A lease by the president and treasurer without authority may be ratified by the stockholders. Mount Washington Hotel Co. *v.* Marsh, 63 N. H. 230 (1884). Or a mortgage. Martin *v.* Niagara, etc. Co., 44 Hun, 130 (1887). A bank is liable on an agreement of its president to give a person ten shares of stock if he would deposit with it, the deposits having been made. Rich *v.* State Nat. Bank, 7 Neb. 201 (1878). Where the company acquiesces in work done by contract with the president it is liable. Grape Co. *v.* Small, 40 Md. 395 (1874). The company may ratify a mortgage given by him. Krider *v.* Western College, 31 Iowa, 547 (1871); Sherman *v.* Fitch, 98 Mass. 59 (1867), where all but one of the directors knew and acquiesced. The acquiescence of a minority of the directors is insufficient. Yellow, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). Acceptance of the property purchased, with knowledge, is ratification. Dent *v.* North, etc. Co., 49 N. Y. 390 (1872). The failure of the president to repudiate at once an agent's unauthorized act is ratification. First Nat. Bank *v.* Fricke, 75 Mo. 178 (1881); Alabama, etc. R. R. *v.* Kidd, 29 Ala. 221 (1856). See also § 727, *infra*, on notice. Ratification of a president's acts may arise by long use of the results, even though the directors expressly repudiated the acts, but did not notify the other party. Belleville Sav. Bank *v.* Winslow, 35 Fed. Rep. 471 (1888). It is a sufficient ratification if the directors discuss the matter at a meeting, though they take no action. Walworth, etc. Bank *v.* Farmers', etc. Co., 16 Wis. 629 (1883). A corporate agent with full powers may ratify the president's act. Perry *v.* Simpson, etc. Co., 37 Conn. 520 (1871). Acquiescence of the board of directors may cure the omission of a

minutes of the company failed to disclose such authority expressly given.[1]

The same rules apply to a vice-president that apply to the president on this subject.[2]

§ 717. *Secretary and treasurer — Their power to contract for the corporation.*— The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.[3]

previous resolution as required by the charter in the issue of the bonds. Curtis *v.* Leavitt, 15 N. Y. 1 (1857), the court saying of the board (p. 49): "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of their power to dispute its validity."

[1] Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514 (1896).

[2] The vice-president of a bank may, by reason of having for a long time conducted the business of the bank, have power to assign a judgment owned by the bank. Cox *v.* Robinson, 82 Fed. Rep. 277 (1897). The vice-president may sign a corporate deed if the president refuses to do so. Smith *v.* Smith, 62 Ill. 492 (1872). The fact that a vice-president swears to a complaint does not raise a presumption that the company authorized its service. American Waterworks Co. *v.* Venner, 18 N. Y. Supp. 379 (1892). The vice-president may make an assignment for the benefit of creditors, where he is authorized "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose." Huse *v.* Ames, 104 Mo. 91 (1891). The vice-president has no power to sell the bonds of the company, even though he is a director, member of the executive committee, and one of the two persons who "run" the company. The purchasers are not *bona fide*. American L. & T. Co. *v.* St. Louis, etc. R'y, 42 Fed. Rep. 819 (1890). It may be proved that the vice-president had authority to accept a draft, although drawn by himself upon the company. Rumbough *v.* Southern Imp. Co., 106 N. C. 461 (1890). A suit is presumed to be authorized where the vice-president swears to the pleading. Lacaze *v.* Creditors, 46 La. Ann. 237 (1894). The vice-president's contracts may be ratified by the directors. Dallas *v.* Columbia, etc. Co., 158 Pa. St. 444 (1893). The vice-president may, in certain circumstances, employ counsel. Streeton *v.* Robinson, 102 Cal. 542 (1894). The vice-president has no power to sign notes. Morris *v.* Griffith, etc. Co., 69 Fed. Rep. 131 (1895). As to the powers of a vice-president, see also Missouri, etc. R'y *v.* Faulkner, 88 Tex. 649 (1895).

[3] The secretary has no power to assign the company's claims for goods sold by it. The assignee's rights are not perfected by the directors' resolution made after he sues on the account. Read *v.* Buffum, 79 Cal. 77 (1889). The secretary of a religious corporation cannot contract for paving for the corporation. Thomason *v.* Grace, etc. Church, 45 Pac. Rep. 838 (Cal., 1896). The secretary has no implied power to bind the company. Wolf *v.* Davenport, etc. R. R., 93 Iowa, 218 (1895). He cannot sell and assign its notes. Blood *v.* Marcuse, 38 Cal. 590 (1869); nor sign a draft for it, First Nat. Bank *v.* Hogan, 47 Mo. 472 (1871); nor purchase iron

The secretary, however, is one of the general managing agents, and in the discharge of his customary duties represents the corporation.[1] The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.[2]

The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation.[3]

for it, Williams *v.* Chester, etc. R. R., 15 Jur. 828 (1850); nor accept a bill of exchange, Neale *v.* Turton, 4 Bing. 149 (1827); nor bind it to pay a debt of an old company whose property it purchased upon a reorganization, American, etc. R'y *v.* Miles, 52 Ill. 174 (1869); nor rent a place for the company, Ridley *v.* Plymouth, etc. Co., 2 Exch. 711 (1848); nor accept accommodation paper, Farmers', etc. Bank *v.* Empire, etc. Co., 5 Bosw. 275 (1859); nor purchase, Kingsbridge Flour Mill Co. *v.* Plymouth, etc. Co., 2 Exch. 718 (1848). Where the assistant secretary signs a mortgage instead of the secretary, it is sufficient to prove that he was the *de facto* assistant secretary. Augusta, etc. R. R. *v.* Kittel, 52 Fed. Rep. 63 (1892).

[1] Hastings *v.* Brooklyn Life Ins. Co., 138 N. Y. 473 (1893).

[2] Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833), where the secretary was authorized to affix the corporate seal; New England, etc. Ins. Co. *v.* De Wolf, 25 Mass. 56 (1829), where the company accepted the benefits. A note signed by the corporate secretary as directed by the president, the money therefor being used by the corporation, is enforceable against it. Jansen *v.* Otto Stietz, etc. Co., 1 N. Y. Supp. 605 (1888). Although corporate notes given by the secretary to a bank are unauthorized, yet if the money was used regularly in the business of the company it is liable. Pauly *v.* Pauly, 107 Cal. 8 (1895). Where the secretary has been permitted to sell the notes of the corporation, a transfer of a note by him to a bank makes the latter a *bona fide* purchaser, the corporation being the payee. Commercial Nat. Bank *v.* Brill, 37 Neb. 626 (1893). The secretary has power to indorse the company's note for discount or sale where for a long time he has been allowed to do so. Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J., 1897).

[3] The treasurer has no power to borrow money and give the corporate note therefor, and the company is not liable where the money was paid into the corporate treasury and immediately embezzled by the treasurer. Craft *v.* South Boston R. R., 150 Mass. 207 (1889). A treasurer has no power to sign the corporate name to promissory notes unless he is expressly given that power. If the note is made payable to his own order, the purchaser of it must take notice that it was issued without authority. Chemical Nat. Bank *v.* Wagner, 20 S. W. Rep. 535 (Ky., 1892). Notes of a cattle company purporting to be signed by it through its treasurer are presumed to have been authorized. Corcoran *v.* Snow Cattle Co., 151 Mass. 74 (1890). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. Holden *v.* Metropolitan Nat. Bank, 151 Mass. 112 (1890). The treasurer cannot, upon the sale of a note held by the company, indorse the note so as to render the company liable, even though a trustee was

But if the treasurer has been accustomed to make certain contracts for the corporation, and the corporation acquiesced in them, it is bound by a new contract of that kind entered into by him.[1] It is for the jury to decide whether such a custom exists.[2] A treasurer has no power to indorse the company's note for discount or sale, but if allowed to do so for a long time such indorsements are legal.[3] If the treasurer is accus-

aware thereof, the opening of an account with the bank being unknown to the company. Columbia Bank *v.* Gospel Tabernacle, 57 N. Y. Super. Ct. 149 (1889). A treasurer has no power to issue corporate notes, and where he does so, the proceeds being used to pay his personal debt to the corporation, the notes are not binding on the company. First Nat. Bank *v.* Council Bluffs, etc. Co., 56 Hun, 412 (1890). The corporate indorsement of a note by the treasurer without authority and for accommodation does not bind the corporation. Wahlig *v.* Standard, etc. Co., 9 N. Y. Supp. 739 (1890). The treasurer has no inherent authority to indorse. Security Bank *v.* Kingsland, 5 N. Dak. 263 (1895). The treasurer has no implied power to make a corporate note. Oak, etc. Co. *v.* Foster, 7 N. M. 650 (1895). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. Usher *v.* Raymond Skate Co., 163 Mass. 1 (1895). An arbitration agreed to by the treasurer was sustained in Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218 (1896). A demand for rent may properly be made on the secretary and treasurer. State *v.* Felton, 52 N. J. L. 161 (1889). He cannot compromise or relinquish its claims, Carver Co. *v.* Manufacturers', etc. Co., 72 Mass. 214 (1856); nor sell and indorse its paper, Bradley *v.* Warren, etc. Bank, 127 Mass. 107 (1879); Holden *v.* Upton, 134 Mass. 177 (1883). *Contra*, Perkins *v.* Bradley, 24 Vt. 66 (1851); nor assume the debt of a third person, Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144 (1861); nor sell and assign a mortgage owned by the corporation, even though he uses the corporate seal. Jackson *v.* Campbell, 5 Wend. 572 (1830). He may employ an attorney to collect unpaid bills. Bristol, etc. Bank *v.* Keary, 128 Mass. 298 (1880). He cannot give a release under seal. Dedham Inst. *v.* Slack, 60 Mass. 408 (1850). He may accept money. Brown *v.* Winnissimmet Co., 93 Mass. 326 (1865). As to admissions by him, see § 726, *infra*.

[1] The treasurer has no inherent power to sign and indorse corporate notes, but long usage may constitute such authority. Page *v.* Fall River, etc. R. R., 31 Fed. Rep. 257 (1887); Lester *v.* Webb, 83 Mass. 34 (1861), where the treasurer indorsed a note; Bank of Attica *v.* Pottier, etc. Co., 1 N. Y. Supp. 483 (1888); Partridge *v.* Badger, 25 Barb. 146 (1857); Foster *v.* Ohio, etc. Co., 17 Fed. Rep. 130 (1883), where he gave a note. Where the secretary and treasurer have been accustomed to manage the entire business and make contracts, a contract entered into by them for the company is legal and enforceable. Moore *v.* H. Gaus Co., 113 Mo. 98 (1892).

[2] Foster *v.* Ohio, etc. Co., 17 Fed. Rep. 130 (1883); Fifth, etc. Bank *v.* First Nat. Bank, 48 N. J. L. 513 (1886), where the treasurer pledged securities.

[3] Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J., 1897).

tomed to act as the managing agent of the corporation he can sell its property,[1] and borrow money and give security.[2] The treasurer binds the corporation by a contract which he is expressly authorized to make.[3] The secretary and treasurer cannot even conjointly bind the corporation by their purchases of the article in which it deals;[4] nor can they borrow money for the corporation;[5] nor release the maker of a note to the corporation.[6] But if the company acquiesces in a contract made by either or both of these officers it is bound.[7] By usage the treasurer may have power to sell goods.[8] In Massachusetts it is held that the treasurer of a trading or manufacturing company

[1] Phillips *v.* Campbell, 43 N. Y. 271 (1870).

[2] Fay *v.* Noble, 66 Mass. 1 (1853); Fifth, etc. Bank *v.* First Nat. Bank, 48 N. J. L. 513 (1886).

[3] Odd Fellows *v.* Bank of Sturgis, 42 Mich. 461 (1880), where the authority was oral; Gafford *v.* American, etc. Co., 77 Iowa, 736 (1889). Funds drawn out by the treasurer on the express authority of the directors and kept apart from his funds are held by him at the risk of the corporation. Butler *v.* Duprat, 51 N. Y. Super. Ct. 77 (1884).

[4] Alexander *v.* Cauldwell, 83 N. Y. 480 (1881), where a coal company was held not liable for coal so purchased, there being no evidence that the corporation authorized it, or used it, or ratified it. *Cf.* Alexander *v.* Brown, 9 Hun, 641 (1877). The secretary and treasurer has no power to sell machinery of the company. Winsted, etc. Co. *v.* New Britain, etc. Co., 38 Atl. Rep. 310 (Conn., 1897).

[5] Adams *v.* Mills, 60 N. Y. 533 (1875).

[6] Moshannon, etc. Co. *v.* Sloan, 7 Atl. Rep. 102 (Pa., 1885).

[7] St. James's Parish *v.* Newburyport, etc. R. R., 141 Mass. 500 (1886), where the treasurer gave an obligation under seal and reported it in his reports, and a committee approved. If the company ratifies a contract made by the president and secretary, the company may compel its officers to give it the benefit of the contract. Church *v.* Sterling, 16 Conn. 388 (1844). Accepting the benefit of an insurance contract made by the secretary and president accepts the contract itself. Emmet *v.* Reed, 8 N. Y. 312 (1853). An indorsement by the secretary, with the knowledge and acquiescence of the directors, is binding. Williams *v.* Cheney, 69 Mass. 215 (1855). So, also, where he pledges bonds with their knowledge and acquiescence. Darst *v.* Gale, 83 Ill. 136 (1876). And see Durar *v.* Hudson, etc. Ins. Co., 24 N. J. L. 171 (1853), in insurance contracts; and Conover *v.* Mutual Ins. Co., 1 N. Y. 290 (1848), where he was accustomed to contract for the company; Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453 (1872); Talladega Ins. Co. *v.* Peacock, 67 Ala. 253 (1880), where the secretary was accustomed to sign notes. Where a corporation uses a wharf under a contract made by its treasurer, it is liable for the contract price. Taylor *v.* Albemarle, etc. Co., 105 N. C. 484 (1890). Taking the benefit of a piece of statuary for advertising purposes binds it to pay therefor, though the treasurer made the contract. Ellis *v.* Howe, etc. Co., 12 Daly, 78 (1880).

[8] Nashua, etc. Co. *v.* Chandler, etc. Co., 166 Mass. 419 (1896).

has implied power to execute notes in behalf of the corporation, and the *bona fide* holder of such notes may enforce them; and this rule applies to a gas-light company.[1] And in Vermont it is held that the treasurer has power to buy, where the company's letterheads direct that all correspondence be addressed to him.[2]

§ 718. *Cashier — The extent of his powers.*— The cashier of a bank has greater inherent powers than any other corporate authority excepting the board of directors. By virtue of his office he performs many and important acts for the bank. He may pledge the bank's securities;[3] and sell and assign its paper;[4] and extend the payment of a note;[5] and certify checks;[6] and may bind the bank by various other acts.[7] But a cashier cannot authorize a person to loan money to the bank, and deliver it to an agent to carry it to a distant city;[8] nor any other act

[1] Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505 (1893).

[2] Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465 (1894).

[3] Coats *v.* Donnell, 94 N. Y. 168 (1883); Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165 (1883). As to the power of the cashier to borrow money for the bank, compare Coats *v.* Donnell, 94 N. Y. 168 (1883), with Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893).

[4] Smith *v.* Lawson, 18 W. Va. 212, 227 (1881); Wild *v.* Bank, 3 Mason, 505 (1825); S. C., 29 Fed. Cas. 1215; Lafayette Bank *v.* State Bank, 4 McLean, 208 (1847); Everett *v.* United States, 6 Port. (Ala.) 166 (1837); Crocket *v.* Young, 9 Miss. 241 (1843). He may indorse paper in a private bank after banking hours. Bissell *v.* First Nat. Bank, 69 Pa. St. 415 (1871).

[5] Wakefield Bank *v.* Truesdell, 55 Barb. 602 (1864).

[6] Merchants' Bank *v.* State Bank, 10 Wall. 604 (1870); Cooke *v.* State Nat. Bank, 52 N. Y. 96 (1873). A *bona fide* holder of a certificate of indebtedness issued by him is protected. Citizens', etc. Bank *v.* Blakesley, 42 Ohio St. 645 (1885).

[7] A bank is liable for the embezzlement by a cashier of a special deposit of bonds. First Nat. Bank *v.* Dunbar, 118 Ill. 625 (1886). See also Caldwell *v.* National Mohawk Bank, 64 Barb. 333 (1869), and § 681, *supra*. He may sell assets to pay a debt, and may guarantee the priority of a mortgage. Peninsular Bank *v.* Hanmer, 14 Mich. 208 (1866). He may employ an attorney. Root *v.* Olcott, 42 Hun, 536 (1886); Potter *v.* New York Inf. Asylum, 44 Hun, 367 (1887); Western Bank *v.* Gilstrap, 45 Mo. 419 (1870), where the other officers were absent; Mumford *v.* Hawkins, 5 Denio, 355 (1848). The president and cashier are presumed to have authority to compromise a debt. Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 (1881). He may transfer stock held in pledge. Matthews *v.* Massachusetts Nat. Bank, 1 Holmes, 396 (1874); S. C., 16 Fed. Cas. 1113. A *bona fide* holder may enforce accommodation paper indorsed by him. City Bank *v.* Perkins, 29 N. Y. 554 (1864); Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312 (1859); Faneuil Hall Bank *v.* Bank of Brighton, 82 Mass. 534 (1860).

[8] In no case has the term "ordinary business" "been judicially allowed

which is not in the regular course of business.[1] A bank may borrow money, but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.[2] A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take stock in payment of a debt.[3] Where a director of a bank delivers bonds to the cashier as security for a debt, and the cashier pledges them to the bank to secure his own debt, the court will hold that the bank holds the bonds as security for the creditor's debt and not for the cashier's debt.[4] The cashier of a bank, in answering an inquiry as to the responsibility of a third person, need not disclose the fact that the bank has a mortgage on the property of such person.[5] A cashier has no right to agree that a note discounted by another bank for a company in which he is personally interested shall be charged up to his bank in case of non-payment.[6] Although a cashier does an act in excess of his powers, yet if the board of directors ratify it or accept its benefits the corporation is bound.[7]

to comprehend a contract made by a cashier, without an express delegation of power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom had been confided the power to manage its business, both ordinary and extraordinary." U. S. *v.* City Bank of Columbus, 21 How. 356 (1858).

[1] He cannot bind the bank by indorsing the bank's name as an accommodation indorser to his own note. West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557 (1877). A cashier may indorse bank paper to any one except himself. Preston *v.* Cutter, 64 N. H. 461 (1888).

[2] Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893). Although the officers of a bank have no power to borrow money from the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though express authority had been given. Armstrong *v.* Chemical Nat. Bank, 83 Fed. Rep. 556 (1897).

[3] Bank of Commerce *v.* Hart, 37 Neb. 197 (1893).

[4] Detroit, etc. Co. *v.* Third, etc. Bank, 69 N. W. Rep. 726 (Mich., 1897).

[5] First Nat. Bank *v.* Marshall, etc. Bank, 83 Fed. Rep. 725 (1897).

[6] Ft. Dearborn Nat. Bank *v.* Seymour, 73 N. W. Rep. 724 (Minn., 1898).

[7] Martin *v.* Webb, 110 U. S. 7 (1884), where the cashier had canceled a deed of trust; Payne *v.* Commercial Bank, 14 Miss. 24 (1846); Bank of Pennsylvania *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Ryan *v.* Dunlop, 17 Ill. 40 (1855), where he satisfied a mort-

§ 719. *General manager, superintendent, and general agent — Their power to contract for the corporation.*— The general manager of a corporation has no power to make and deliver the promissory note of the company;[1] nor can he indorse the company's name on commercial paper,[2] except possibly in payment

gage; Kelsey *v.* National Bank, 69 Pa. St. 426 (1871), where he offered a reward with the knowledge and acquiescence of the directors; Medomak Bank *v.* Curtis, 24 Me. 36 (1844), where the bank claimed the benefit of a contract; U. S. Bank *v.* Dandridge, 12 Wheat, 64 (1827), where a cashier's bond in possession of a bank was held to have been accepted by the bank, though no vote accepting it was to be found in its records; Bank of Lyons *v.* Demmon, Hill & D. Supp. (N. Y.) 398 (1844), where the president and secretary sold stock and agreed to purchase it if the vendee desired. He cannot assign non-negotiable paper. Barrick *v.* Austin, 21 Barb. 241 (1855). As to the power of the cashier and president together to pledge paper for an antecedent debt, see Tennessee *v.* Davis, 50 How. Pr. 447 (1874). As to the power of the cashier to take payment in other notes, etc., see Sandy River Bank *v.* Merchants', etc. Bank, 1 Biss. 146 (1857); S. C., 21 Fed. Cas. 356. A cashier has no power to agree with an indorser of a note to a bank that he shall not be liable. Thompson *v.* McKee, 5 Dak. 172 (1888); Bank of Metropolis *v.* Jones, 8 Pet. 12 (1834); Bank of U. S. *v.* Dunn, 6 Pet. 51 (1832). A person taking a note from the cashier on the latter's personal debt cannot hold the bank liable on the latter's indorsement of the note as cashier. West St. Louis Sav. Bank *v.* Shawnee, etc. Bank, 3 Dill. 403 (1874); S. C., 29 Fed. Cas. 831; S. C., 95 U. S. 557. A cashier cannot assign corporate notes to a depositor in payment of a deposit. Schneitman *v.* Noble, 75 Iowa, 120 (1888). He cannot render the charter forfeitable by taking payment on subscriptions in an illegal manner. State *v.* Commercial Bank, 14 Mass. 218 (1846). A bank may be bound by a release of its cashier upon a note signed by the cashier and several others, where the cashier pays his part of the note and erases his name from the note, and such facts become known to the board of directors. First Nat. Bank *v.* Shook, 45 S. W. Rep. 338 (Tenn., 1898).

[1] New York, etc. Mine *v.* Negaunee Bank, 39 Mich. 644 (1878), in which case the note was held not enforceable, although the general manager had often drawn drafts on the company. See *Re* Cunningham, L. R. 36 Ch. D. 532. Where a corporation and a firm are practically one and the same concern, and the same man signs for both, his signature of the corporate name to the firm obligation is binding on the corporation. National Bank, etc. *v.* John, etc. Sons, 33 S. W. Rep. 415 (Ky., 1895). A general manager is presumed to have authority to sign a corporate note. Citizens' Nat. Bank *v.* Wintler, 14 Wash. 558 (1896). The president and general manager has no implied power to issue notes. The fact that he has done so before is immaterial, where all of the directors, excepting one, were ignorant of such acts. Elwell *v.* Puget Sound, etc. R. R., 7 Wash. 487 (1893). The general manager of a telegraph company has no implied authority to make a note for it and in its name. Helena Nat. Bank *v.* Rocky, etc. Tel. Co., 51 Pac. Rep. 829 (Mont., 1898).

[2] Accommodation acceptances, accepted in the corporate name by the

of debts;[1] nor can he change the terms of a sealed contract of the corporation;[2] but he may give a note in payment of wages due;[3] and he may accept a draft.[4] There is grave doubt as to whether he may borrow money and give a lien or chattel mortgage therefor.[5] A general manager has power to borrow money

manager of the corporation without the knowledge of the directors, are not enforceable, though the manager had at times drawn notes to meet expenses. Merchants' Nat. Bank *v.* Detroit, etc. Works, 68 Mich. 620 (1888). The power of a manager to borrow money for the company by giving his own note and indorsing the company's name to it is a question for the jury. The books of the company are evidence to prove that the company received the money. The jury may decide that his authority might be "either authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution." Huntington *v.* Attrill, 118 N. Y. 365 (1890). A general manager has no power to guarantee in the corporate name the payment of a third person's note. Dobson *v.* More, 164 Ill. 110 (1896). A general manager has no inherent power to indorse the commercial paper coming to the company. The by-laws are admissible on the subject. Railway Equip. etc. Co. *v.* Lincoln Nat. Bank, 82 Hun, 8 (1894). But he may accept a draft if he is accustomed so to do. Munn *v.* Commission Co., 15 Johns. 44 (1818). And the general agent of a bank may indorse. Merchants' Bank *v.* Central Bank, 1 Ga. 418 (1846). Where there is no treasurer, the general manager or a director may sign the corporate name to negotiable paper for collection. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). Where the power to indorse notes is given by the by-laws to the president and vice-president, a general manager does not have that power, although he has drawn checks and previously indorsed two notes, but without the knowledge of the board of directors. Davis *v.* Rockingham Investment Co., 89 Va. 290 (1892).

[1] McKiernan *v.* Lusgan, 56 Cal. 61 (1880); Seeley *v.* San Jose, 59 Cal. 22 (1881).

[2] Boynton *v.* Lynn, etc. Co., 124 Mass. 197 (1878).

[3] Bates *v.* Keith, etc. Co., 48 Mass. 224 (1843).

[4] Hascall *v.* Life, etc. Assoc., 5 Hun, 151 (1875); aff'd, 66 N. Y. 616.

[5] The general agent and treasurer may borrow money and give a chattel mortgage as security. Fay *v.* Noble, 66 Mass. 1 (1853). The superintendent of a mine cannot borrow money for the company. Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531 (1872). Where a superintendent borrows money for himself, giving a lien on corporate property as security, the parties loaning the money with knowledge of these facts cannot hold the company liable. Planters', etc. Co. *v.* Olmstead, 78 Ga. 586 (1887). The well-considered case of Whitwell *v.* Warner, 20 Vt. 425 (1848), holds that the general manager cannot give a lien to secure the price of goods which he purchases; but it is held that if the company uses the goods, even without knowledge of the lien, the vendors may pursue the goods or the proceeds realized therefrom. In Leonard *v.* Burlington, etc. Assoc., 55 Iowa, 594 (1881), it is held that he may borrow money, and the company is liable if it has used the money. A superintendent's mortgage was upheld in Poole *v.* West, etc. Assoc., 30 Fed. Rep. 513 (1887).

to meet corporate bills in due course of business.[1] The president and general manager of an insolvent corporation has no power to give a preference;[2] nor can he transfer all its assets to one creditor in payment of his claim, even though the by-laws gave him entire charge of the business, subject to the approval of the board of directors.[3] A general manager may give a mortgage where he has the power to sell the property and carry on the entire business.[4]

It has been held that he may waive demand and notice of a note indorsed by the company;[5] may also employ an attorney;[6] may render the company liable for overpayment of a check by mistake of the bank;[7] may contract for the use of a patent;[8] may render the company liable for an illegal use of the word "patented;"[9] and may enter into various contracts which pertain to the regular course of his business.[10] Where the president

[1] Rosemond *v.* Northwestern, etc. Co., 62 Minn. 374 (1895).

[2] Dooley *v.* Pease, 79 Fed. Rep. 860 (1897).

[3] Hadden *v.* Linville, 38 Atl. Rep. 37 (Md., 1897).

[4] Thayer *v.* Nehalem Mill Co., 51 Pac. Rep. 202 (Oreg., 1897).

[5] Whiting *v.* Smith, etc. Co., 39 Me. 316 (1855).

[6] St. Louis, etc. R. R. *v.* Grove, 39 Kan. 731 (1888); Frost *v.* Domestic, etc. Co., 133 Mass. 563 (1882); Southgate *v.* Atlantic, etc. R. R., 61 Mo. 89 (1875). A general manager may employ an attorney. Gulf, etc. R'y *v.* James, 73 Tex. 12 (1889). The general manager may execute an appeal bond. Sarmiento *v.* Davis, etc. Co., 105 Mich. 300 (1895).

[7] Kansas, etc. Co. *v.* Central Bank, 34 Kan. 635 (1886).

[8] Eureka Co. *v.* Bailey Co., 11 Wall. 488 (1870).

[9] Tompkins *v.* Butterfield, 25 Fed. Rep. 556 (1885).

[10] Where a firm is turned into a corporation the latter may assume a contract of the former, for the purchase of lumber, by adopting it through its manager. Pratt *v.* Oshkosh Match Co., 89 Wis. 406 (1895). The president and general manager may agree that the stage company will be co-owner of a stage line with another. Calvert *v.* Idaho Stage Co., 25 Oreg. 412 (1894). A local manager of a branch store is a general manager to the extent of having power to take a lease of a store for five years. Phillips, etc. Co. *v.* Whitney, 109 Ala. 645 (1896). The general agent of a cattle-feeding company has power to buy feed. Powder River, etc. Co. *v.* Lamb, 38 Neb. 339 (1893). Although the company owes a bank money secured by mortgage, the manager and secretary may deposit the company's money and agree that it may be drawn out free from the mortgage. Merchants', etc. Bank *v.* Hervey Plow Co., 45 La. Ann. 1214 (1893). The general manager and treasurer has no power to turn over the whole property to a corporate creditor, even though he ran all the business of the company. First Nat. Bank, etc. *v.* Asheville, etc. Co., 116 N. C. 827 (1895). Where the general manager of a corporation owning a mine and reduction mill causes laborers to work in the company's mine

is also general manager and has entire charge of the business of a corporation, he may bind it by his contract to pay for pro-

and mill, and also to open a mine of his own, all without the knowledge of the company or of the employees, who supposed they were working for the company, the company is liable for their wages. Oro, etc. Co. *v.* Kaiser, 4 Colo. App. 219 (1893). A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. American, etc. Co. *v.* Maurer, 10 Atl. Rep. 762 (Pa., 1887). A contract for a corporation by its general superintendent to give a right of way to another railroad may become binding by acquiescence. Alabama, etc. R. R. *v.* South, etc. R. R., 84 Ala. 570 (1887). The president and manager of a milling company cannot purchase flour. Getty *v.* Barnes, etc. Co., 40 Kan. 281 (1888). As to insurance agents, see Insurance Co. *v.* McCain, 96 U. S. 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under a judgment. Phillips *v.* Campbell, 43 N. Y. 271 (1870). A general manager has implied power to make a time contract of employment. Stahlberger *v.* New Hartford Leather Co., 92 Hun, 245 (1895). A general manager has no power to engage an employee for five years. Camacho *v.* Hamilton, etc. Co., 2 N. Y. App. Div. 369 (1896). An executive officer having power to employ persons does not thereby have power to employ a person for life. Carney *v.* New York L. Ins. Co., 19 N. Y. App. Div. 160 (1897). The managing agent may employ a person, but not for a long time in the future. Smith *v.* Cook, etc. Assoc., 12 Daly, 304 (1884). He cannot employ a broker. Allegheny, etc. Co. *v.* Moore, 95 Pa. St. 412 (1880). The general manager of a mining company has no inherent power to contract for it for machinery. Victoria, etc. Co. *v.* Fraser, 2 Colo. App. 14 (1892). The general manager of a live-stock company has implied power to sell a part of such stock. Hamm *v.* Drew, 83 Tex. 77 (1892). Long acquiescence in a person's assuming to act for the company is the same as expressly authorizing his action. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 560 (1891). A general manager has no power to deed the company's real estate, and a purchaser other than a *bona fide* one from the vendee cannot retain the title. Allowance was made for improvements. Especially is the deed invalid where the grantee was a director. Schetter *v.* Southern, etc. Co., 19 Oreg. 192 (1890). The president and general manager of a lumber company may engage a lawyer for the season. Ceeder *v.* Loud, etc. Co., 86 Mich. 541 (1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as manager assents to the modifications, the company is bound thereby. Nichols *v.* Scranton Steel Co., 137 N. Y. 471 (1893). A general manager has no power to sell rights for a particular state, and a power of attorney which has been revoked is insufficient to be relied upon. Johnson *v.* Alabama, etc. Co., 90 Ala. 505 (1890). Where the by-laws give the general manager power to sell, he has power to sell the product for a certain space of time in the future. Robert, etc. Min. Co. *v.* Omaha, etc. Co., 16 Colo. 118 (1891). For a discussion of what constitutes the appointment of a resident gen-

moting-expenses.[1] The by-laws may give to the general manager power to carry on the business of the company.[2] Although a general manager exceeds his authority in agreeing to an arbitration, yet, if the company does not repudiate his agreement promptly, it is bound.[3] A managing director may, by a by-law, be given the powers of the board. An outside party need not inquire as to whether his appointment was validly made, and may assume that such director has the powers which the board might delegate to him.[4]

A railroad superintendent may employ a physician in cases of accident,[5] and may offer rewards for the conviction of per-

eral agent by a corporation, see Rathbun *v.* Snow, 123 N. Y. 343 (1890). A general manager has no power to employ a person on a long-time contract. Smith *v.* Co-operative, etc. Assoc., 12 Daly, 304 (1884). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. Decker *v.* Gutta Percha, etc. Co., 61 Hun, 516 (1891).

[1] Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894).

[2] Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896). A general manager authorized to "take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," may appoint a local agent and empower him to hire a barge. Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1 (1893).

[3] Central Trust Co. *v.* Ashville Land Co., 72 Fed. Rep. 361 (1896). Where a corporation allows its manager to largely control its business, it is liable on a contract made by him in the name of the company, and in the line of its business. Carrigan *v.* Port Crescent Imp. Co., 6 Wash. 590 (1893). So also as to its president and secretary. Duggan *v.* Pacific Boom Co., 6 Wash. 593 (1893). Where a party who buys a mine does not object to a lease thereof made by the superintendent without authority, but on the contrary allows the lessee to proceed and receives the rent, he thereby ratifies the lease. Bicknell *v.* Austin Min. Co., 62 Fed. Rep. 432 (1894).

[4] Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93.

[5] Pacific R. R. *v.* Thomas, 19 Kan. 257 (1877); Toledo, etc. R'y *v.* Rodrigues, 47 Ill. 188 (1868); Atlantic, etc. R. R. *v.* Reiser, 18 Kan. 458 (1877). *Contra*, Stephenson *v.* New York, etc. R. R., 2 Duer, 341 (1853); Shriver *v.* Stevens, 12 Pa. St. 258 (1849), holding that the agent of a stage line cannot. A yardmaster cannot employ a physician for the company. Marquette, etc. R. R. *v.* Taft, 28 Mich. 289 (1873). Nor an engineer. Cooper *v.* New York, etc. R. R., 6 Hun, 276 (1875). Nor a station agent. Tucker *v.* St. Louis, etc. R. R., 54 Mo. 177 (1873); Cox *v.* Midland, etc. R. R., 3 Exch. 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. Cairo, etc. R. R. *v.* Mahoney, 82 Ill. 73 (1876); Toledo, etc. R. R. *v.* Prince, 50 Ill. 26 (1869). The general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. Dale *v.* Donaldson Lumber Co., 48 Ark. 188 (1887); Wood, Railw. Law, pp. 439–444.

sons obstructing the tracks.[1] A general freight agent may agree to give rebates.[2] It has been held that a superintendent has not the powers of a general manager.[3] The superintendent may, of course, be given express powers to contract.[4] If the company ratifies the contract or accepts its benefits the contract becomes binding.[5]

§ 720. *Subordinate agents — Their power to contract.* — It is a general rule that a corporate agent, like the agent of an individual, can make only such contracts as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him. It is true, also, that the corporation may ratify and confirm a contract which an unauthorized agent has made in its name; and this ratification may be by express vote of the directors, or it may be implied by an acceptance of the benefits to the corporation. The subordinate agents of a corporation may be of great variety: tellers, engineers, stewards, station agents, local agents, freight agents, roadmasters, clerks, attorneys, and miscellaneous agents. Various decisions on their powers are given in the notes.[6]

[1] Central, etc. Co. *v.* Cheatham, 85 Ala. 292 (1888).

[2] Kansas Pac. R'y *v.* Bayles, 19 Colo. 348 (1894).

[3] Adriance *v.* Roome, 52 Barb. 399 (1868), holding that the superintendent cannot borrow money and agree to make payment in iron.

[4] Where the by-laws give the president and superintendent power to make a contract, they have power to release that contract. Directors knowing of release must act promptly if they intend to question its validity. Indianapolis, etc. Co. *v.* St. Louis, etc. R. R., 26 Fed. Rep. 140 (1886); aff'd, 120 U. S. 256. A general power authorizes the purchase of a house and the giving of a mortgage. Shaver *v.* Bear, etc. Co., 10 Cal. 396 (1858).

[5] Kickland *v.* Menasha, etc. Co., 68 Wis. 34 (1887), where the superintendent and a director took a deed and agreed to pay an extra price; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841), where he gave a mortgage and the company received the money; Lyndeborough, etc. Co. *v.* Massachusetts, etc. Co., 111 Mass. 315 (1873), where he bought glass and the directors acquiesced; Seeley *v.* San Jose, etc. Co., 59 Cal. 22 (1881), where he and the president gave a note; Goodwin *v.* Union, etc. Co., 34 N. H. 378 (1857), where he and the president employed workmen; Starr *v.* Gregory, etc. Co., 6 Mont. 485 (1887), where he accepted a mill; Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875); affirmed, 96 U. S. 640, where a loan of the bank's money was made by him and the president. Ratification cannot be by the same persons who assume power to contract. Tracy *v.* Guthrie, etc. Soc., 47 Iowa, 27 (1877).

[6] An inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock must be made of officers having authority to speak for the corporation. Browning *v.* Hinkle,

These decisions show that a corporation is bound by its agents' acts only when a partnership would be bound under similar circumstances. And in general the corporation may ratify and

48 Minn. 544 (1892). The financial agent may give notes in accordance with a corporate contract. Case Mfg. Co. *v.* Coxman, 138 U. S. 431 (1891); Wilson *v.* Kings, etc. R'y, 114 N. Y. 487 (1889). The cashier and clerk of a lumber company cannot agree to give a customer a carload of lumber in case certain other lumber is not satisfactory. Delta Lumber Co. *v.* Williams, 73 Mich. 86 (1888). The local manager of a branch bank renders it liable for his embezzlement of depositor's funds, which he induces the depositor to give to him to pay a lien of the bank on the property. Thompson *v.* Bell, 26 Eng. L. & Eq. 536 (1854). The receiving teller of a savings bank has no power to bind the bank not to pay out money deposited in one name, except upon the order of three other persons. The bank is protected in paying on the check of a person in whose name the deposit is made. Riley *v.* Albany Sav. Bank, 36 Hun, 513 (1885). A teller's certification of a check in bad faith does not bind the bank, Mussey *v.* Eagle Bank, 50 Mass. 306 (1845); unless it is in the hands of a *bona fide* indorsee. Farmers', etc. Bank *v.* Butchers', etc. Bank, 16 N. Y. 125 (1857); Farmers', etc. Bank *v.* Butchers', etc. Bank, 14 N. Y. 624 (1856). As to certification of check, see also Meads *v.* Merchants' Bank, 25 N. Y. 143 (1862); Cooke *v.* State, etc. Bank, 52 N. Y. 96 (1873); in the latter case the certification being by the cashier. Where a depositor sends deposits by the bank's book-keeper without the bank-book, the bank is not liable for the book-keeper's fraud. Manhattan Co. *v.* Lydig, 4 Johns. 377 (1809). A teller may receive a special deposit of valuables. Patterson *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880). It may be a question for the jury as to whether the foreman of the works of a foreign corporation may employ workmen on long time. Tunison *v.* Detroit, etc. Co., 73 Mich. 452 (1889). Where a bank owning railroad bonds allows its agent to exchange them for stock in a reorganized company, it is bound. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky., 1890). A caterer may hold a club responsible for food, etc., furnished to its guests under the authorized contract of the house committee. Deller *v.* Staten Island, etc. Club, 9 N. Y. Supp. 876 (1890).

The following decisions are concerning railroad agents: The engineer of a railroad company may have authority to modify a construction contract or enter into a new contract. Henderson Bridge Co. *v.* McGrath, 134 U. S. 260 (1890). The civil engineer of a railroad cannot employ a station agent. Willis *v.* Toledo, etc. R'y, 72 Mich. 160 (1888). The engineers of a railroad company cannot bind it to an agreement to pay the construction contractors extra pay. Woodruff *v.* Rochester, etc. R. R., 108 N. Y. 39 (1888). The construction engineer of a railroad has no power to vary the construction contract. Campbell *v.* Cincinnati Southern R'y, 6 S. W. Rep. 337 (Ky., 1888). A person whom the railroad holds out as the general freight agent of the company may bind it by his contracts relative to freight. Baker *v.* Kansas City, etc. R. R., 91 Mo. 152 (1887). A roadmaster of a railway has power to purchase such material as he uses, and the company is liable therefor where the material has been used. Walker *v.* Wilmington, etc. R. R., 26 S. C. 80 (1887). A station agent may contract that goods will

adopt the unauthorized acts of an agent.[1] There are no arbitrary rules as to the mode of making a corporate contract. A contract may be inferred from corporate acts and customs with-

be delivered at a certain time. Blodgett *v.* Abbot, 72 Wis. 516 (1888). See also Wood, Railw. Law, pp. 444–454.

The following decisions concern miscellaneous agents and powers: An agent with power to give and indorse notes may waive notice of protest, etc. Whitney *v.* South, etc. Co., 39 Me. 316 (1855). A resident agent of a mining company has no implied authority to borrow money on account of the corporation to pay arrears of wages due the workmen in the mines. Hawtayne *v.* Bourne, 7 M. & W. 595 (1841). An agent attending to the daily routine of the business of a corporation cannot create a general lien upon its property to secure a creditor, unless by the approval of the board of directors. Whitewell *v.* Warner, 20 Vt. 425 (1848). An agent employed to promote the interests of a corporation in every way has no authority to purchase land for it. Bocock *v.* Alleghany, etc. Co., 82 Va. 913 (1887). Where a corporation agent buys land for the company at a certain price, and agrees that the company will pay also the vendor one-half of its profits upon sale of said land, the company is bound by this latter parol agreement. Kickland *v.* Menasha, etc. Co., 68 Wis. 34 (1887). Persons expending money for a corporation under the direction of authorized corporate officers may hold the corporation liable. Topeka, etc. Assoc. *v.* Martin, 39 Kan. 750 (1888). An agent of a lumber company cannot pay debts due the company by boarding them out. St. John, etc. Co. *v.* Cornwell, 52 Kan. 712 (1894). A sewing-machine company's agent to sell machines has no power to trade the company's horse, but ratification suffices. Singer Mfg. Co. *v.* Belgart, 84 Ala. 519 (1888). Acts of local insurance agents appointed

[1] Essex Turnp. Co. *v.* Collins, 8 Mass. 292 (1811); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 403 (1813); White *v.* Westport Cotton Mfg. Co., 18 Mass. 220 (1822); Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Peterson *v.* New York, 17 N. Y. 449 (1858); Canal Bridge *v.* Gordon, 18 Mass. 297 (1823); Baker *v.* Cotter, 45 Me. 236 (1858); Bennett *v.* Maryland F. Ins. Co., 14 Blatchf. 422 (1878); S. C., 3 Fed. Cas. 229; Church *v.* Sterling, 16 Conn. 388 (1844); Pennsylvania Bank *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Hayward *v.* Pilgrim Soc., 38 Mass. 270 (1838); Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841); Planters' Bank *v.* Sharp, 4 Sm. & M. (Miss.) 75 (1844); Burrill *v.* Nahant Bank, 43 Mass. 167 (1841); Fox *v.* Northern Liberties, 3 Watts & S. (Pa.) 103 (1841); New Hope, etc. Co. *v.* Phenix Bank, 3 Comst. 156 (1850); Alabama, etc. R. R. *v.* Kidd, 29 Ala. 221 (1856); Everett *v.* U. S., 6 Port. (Ala.) 166 (1837); Medomak Bank *v.* Curtis, 24 Me. 38 (1844); Whitwell *v.* Warner, 20 Vt. 425 (1848); Trott *v.* Warren, 11 Me. 227 (1834); Detroit *v.* Jackson, 1 Doug. (Mich.) 106 (1842); Merchants' Bank *v.* Central Bank, 1 Ga. 428 (1846); Hoyt *v.* Bridgewater Copper Co., 6 N. J. Eq. 253 (1847); Durar *v.* Hudson, etc. Ins. Co., 24 N. J. L. 171 (1853); Moss *v.* Rossie Lead Co., 5 Hill, 137 (1843); Brown *v.* Winnissimmet Co., 93 Mass. 326 (1865); Sherman *v.* Fitch, 98 Mass. 59 (1867); Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315 (1873); Moss *v.* Averell, 6 Seld. 449 (1853); Olcott *v.* Tioga R. R., 27 N. Y. 546 (1863); Shaver *v.* Bear River, etc. Co., 10 Cal. 396 (1858).

out a vote or formal act.[1] It is not necessary that such assent and acceptance be under seal or in writing or be spread

by the general agent of a foreign insurance company are binding on such company, such acts being within the express powers given him by the general agent therein to solicit or take insurance. Kuney *v.* Amazon Ins. Co., 36 Hun, 66 (1885). In Rice *v.* Peninsular Club, 52 Mich. 87 (1883), Cooley, J., said: "A party dealing with the agent of a corporation must at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority." The club is not liable for the steward's purchases. The powers of an agent appointed for a special purpose cease when the object of his appointment is accomplished. Seton *v.* Slade, 7 Ves. 265, 276 (1802). A subordinate agent cannot employ an attorney for the company. Maupin *v.* Virginia, etc. Co., 78 Mo. 24 (1883). Nor can he make the corporation liable for the debt of another. Rehm *v.* King, etc. Co., 16 Kan. 277 (1876). Nor make a note for the company. Benedict *v.* Lansing, 5 Denio, 283 (1848). If the purchaser of corporate bonds knows that the agent is selling for his own purposes he is not protected. Chew *v.* Henrietta, etc. Co., 2 Fed. Rep. 5 (1880). Secret instructions to a general insurance agent do not bind a person dealing with him. Insurance Co. *v.* McCain, 96 U. S. 84 (1877). So also as to a cashier. Merchants' Bank *v.* State Bank, 10 Wall. 604, 650 (1870). A grantor to a corporation cannot deny the authority of the corporate agent to accept the deed. Case *v.* Benedict, 63 Mass. 540 (1852). An agent who is accustomed to contract for the company may bind it. Christian University *v.* Jordan, 29 Mo. 68 (1859); Mead *v.* Keiler, 24 Barb. 20 (1857). Acceptance of services known to officers binds the company. Lee *v.* Pittsburgh, etc. Co., 66 How. Pr. 375 (1877). But the use of a building has been held not to constitute an acceptance of debts incurred in building it. Ruby *v.* Abyssinian Soc., 15 Me. 306 (1839). Use of goods with knowledge is acceptance. Smith *v.* Hull Glass Co., 11 C. B. 897, 925 (1852); S. C., 8 C. B. 668 (1849). Even if the agent gave a note which is not binding. Emerson *v.* Providence, etc. Co., 12 Mass. 237 (1815). Acceptance is presumed where a written statement is placed before a directors' meeting. State Bank *v.* Comegys, 12 Ala. 772 (1848). Satisfaction by subsequent officers is good. Chouteau *v.* Allen,

[1] Bank of Columbia *v.* Patterson, 7 Cranch, 299, 306 (1813); Randall *v.* Van Vechten, 19 Johns. 60, 65 (1821); Haight *v.* Sahler, 30 Barb. 218 (1859); Canal Bridge *v.* Gordon, 18 Mass. 296 (1823); Dunn *v.* St. Andrew's Ch., 14 Johns. 118 (1817); Mendham *v.* Losey, 2 N. J. L. 252 (1808); Saddle River *v.* Colfax, 6 N. J. Eq. 115 (1821); Antipæda Bapt. Ch. *v.* Mulford, 8 N. J. L. 182 (1825); Powell *v.* Newburgh, 19 Johns. 284 (1821); Chestnut Hill Turnp. *v.* Rutter, 4 Serg. & R. 6 (1818); American Ins. Co. *v.* Oakley, 9 Paige, 496 (1842); Fister *v.* La Rue, 15 Barb. 323 (1853), where a contract was inferred from the acts of the corporate officers; Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Witte *v.* Derby Fishing Co., 2 Conn. 260 (1817); Petrie *v.* Wright, 6 Sm. & M. (Miss.) 647 (1846); Lime Rock Bank *v.* Macomber, 29 Me. 564 (1849); Bank of Metropolis *v.* Guttschlick, 14 Pet. 19 (1840) (contract inferred from acts of officers); New York, etc. R. R. *v.* New York, 1 Hilt. 587 (1858); Wood, Railw. Law, pp. 454–457.

upon the records.[1] The acceptance of the consideration of an unauthorized contract by the corporation, however, without knowledge of the terms of the contract or of the account upon which it is paid, is not in itself a ratification of the contract.[2]

B. THE FORM OF CORPORATE CONTRACTS — THE CORPORATE SEAL IS NECESSARY ONLY WHEN THE SAME INSTRUMENT BY AN INDIVIDUAL MUST BE UNDER SEAL — FORMS OF THE BODY OF THE CONTRACT; ALSO THE METHOD OF SIGNING AND SEALING — LIABILITY OF OFFICERS AND AGENTS ON CORPORATE CONTRACTS WHICH ARE INFORMALLY EXECUTED.

§ 721. *The corporate seal need not be attached to a corporate contract unless a similar contract, when made by an individual, would require a seal.*— This is now the well-established rule, although formerly it was supposed that a corporation could

70 Mo. 290 (1879). If an agent with authority to give a note embezzles the funds the company is liable. Bird *v.* Daggett, 97 Mass. 494 (1867). A suit on a note is a ratification of its execution. Planters' Bank *v.* Sharp, 12 Miss. 75 (1844). An actuary of a bank, who is accustomed so to do, may give the note of the bank, especially where the directors acquiesce. Creswell *v.* Lanahan, 101 U. S. 347 (1879). As to insurance agents, see Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825). Knowledge of the president of drafts by an agent, and acquiescence therein, binds the company. Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). See § 727, *infra*, on notice; also Lindley, Companies, p. 159, etc. An agent's authority to act for a corporation is not terminated by the fact that the members of the board of directors or other body which appointed have gone out of office by the expiration of their terms or by removal. Anderson *v.* Longden, 1 Wheat. 85 (1816); Brown *v.* Somerset, 11 Mass. 221 (1814); Northampton Bank *v.* Pepoon, 11 Mass. 294 (1814); Dedham Bank *v.* Chickering, 20 Mass. 335 (1825); Exeter Bank *v.* Rodgers, 7 N. H. 21, 33 (1834); Thompson *v.* Young, 2 Ohio, 334 (1825). It has been held that a mortgage of corporate property which is illegal for want of authority may be rendered valid by subsequent ratification by acts of the legislature. White Water, etc. Canal Co. *v.* Vallette, 21 How. 414 (1858); Shepley *v.* Atlantic, etc. R. R., 55 Me. 395 (1868); Richards *v.* Merrimack, etc. R. R., 44 N. H. 127 (1862), where an act authorizing the trustees of a mortgage to sell the

[1] Dedham Bank *v.* Chickering, 20 Mass. 335 (1825); Union Bank *v.* Ridgeley, 1 Har. & G. (Md.) 324 (1827); Burgess *v.* Pue, 2 Gill (Md.), 11 (1844); Apthorp *v.* North, 14 Mass. 167 (1817); Smith *v.* Bank of Scotland, 1 Dow. P. C. 272 (1841); Monumoi Great Beach *v.* Rogers, 1 Mass. 159 (1804); Amherst Bank *v.* Root, 43 Mass. 522. 533 (1841); Western R. R. *v.* Babcock, 47 Mass. 346 (1843), and the many cases *supra*. See also § 714, *supra*.

[2] Pennsylvania Co. *v.* Dandridge, 8 Gill & J. (Md.) 248 (1836); Christian University *v.* Jordan, 29 Mo. 68 (1859); Hilliard *v.* Goold, 34 N. H. 230 (1856), and cases *supra*.

not enter into a contract except by attaching the corporate seal to a written statement of that contract.[1]

It is settled law that it is not necessary to use a seal in appoint-

mortgaged property was held to be a ratification; Shaw *v.* Norfolk County R. R., 71 Mass. 162 (1855); Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875), where bonds signed by the treasurer instead of the secretary were held ratified by a subsequent act referring to them as "now a valid lien on said property." Power to act as agent of the corporation may be conferred by a general resolution. Elwell *v.* Dodge, 33 Barb. 336 (1861).

[1] A corporate contract need not be in writing nor under the corporate seal. Leinkauf *v.* Calman, 110 N. Y. 50 (1888). A corporation need not necessarily have or use a seal in making its contracts. Muscatine Water Co. *v.* Muscatine Lumber Co., 85 Iowa, 112 (1892). "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorizes it to contract in another mode, has been broken in upon, and, indeed, entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from the acts of its agents as if it had been an individual;" citing many cases. Davenport *v.* Peoria, etc. Co., 17 Iowa, 276 (1864). See also Bank of U. S. *v.* Dandridge, 12 Wheat. 64 (1827); Gottfried *v.* Miller, 104 U. S. 521 (1881); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Hoag *v.* Lamont, 60 N. Y. 96 (1875); McCullough *v.* Talladega Ins. Co., 46 Ala. 376 (1871); Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291 (1881); Racine, etc. R. R. *v.* Farmers' Loan & T. Co., 49 Ill. 331 (1868); Bulkley *v.* Briggs, 30 Mo. 452 (1860); New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 535 (1865); Hamilton *v.* Lycoming Ins. Co., 5 Pa. St. 339 (1847); Muir *v.* Louisville, etc. Canal Co., 8 Dana (Ky.), 161 (1839); Henning *v.* U. S. Ins. Co., 47 Mo. 425 (1871); Salem Bank *v.* Gloucester, 17 Mass. 1 (1820); Gloucester Bank *v.* Salem Bank, 17 Mass. 33 (1820); Foster *v.* Essex Bank, 17 Mass. 479 (1821); Smith *v.* Lowell Meeting-house, 25 Mass. 178 (1829); Limerick Academy *v.* Davis, 11 Mass. 113 (1814); Farmington Academy *v.* Allen, 14 Mass. 172 (1817); Amherst Academy *v.* Cowels, 23 Mass. 427 (1828); Kennedy *v.* Baltimore Ins. Co., 3 Har. & J. (Md.) 367 (1813); Stone *v.* Berkshire, etc. Soc., 14 Vt. 86 (1842); Episcopal, etc. Soc. *v.* Needham, etc. Church, 18 Mass. 372 (1823); Banks *v.* Poitiaux, 3 Rand. (Va.) 136 (1825); Bank of Columbia *v.* Patterson, 7 Cranch, 299 (1813); Randall *v.* Van Vechten, 19 Johns. 60 (1821); Gooday *v.* Colchester R'y, 17 Beav. 132 (1852); Magill *v.* Kauffman, 4 Serg. & R. 317 (1818); Dunn *v.* St. Andrew's Church, 14 Johns. 118 (1817); Waller *v.* Bank of Kentucky, 3 J. J. Marsh. (Ky.) 201 (1830); Western, etc. Co. *v.* First Nat. Bank, 47 Pac. Rep. 721 (N. M., 1897); Grubbs *v.* National, etc. Ins. Co., 27 S. E. Rep. 464 (Va., 1897). Crawford *v.* Longstreet, 43 N. J. L. 325 (1881), held that, to bind a corporation under a lease for years, execution under its corporate seal is not necessary. See also, in general, Moss *v.* Averill, 10 N. Y. 449 (1853). The corporate seal to a note is superfluous. St. James's Parish *v.* Newburyport, etc. R. R., 141 Mass.

ing agents or entering into ordinary contracts for the corporation.[1] The supreme court of Illinois says, "the rule now is that a corporation may bind itself, in a matter within its char-

500 (1886). On this point, see also § 761, *infra*. The word "seal," following the name of the corporation on an insurance policy, does not prevent the suit being in assumpsit. Grubbs *v.* National, etc. Ins. Co., 27 S. E. Rep. 464 (Va., 1897). *Contra*, Benoist *v.* Carondelet, 8 Mo. 250 (1843); Clark *v.* Farmers', etc. Co., 14 Wend. 256 (1836). See § 761, *infra*. So also as to other contracts. It is considered to be the company's signature. Levering *v.* Mayor, etc., 7 Humph. (Tenn.) 553 (1847). See also § 722, *infra*. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841), a chattel mortgage. The officers' seal to the contract may be disregarded. Bank, etc. *v.* Guttschlick, 14 Pet. 19 (1840); Eureka Co. *v.* Bailey Co., 11 Wall. 488 (1870); Dubois *v.* Delaware, etc. Co., 4 Wend. 285 (1830).

[1] Pennsylvania R. R. *v.* Vandiver, 42 Pa. St. 365. 369 (1862); Bank of Columbia *v.* Patterson, 7 Cranch. 299 (1813); Lathrop *v.* Commercial Bank, 8 Dana (Ky.), 114 (1839); Buncombe Turnp. Co. *v.* McCarson, 1 Dev. & B. 310 (1835), holding that an appointment need not be under the corporate seal; Bates *v.* Bank of Alabama, 2 Ala. 452 (1841), where the appointment of an agent was by vote of the corporation; Maine Stage Co. *v.* Longley, 14 Me. 444 (1837), holding that the fact of agency may be proved by parol. See also Union Mfg. Co. *v.* Pitkin, 14 Conn. 174 (1841); State Bank *v.* Bell, 5 Blackf. (Ind.) 127 (1839); Brookville Ins. Co. *v.* Records, 5 Blackf. (Ind.) 170 (1839); Bridgeton *v.* Bennett, 23 Me. 420 (1844), retaining an attorney proved by his statement; Randall *v.* Van Vechten, 19 Johns. 60 (1821); Antipæda Bapt. Ch. *v.* Mulford, 8 N. J. L. 182 (1825); Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825); Lathrop *v.* Scioto Bank, 8 Dana (Ky.), 115 (1839); New Haven Sav. Bank *v.* Davis, 8 Conn. 191 (1830), vote of directors without evidence under seal; Bank of Columbia *v.* Patterson, 7 Cranch, 299 (1813); Andover Turnp. Co. *v.* Hay, 7 Mass. 102 (1810); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 397 (1813); Essex Turnp. *v.* Collins, 8 Mass. 292 (1811); Wright *v.* Lanckton, 36 Mass. 288 (1837); Bancroft *v.* Wilmington, etc., 5 Houst. (Del.) 577 (1876); Dunn *v.* St. Andrew's Church, 14 Johns. 118 (1817); Union Bank *v.* Ridgley, 1 Har. & G. (Md.) 324 (1827); Kennedy *v.* Baltimore Ins. Co., 3 Har. & J. (Md.) 367 (1813); Garrison *v.* Coombs, 7 J. J. Marsh. (Ky.) 85 (1831); Legrand *v.* Hampden-Sidney College, 5 Munf. (Va.) 324 (1817); Bates *v.* Alabama Bank, 2 Ala. 451 (1841); Stamford Bank *v.* Benedict, 15 Conn. 437, 445 (1843); Detroit *v.* Jackson, 1 Doug. (Mich.) 106 (1843); St. Andrew's Bay Land Co. *v.* Mitchell, 4 Fla. 192 (1851); Topping *v.* Bickford, 86 Mass. 120 (1862). Parol evidence may prove the creation of a debt by the company. Borland *v.* Haven, 37 Fed. Rep. 394 (1888). An appeal bond given by a corporation may be signed without the corporate seal. Campbell *v.* Pope, 96 Mo. 468 (1888). Corporations may enter into contracts through agents duly authorized, and such contracts may be by writing not under seal or by parol, as though made by natural persons. See § 714, *supra;* also American Ins. Co. *v.* Oakley, 9 Paige, 496 (1842); Watson *v.* Bennett, 12 Barb. 196 (1851); Hamilton *v.* Lycoming Ins. Co., 5 Pa. St. 344 (1847); Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 413 (1827); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 401 (1813); Shotwell *v.* McKown, 5

ter powers, by a writing not under seal to the same extent as an individual may."[1] The corporate seal must be used in deeds and other instruments which would require a seal if they were the deeds or instruments of individuals.[2]

Hence the law is that a corporation may become bound by a contract which is executed in any of the following ways: by a written instrument sealed with the corporate seal, and either with or without the corporate name signed thereto;[3] by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors;[4] by an unwritten resolution of its directors;[5] by the oral agreements of its authorized agents;[6] or by ratifying, acquiescing in, or accepting the benefits of contracts made in its name by unauthorized agents.[7]

N. J. L. 828 (1820); and an agent is not personally liable on a note signed by him as agent. Merrick *v.* Burlington, etc. P. R. Co., 11 Iowa, 74 (1860), a verbal contract made by an agent; Buckley *v.* Briggs, 30 Mo. 452 (1860); Dunn *v.* St. Andrew's Church, 14 Johns. 118 (1817). In England a contrary rule has been upheld. Homersham *v.* Wolverhampton Waterworks, 6 Exch. 137 (1851); Diggle *v.* London R'y, 5 Exch. 442 (1850); Copper Miners *v.* Fox, 16 Q. B. 229 (1851); Clark *v.* Cuckfield Union, 11 Eng. L. & Eq. 442 (1852), citing and reviewing other authorities. In England, by statute 8 & 9 Vict., c. 16, sec. 97, directors may contract by parol on behalf of a corporation where private persons may make a valid parol contract. See also Pauling *v.* London, etc. R'y, 8 Exch. 868 (1853). *Cf.* Crampton *v.* Varna R'y, L. R. 7 Ch. 562 (1872). After a contract for necessary work or goods is executed by the other party, and accepted by the corporation, it must pay for the same notwithstanding the irregularity. Clark *v.* Cuckfield Union, 11 Eng. L. & Eq. 442 (1852); Doe *v.* Tainere, 12 Q. B. 1011 (1848). *Cf.* Lindley, Companies, p. 220, etc.

[1] Green Co. *v.* Blodgett, 159 Ill. 169 (1895).

[2] See § 722, *infra;* Stinchfield *v.* Little, 1 Me. 231 (1821); New Haven Sav. Bank *v.* Davis, 8 Conn. 191 (1830); Hatch *v.* Barr, 1 Ohio, 390 (1824); Brinley *v.* Mann, 56 Mass. 337 (1848); Kinzie *v.* Chicago, 3 Ill. 187 (1839), in which it is also held that the mode of executing an instrument by a corporation "is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signature of the president and secretary of the corporation." Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862). The corporate seal must be attached to a deed in order to make it a deed. Allen *v.* Brown, 50 Pac. Rep. 505 (Kan., 1897).

[3] See § 722, *infra.*

[4] See § 714, *supra.*

[5] See § 714, *supra.*

[6] See §§ 716–720, *supra,* relative to the inherent powers of the president and various other corporate agents to contract. A parol contract with a corporation may be proved although the director with whom it was made is dead. South Baltimore Co. *v.* Muhlbach, 69 Md. 395 (1888).

[7] See §§ 716–720, *supra.*

§ 722. *Method of drafting, signing, sealing, and acknowledging a corporate deed or contract.*— A deed or contract of a corporation should be drawn so that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals, or acknowledges it.[1] The name of the corporation should be signed to the instrument, and this should be followed by the word "by" and by the name of the officer or person who makes the signature.[2]

[1] A mortgage made in the president's name, signed by him, and sealed with his own seal, is not a mortgage although authorized by the corporation. It operates, however, as an equitable mortgage as regards subsequent mortgagees with notice. Miller *v.* Rutland, etc. R. R., 36 Vt. 452 (1863). See Hatch *v.* Barr, 1 Ohio, 180 (1823), and § 810, *infra*. A corporate chattel mortgage is good if it runs in the corporate name, even though the president signs only his own name. Sherman *v.* Fitch, 98 Mass. 59 (1867); Hamilton *v.* McLaughlin, 145 Mass. 20 (1887). If so drawn it is immaterial as to who signs or seals. Wiley *v.* Board of Education, 11 Minn. 371 (1866), involving a bond. If the statute authorizes the trustees to convey, their personal deed suffices. De Zeng *v.* Beekman, 2 Hill, 489 (1842). Where the president has title in his name he may convey as president. Vilas *v.* Reynolds, 6 Wis. 214 (1858). A deed made before incorporation, to be delivered to the corporation after incorporation, is good. Spring, etc. Bank *v.* Hurlings, etc. Co., 32 W. Va. 357 (1889). A deed to the "trustees of the First Baptist Church" passes title to the corporation. Keith, etc. Co. *v.* Bingham, 97 Mo. 196 (1888). Although the body of the deed reads, "the president, directors, etc., of," followed by the name of the corporation as grantor, the deed should be construed as the deed of the corporation. Shaffer *v.* Hahn, 111 N. C. 1 (1892). The contract is signed sufficiently to satisfy the statute of frauds where the name of the corporation appears in the body of the instrument. Tingley *v.* Bellingham, etc. Co., 5 Wash. St. 644 (1893). Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. Brown *v.* Farmers' Supply Co., 23 Oreg. 541 (1893). A deed of a corporation not under seal is not a deed and is void. Danville Seminary *v.* Mott, 136 Ill. 289 (1891). The corporate seal must be used in the conveyance of corporate real estate in Texas. Shropshire *v.* Behrens, 77 Tex. 275 (1890). A corporation may by its charter be given the power to act as an attorney in fact, and it may execute a deed as such attorney. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351 (1890). See also note 2, p. 1535.

[2] Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836). The indorsement of a note by signing the corporate name, without adding by whom the name is signed, is good. Second Nat. Bank *v.* Martin, 82 Iowa, 442 (1891). A deed of corporate land properly drawn in the body of the deed, sealed with the corporate seal, and properly acknowledged, but signed "M. Bray-

The courts will hold any device or form to be the corporate seal if there was an intent to bind the corporation, and if the device was intended for the corporate seal.[1]

man, President, C. & F. R. R. Co.," etc., is nevertheless good. Chouteau *v.* Allen, 70 Mo. 290 (1879). *Cf.* Taylor *v.* Agricultural, etc. Assoc., 68 Ala. 229 (1880). A corporate mortgage signed by the officers with their own names, followed by their titles and scrolls for seals, is good. Johnston *v.* Crawley, 25 Ga. 316 (1858). A lease running to the company is good though only its officers' names were signed. Clark *v.* Gordon, 121 Mass. 330 (1876); Carroll *v.* St. Johns, etc., 125 Mass. 565 (1878). A sealed instrument to pay money, signed by an individual's name, followed by the words "President of the New York Banking Company," is enforceable against it. Boisgerard *v.* New York Banking Co., 2 Sandf. 23 (1844).

[1] Where a lease recites that it is given under the corporate seal, "in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether a mark or character shall be held to be a seal depends upon the intention of the executant as shown by the paper." Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514 (1896). Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. Rusling *v.* Union, etc. Co., 5 N. Y. App. Div. 448 (1896); Christie *v.* Gage, 2 Thomp. & C. 344 (1873), where the private seals of trustees of a church were held to be the corporate seal to a deed of its property. To same effect, Johnston *v.* Crawley, 25 Ga. 316 (1858); Porter *v.* Androscoggin R. R., 37 Me. 349 (1853); Taylor *v.* Heggie, 83 N. C. 244 (1880). *Cf.* Saxton *v.* Texas, etc. R. R., 4 N. M. 201 (1888); South Baptist Church *v.* Clapp, 18 Barb. 35 (1853); Tenney *v.* Lumber Co., 43 N. H. 350 (1861). See also Ransom *v.* Stonington, etc. Bank, 13 N. J. Eq. 212 (1860); Mill-dam Foundery *v.* Hovey, 38 Mass. 417 (1839); Stebbins *v.* Merritt, 64 Mass. 27 (1852); Sherman *v.* Fitch, 98 Mass. 59 (1867); McDaniels *v.* Flower, etc. Co., 22 Vt. 274 (1850); Benbow *v.* Cook, 115 N. C. 324 (1894); Woodman *v.* York, etc. R. R., 50 Me. 549 (1861), where an imprint in red ink upon bonds was held valid; Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant, Ch. (U. C.) 551 (1871), where simple wafer seals used by corporations in executing a deed were held sufficient in the absence of evidence that they were not their proper corporate seals; Hamilton *v.* Dennis, 12 Grant, Ch. (U. C.) 325 (1866), in which a ribbon woven through slits in the paper, so as to appear at intervals opposite the signatures, was held sufficient; Bates *v.* New York Central R. R., 92 Mass. 251 (1865), where, however, it was held that a fac-simile printed in ink when the blank instrument was printed is a mere scroll and not a valid seal. The fac-simile of the seal of a corporation printed on a blank form is not the corporate seal. McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254 (1894). A seal printed on the instrument is not good. The company cannot object to a seal which it uses. Haven *v.* Grand Junction, etc. Co., 94 Mass. 337 (1866). *Cf.* Royal Bank *v.* Junction, etc. R. R., 100 Mass. 444 (1868), in which a seal printed upon bonds by direction of the officers of a corporation after they had been otherwise executed, and which pur-

It is no longer necessary that the impression of a corporate seal shall be made upon wax or other adhesive substance — an impression upon the paper itself being held sufficient.[1] It is not necessary that express authority, or authority under seal, be given to an officer or agent to affix the corporate seal to an instrument; such powers may be inferred from the general powers of the officer or agent, the usual course of business, and similar circumstances.[2]

ported to bear the corporate seal, was held valid. *Contra*, Mitchell *v.* Union, etc. Co., 45 Me. 104 (1858). The corporation may have several seals. Bank of Middlebury *v.* Rutland, etc. R. R., 30 Vt. 159 (1858), and cases *supra*. An official may, while out of the state, cause a new seal to be made and attach it to bonds of the corporation out of the state. Lynde *v.* Winnebago County, 16 Wall. 6 (1872). A blank wafer will do for a seal. Brinley *v.* Mann, 56 Mass. 337 (1848). A scroll has been held good. Kansas City *v.* Hannibal, etc. R. R., 77 Mo. 180 (1882). A scroll may be a sufficient seal even though the corporation has a regular seal. Thayer *v.* Nehalem Mill Co., 51 Pac. Rep. 202 (Oreg., 1897). *Contra*, Hendee *v.* Pinkerton, 96 Mass. 381 (1867). A scroll will do for the corporate seal on an appeal bond. Sarmiento *v.* Davis, etc. Co., 105 Mich. 300 (1895). The word "seal," following the name of a president, is not a sufficient corporate seal in a deed. Caldwell *v.* Morganton Mfg. Co., 28 S. E. Rep. 475 (N. C., 1897). The use of a seal may be a sufficient adoption of it as the corporate seal. Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). Any seal is presumed to be the corporate seal, the signature of the agent executing the instrument being proved. Pennsylvania Nat. Gas Co. *v.* Cook, 123 Pa. St. 170 (1889). Where a deed is executed by the president and secretary under their private seals, there is a flaw in the title to the land. McCroskey *v.* Ladd, 28 Pac. Rep. 216 (Cal., 1891).

[1] Hendee *v.* Pinkerton, 96 Mass. 381 (1867), holding that a distinct and visible impression of a corporate seal upon and into the substance of the paper is sufficient and valid; Pillow *v.* Roberts, 13 How. 472 (1851); Allen *v.* Sullivan, etc. R. R., 32 N. H. 446 (1855); Corrigan *v.* Trenton, etc. Co., 5 N. J. Eq. 52 (1845). But see, *contra*, Farmers', etc. Bank *v.* Haight, 3 Hill, 493 (1842).

[2] Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873); Merchants' Bank *v.* Goddin, 76 Va. 503 (1882); Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Berks, etc. R. R. *v.* Myers, 6 Serg. & R. (Pa.) 12 (1820), holding that the question of authority to affix a corporate seal is for the jury; Haven *v.* Adams, 86 Mass. 80 (1862); Gordon *v.* Preston, 1 Watts (Pa.), 385 (1833), saying that power to affix a seal carries with it the power to acknowledge the execution of the instrument. See, however, Hoyt *v.* Thompson, 5 N. Y. 320 (1851), holding that the usual duties and powers of the president and cashier of a bank are not such as will justify them in affixing its corporate seal without express authority from the directors. A corporate officer may execute a mortgage for it without being authorized under the corporate seal. A mere resolution suffices. Hopkins *v.* Gallatin, etc. Co., 4 Humph. (Tenn.) 403 (1843); Fitch *v.* Lewiston, etc. Co., 80 Me. 34 (1888); New Haven Sav. Bank

The mere affixing of the corporate seal is of itself sufficient execution of a contract or deed, when properly affixed by a person duly authorized, and no signature at all need be made or used.[1]

If an instrument or contract appears to be signed by the proper officer and the corporate seal appears to be affixed, the courts will presume that the seal is the corporate seal and was affixed by proper authority, and that the execution was duly

v. Davis, 8 Conn. 191 (1830); Howe *v.* Keiler, 27 Conn. 538 (1858); Hutchins *v.* Bynum, 75 Mass. 367 (1857); Beckwith *v.* Windsor, 14 Conn. 594 (1842). Members of the board of directors may affix the corporate seal to a mortgage and acknowledge the execution. Gordon *v.* Preston, 1 Watts (Pa.), 385 (1833). An employee may be directed to affix the seal. Royal Bank *v.* Grand, etc. R. R., 100 Mass. 445 (1868), where it was affixed by the printer.

[1] Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872); Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836). Affixing the corporate seal is the regular mode of executing a corporate mortgage. Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878); Whiting *v.* Union Trust Co., 65 N. Y. 576 (1875), where authority was given to the secretary to sign an instrument, and it was held that signature by the treasurer did not render it invalid, since the seal of the corporation was sufficient execution; McDaniels *v.* Flower, etc. Co., 22 Vt. 274 (1850); Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884), holding that a deed concluding "in witness whereof the said corporation has caused this indenture to be signed by the president and attested by its secretary, and its common seal to be affixed," signed "G. C. W., President," with the seal affixed, is a valid common-law deed; Shewalter *v.* Pirner, 55 Mo. 218 (1874); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872), saying, "*it seems*, a corporate seal being properly affixed, no signature is necessary;" Lowett *v.* Steam Saw-mill Assoc., 6 Paige. 54, 60 (1836); Bank of Vergennes *v.* Warren, 7 Hill, 91 (1845); Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875); Campbell *v.* James, 17 Blatchf. 42 (1879); S. C., 4 Fed. Cas. 1168; rev'd on other grounds, 104 U. S. 357 (1881); Lamson, etc. Co. *v.* Russell, 112 Mass. 387 (1873); Levering *v.* Mayor, 7 Humph. (Tenn.) 553 (1847); Memphis *v.* Adams, 9 Heisk. (Tenn.) 518 (1872). Where three directors, as a committee, are authorized to make a lease, and the lease is signed by two, and the corporate seal is affixed by them, it is sufficient, the third acquiescing. Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872). But see Isham *v.* Bennington, etc. Co., 19 Vt. 230 (1847), holding that affixing a corporate seal will not excuse default in signing a deed when signing is necessary by statute. Mandamus to an officer to attach the corporate seal will be denied if there is any doubt as to the legal rights of the parties. People *v.* Blackhurst, 11 N. Y. Supp. 675 (1890). At common law a corporation signed a contract by attaching its seal thereto. Globe Acc. Ins. Co. *v.* Reid, 47 N. E. Rep. 947 (Ind., 1897). It is a curious fact that to this day the great Equitable Life Insurance Company of New York signs its name to discharges of mortgages by simply attaching its seal thereto, without any writing or other signature whatsoever.

authorized, when proof is given that the officers signed and sealed the instrument;[1] but this presumption may be overthrown by proof that the seal was affixed without proper author-

[1] Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892); McDonald *v.* Chisholm, 131 Ill. 273 (1890); Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890); Mullanphy Sav. Bank *v.* Schott, 135 Ill. 635 (1891); Union Pac. R'y *v.* Chicago, etc. R'y, 51 Fed. Rep. 309 (1892); Bowers *v.* Hechtman, 45 Minn. 238 (1891); Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892); Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893); Reed *v.* Bradley, 17 Ill. 321 (1856); Blackshire *v.* Iowa, etc. Co., 39 Iowa, 624 (1874); Southern Cal. Colony Assoc. *v.* Bustamente, 52 Cal. 192 (1877); Wood *v.* Whelen, 93 Ill. 153 (1879); Mickey *v.* Stratton, 5 Sawyer, 475 (1879); Thorington *v.* Gould, 59 Ala. 461 (1877); Morris *v.* Keil, 20 Minn. 531 (1874); Abbott, Tr. Ev. 35; Canandaigua Academy *v.* McKechnie, 19 Hun, 62 (1879); 90 N. Y. 628; Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873); Mill-dam Foundery *v.* Hovey, 38 Mass. 417, 428 (1839); Malone *v.* Crescent, etc. Co., 77 Cal. 38 (1888); Johnson *v.* Bush, 3 Barb. Ch. 207 (1848); Leggett *v.* New Jersey M. & B. Co., 1 N. J. Eq. 541 (1832); Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465 (1887); Hoyt *v.* Thompson, 5 N. Y. 320 (1851); Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Morse *v.* Beale, 68 Iowa, 463 (1886); Bliss *v.* Kaweah, etc. Co., 65 Cal. 502 (1884); Goodnow *v.* Oakey, 68 Iowa, 25 (1885); Evans *v.* Lee, 11 Nev. 194 (1876); Cincinnati, etc. R. R. *v.* Harter, 26 Ohio St. 426 (1875); Whitney *v.* Union, etc. Co., 64 N. Y. 576 (1875); President, etc. *v.* Myers, 6 Serg. & R. (Pa.) 12 (1820); Adams *v.* Creditors, 14 La. 454 (1840); Darnell *v.* Dickens, 4 Yerg. (Tenn.) 7 (1833); Burrill *v.* Nahant Bank, 43 Mass. 163 (1840); Flint *v.* Clinton, etc. Co., 12 N. H. 434 (1841); Indianapolis, etc. R. R. *v.* Morganstown, 103 Ill. 149 (1882); Solomon's Lodge *v.* Montmoclin, 58 Ga. 548 (1877); St. Louis *v.* Risley, 28 Mo. 415 (1859); St. Johns *v.* Steinmetz, 18 Pa. St. 273 (1852); Lovell *v.* Steam, etc. Assoc., 6 Paige, 54 (1836); Bank of Vergennes *v.* Warren, 7 Hill, 91 (1845); New England, etc. Co. *v.* Gilbert, etc. R. R., 91 N. Y. 153 (1883). A corporate deed twenty-five years old, reciting that it is under seal, is presumed to have been under seal, though none is present. Catlett *v.* Starr, 70 Tex. 485 (1888). The seal is not proof *per se*. The signature of the officer must be proved. Southern, etc. Assoc. *v.* Bustamente, 52 Cal. 192 (1877). The presence of the seal raises the presumption that the contract was duly authorized. Andres *v.* Fry, 45 Pac. Rep. 534 (Cal., 1896). The action of the board authorizing a deed need not be proved where the deed recites that it was executed by order of the board of directors. Caldwell *v.* Morganton Mfg. Co., 28 S. E. Rep. 475 (N. C., 1897). The seal of a corporation, like the seal of an individual, must be proved in establishing the assignment of a mortgage. Jackson *v.* Pratt, 10 Johns. 381 (1813). That the seal is the company's seal must be proved. Den *v.* Vreelandt, 7 N. J. L. 352 (1800); Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821). "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized." Osborne *v.* Tunis, 25 N. J. L. 633, 658 (1856). A mortgage with the corporate seal attached is presumed to have been regularly sealed. It is not invalidated by proof that the directors passed no resolu-

ity.[1] The corporation, by ratification and otherwise, may easily cure a defect as to the sealing.[2]

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an

tion authorizing the use of the seal. Fidelity, etc. Co. *v.* Shenandoah, etc. R. R., 32 W. Va. 244 (1889). The signature of the president and the seal of the corporation does not prove the deed. It is necessary to prove that it was executed by the president. Walsh *v.* Barton, 24 Ohio St. 28, 41 (1873). The execution and recording of a deed by a corporation is *prima facie* evidence of delivery and acceptance. Stokes' *v.* Detrick, 75 Md. 256 (1892). The presence of the seal is *prima facie* evidence that the corporation duly authorized the contract, Berks, etc. Turnp. Co. *v.* Myers, 6 Serg. & R. (Pa.) 16 (1820); Parkinson *v.* Parker, 85 Pa. St. 313 (1877); and that it was affixed by competent authority. St. John's Church *v.* Steinmetz, 18 Pa. St. 273 (1852); Solomon's Lodge *v.* Montmollin, 58 Ga. 547 (1877); Morris *v.* Keil, 20 Minn. 531 (1874); Conine *v.* Junction, etc. R. R., 3 Houst. (Del.) 288 (1866). Where a contract is signed by the second vice-president and assistant secretary, and has the seal attached, it is presumed to have been properly executed. Gutzeil *v.* Pennie, 95 Cal. 598 (1892). Where a corporate deed is not under seal, proof must be given that the corporation authorized the deed. Barney *v.* Pforr, 48 Pac. Rep. 987 (Cal., 1897). A corporate deed signed "J., President" of the corporation, is not sufficiently signed. A corporate seal is also necessary. Garrett *v.* Belmont Land Co., 94 Tenn. 459 (1895). In Maine it has been held that the presence of the corporate seal on an instrument does not raise a presumption that the corporation entered into the contract. Morrison *v.* Wilder Gas Co., 40 Atl. Rep. 542 (Me., 1898). The court evidently overlooked the fact that originally a corporation signed a deed or contract by affixing its seal without any written signature whatsoever, and that consequently, upon proof that such seal was the corporate seal, the presumption arose that it was properly affixed, just as proof of the signature of the maker of a promissory note raises a presumption that the maker signed the note and was bound by it.

[1] Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862); Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465 (1888), holding also that the testimony of a single officer that he had no knowledge of any authority having been given by the corporation to execute the instrument in suit was not sufficient to overcome the presumption of proper execution raised by the fact that the corporate seal was affixed to it. Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873). Where deeds are duly sealed with a corporate seal, the tes-

[2] Wood *v.* Whelen, 93 Ill. 153 (1879), where a mortgage executed by corporation officers under its seal without proper authority was held to be adopted by a simple resolution without again affixing the seal; Royal Bank *v.* Grand Junction R. R., 100 Mass. 444 (1868); St. James's Parish *v.* Newburyport, etc. R. R., 141 Mass. 500 (1886), in which the facts that two directors had examined corporate notes under seal and pronounced them genuine, and that the treasurer had paid interest upon them, were held to constitute a ratification. A court of equity may compel a corporation to affix its seal. Missouri River, etc. R. R. *v.* Miami County, 12 Kan. 483 (1874). Mandamus sometimes lies. Rex *v.* Vice-Chancellor, 3 Burr. 1647 (1765).

intent to acknowledge. The acknowledgment is made by one of the officers who executed it.[1]

An acknowledgment by a corporation must show the identity of the party executing it, and his acknowledgment or ad-

timony of a director that he knew nothing thereof does not invalidate the sealing. Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465 (1887). The execution of a corporate deed, apparently perfect on its face, may be overthrown by proof that the board of directors never authorized it: that the president signed it before the description was filled in; and that the description was to be other than that which was written in. Vica, etc. R. R. *v.* Mansfield, 84 Cal. 560 (1890). Where the seal of the company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation. Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 224 (1894). Where it is proven that the proper agents of a corporation signed a deed, and the seal attached to the deed is presumed to be the corporate seal, such presumption is not overcome by proof that no vote of the directors was had authorizing the execution of the deed. Ruffner *v.* Welton, etc. Co., 36 W. Va. 244 (1892). Although the proper signatures and seal attached to corporate contracts, deeds, and mortgages raises a presumption of authority on the part of the officers to sign, yet the want of authority may be shown. Leggett *v.* New Jersey, etc. Co., 1 N. J. Eq. 541 (1832).

[1] The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument is, in the absence of any statutory provision, deemed the agent executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors. Bowers *v.* Hechtman, 45 Minn. 238 (1891). The deed of a corporation is capable of being acknowledged. Proving the execution is not the only way of preparing it for record. Hopper *v.* Lovejoy, 47 N. J. Eq. 573 (1891). Authority to execute gives authority to acknowledge the instrument. Wright *v.* Lee, 12 S. D. 596 (1892). The deed is good though there is no attestation as to the seal. Smith *v.* Smith, 62 Ill. 492 (1872). If the president signs the deed he is the proper person to acknowledge it. Lovett *v.* Steam, etc. Assoc., 6 Paige, 54 (1836). The acknowledgment may be taken out of the state. Hodder *v.* Kentucky, etc. R'y, 7 Fed. Rep. 793 (1881). Where a deed of the corporation is acknowledged by individuals, instead of being proved by the officers, the recording of such deed is of no effect. Bernhardt *v.* Brown, 29 S. E. Rep. 884 (N. C., 1898). An acknowledgment similar in form to that of an individual suffices. Hoopes *v.* Auburn,

mission that he executed it, and that the person executing it was authorized to execute it. If the seal is attached, this raises the presumption that the party executing it was authorized so to do, and to that extent it need not be acknowledged.[1] At common law there is no particular form for the acknowledgment of an instrument by a corporation.[2] A mortgage should not be acknowledged before a notary public who is a stockholder in and officer of the mortgagee.[3]

§ 723. *Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.*— This is now the well-established rule.[4] Thus, where a contract is made by the

etc. Co., 37 Hun, 568 (1885). *Cf.* Howe, etc. Co. *v.* Avery, 16 Hun, 555 (1879). See also Kelly *v.* Calhoun, 95 U. S. 710 (1877); Frostburg, etc. Assoc. *v.* Bruce, 51 Ind. 508 (1879); Muller *v.* Boone, 63 Tex. 91 (1885); Eppright *v.* Nickerson, 78 Mo. 482 (1883); City of Kansas *v.* Hannibal, etc. R. R., 77 Mo. 180 (1882); Tenney *v.* Lumber Co., 43 N. H. 350 (1861). A deed may conclude with the words: "In testimony whereof the common seal of said company is hereunto affixed." Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884).

An approved form of attestation is:

"In witness whereof the said party of the first part has caused its corporate seal to be affixed hereunto by its secretary, and its name to be subscribed hereto by its president" [or other corporate officers, as the case may be], the day and year aforesaid.

[Seal.] [Signatures.]

The New York form of proof of the deed of a corporation by the president is as follows:

"On this —— day of ——, in the year 18—, before me personally came A. B., the president of the —— company, with whom I am personally acquainted, who, being by me duly sworn, said that he resided in the city of ——; that he was the president of the —— company; that he knew the corporate seal of said company; that the seal affixed to the above instrument was such corporate seal; that it was affixed by order of the board of directors of said company; and that he signed the corporate name thereto by the like order as president of said company."

[1] Bennett *v.* Knowles, 68 N. W. Rep. 111 (Minn., 1896). See also note 1, p. 1540.

[2] Pruyne *v.* Adams, etc. Co., 92 Hun, 214 (1895), upholding an acknowledgment by the secretary.

[3] Kothe *v.* Krag, etc. Co., 50 N. E. Rep. 594 (Ind., 1898). The fact that the acknowledgment is taken before a notary who was also the vice-president of the company does not necessarily invalidate the acknowledgment. Florida, etc. Exchange *v.* Rivers, 36 Fla. 575 (1896).

[4] See p. 1536, *supra*, and notes; also § 810, *infra*. Where the president loans corporate funds and takes notes in his own name, the corporation is considered to be the payee. New England, etc. Co. *v.* Gay, 33 Fed. Rep. 636 (1888); Elwell *v.* Dodge, 33 Barb. 336 (1861). A bond running to the treasurer may be sued on by the company. New York, etc. Soc. *v.* Varick, 13 Johns. 38 (1816). So also as to a note running to a cashier. Baldwin *v.* Bank, etc., 1 Wall. 234 (1863); Commercial Bank *v.* French, 38 Mass. 486 (1839). Or to a manager. Société, etc. *v.* Mackintosh, 5 Utah, 568 (1888). The company is liable on an order for goods though the order is signed by an officer as such officer. Rogers, etc. Co. *v.* Union, etc. Co., 134 Mass. 31 (1883). The case of Farmers', etc. Bank *v.* Haight, 3 Hill, 493 (1842),

president in his individual name, but for the corporation, and the corporation knows of the contract, and acts upon it, and

holds a corporation not liable on a note informally made out. See also Steele *v.* Oswego, etc. Co., 15 Wend. 266 (1836). Suit lies against a bank on its check signed by its cashier in his own name. Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326 (1820). See also Edwards *v.* Cameron's, etc. Co., 11 Eng. L. & Eq. 565 (1852), where directors signed a note; Olcott *v.* Tioga R. R., 27 N. Y. 546 (1863); Bank of Brit. N. A. *v.* Hooper, 71 Mass. 567 (1856); Morrill *v.* Segar Co., 32 Hun, 543 (1884), where the secretary signed a contract; Van Leuven *v.* First Nat. Bank, 54 N. Y. 671 (1873), where the president signed; Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312 (1859); S. C., 13 N. Y. 308 (1855); Many *v.* Beekman, etc. Co., 9 Paige, 188 (1841). But see De Witt *v.* Walton, 9 N. Y. 570 (1854). A cashier may transfer a note by signing his own name as cashier. McIntyre *v.* Preston, 10 Ill. 48 (1848). See also § 724, notes, *infra*. A note payable to and indorsed by "E. S. Hubbell, agent for Buffalo Colliery Company," is collectible against the company where it is shown that he was authorized by the company by its mode of doing business. Lake Shore Nat. Bank *v.* Butler Colliery Co., 51 Hun, 63 (1889). A due-bill signed by an individual may be shown to have been intended as a due-bill of the company, he being the president. Richmond, etc. R. R. *v.* Snead, 19 Gratt. (Va.) 354 (1869). An instrument for the payment of money running from a person "as manager and president" is enforceable against the corporation, although signed by the person as an individual. Jones *v.* Woolley, 2 Idaho, 790 (1891). A check signed by an individual with the corporate seal and the name of the secretary attached is not enforceable against the company, it having no benefit thereof. Serrell *v.* Derbyshire, etc. R'y, 9 C. B. 811 (1850). The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, president of the Santa," etc., is sufficient where the corporate seal is affixed. Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892). Where notes are made by an individual the payee cannot introduce evidence that they were in behalf of the corporation, the suit being on the notes. Sparks *v.* Dispatch Transfer Co., 104 Mo. 531 (1891). An accommodation note running to "F. Medhurst, commercial director," given to him by a friend, cannot be enforced by the corporation, Medhurst having defaulted and defrauded the company. Société, etc. *v.* Mackintosh, 7 Utah, 35 (1890). The corporation is not liable on a note as follows: "For value received, we, the subscribers, jointly and severally, promise to pay the plaintiffs or order, for the Boston Glass Manufactory, $3,500, on demand," and signed by individuals as individuals. Bradlee *v.* Boston, etc. Mfy., 33 Mass. 347 (1835). A grant to "the governors, president, and fellows of King's College, at Windsor, in the province of Nova Scotia," is *prima facie* a grant to the corporation. King's College *v.* McDonald, 2 Tham. 106 (Can., 1843). A company may be bound by a contract, although the contract is signed in the name of an individual. Jones *v.* Williams, 39 S. W. Rep. 486 (Mo., 1897). A contract drawn and signed by "S., general agent," may be shown by parol to be a corporate contract. Lewis *v.* Mutual L. Ins. Co., 8 Colo. App. 368 (1896). The agreement of J. Gould, as trustee for the Missouri Pacific Railroad, that the latter will

partially performs it, the corporation is bound.[1] Although a contract under seal is executed by the corporate officers in their individual names, it may be proved by parol that it was a corporation contract, and that the corporation, having adopted and ratified it and attempted to carry it out, is liable on it.[2]

§ 724. *Liability of officers and agents on corporate securities which are not properly drawn, signed, or sealed in the corporate name.*— The rule that an officer or agent, to bind the corporation, must have an instrument made out in the corporate name, applies only to deeds and not to simple contracts.[3] It frequently happens, however, that the person with whom the contract is made attempts to hold liable the officer or agent of the corporation on the ground that such officer or agent used his own name in the body of the contract, or signed it as principal

do a certain thing upon an extension being made, does not bind the latter. Hill *v.* Gould, 129 Mo. 106 (1895). Where a note is signed by the officers individually, but is really a corporate note, the officers who pay and take up the note may enforce it against the corporation. *Re* Pendleton Hardware, etc. Co., 24 Oreg. 330 (1893). A note signed "National Forge and Iron Co., Mark Swarts, President," may be shown to be the joint note of the company and president. Swarts *v.* Cohen, 11 Ind. App. 20 (1894), classifying many authorities.

[1] Cotting *v.* Grant Street Elec. R'y, 65 Fed. Rep. 545 (1895).

[2] Williams *v.* Uncompahgre Canal Co., 13 Colo. 469 (1889). The corporation is bound where the president signs his name followed by the word "president," and the secretary signs his name followed by the word "secretary," the corporate seal having been also impressed upon the document in the body thereof. Union, etc. Co. *v.* Robinson, 79 Fed. Rep. 420 (1897). Where the lease in its body is to a corporation, the corporation is bound, even though it is signed "E. J. Crandall [Seal], President." Consolidated Coal Co. etc. *v.* Peers, 150 Ill. 344 (1894). A sealed contract to sell land running to the president cannot be enforced by the corporation. Buffalo, etc. Inst. *v.* Bitter, 87 N. Y. 250 (1881). It is not liable on a deed to the manager. Pickering's Claim, L. R. 6 Ch. 525 (1871). An assignment of a lease running in its body from "George F. Baker, treasurer," etc., of the company, and signed in the same way, is not a corporate assignment. Norris *v.* Davis, 52 Ohio St. 215 (1894). A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and signed by an individual "as president." Clark *v.* Hodge, 116 N. C. 761 (1895). An assignment of a mortgage and note belonging to a corporation by its president and secretary, as follows: "We, the undersigned, D. R. T., president, and C. S. B., secretary, have transferred . . . and on the part of said company have hereunto attached our names and affixed our seals," signing their names and affixing their private seals, is presumptively a corporate transfer. Lay *v.* Austin, 25 Fla. 933 (1890).

[3] See New England, etc. Co. *v.* De Wolf, 25 Mass. 56 (1829), and cases in preceding section.

instead of using the corporate name. But the courts have quite uniformly defeated such attempts to hold the officer or agent liable. If the instrument or contract indicates that the officer or agent is acting only as agent, and if the name of the corporation appears on the instrument, the officer or agent is not liable thereon.[1] There are cases, however, upholding a con-

[1] A note stamped with the corporate seal, followed by the words "John Roach, Treasurer," is the company's note alone. Miller *v.* Roach, 150 Mass. 140 (1889). A note, "We promise to pay," and signed "San Pedro Mining and Milling Company, T. Kraus, President," cannot be enforced against Kraus personally. Liebscher *v.* Kraus, 74 Wis. 387 (1889). A note reading "We promise," etc. and signed "Warrick Glass Works, J. Price Warrick, President," is conclusively held to be the note of the corporation alone. Reeve *v.* First Nat. Bank, 54 N. J. L. 208 (1892). It is a question of fact whether a note is that of the corporation or of an individual where in the body it is made by the corporation, but the signature is that of a person as "Gen. Supt." Frankland *v.* Johnson, 147 Ill. 520 (1893). Where the unissued stock of a corporation (upon its reorganization on the expiration of its charter) is issued to the president as trustee to sell from time to time, and to turn over the proceeds of the sales to the company, the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. Neptune *v.* Paxton, 15 Ind. App. 284 (1896). Where the directors sign a corporate note on the back with the words added "board of directors," it may be shown by parol evidence that they signed it as directors, and are not liable personally. Kline *v.* Bank of Tescott, 50 Kan. 91 (1892). A note signed "G. A. Colby, President Pac. Peat Coal Co., D. K. Tripp, Sec. *pro tem.*" is on its face a corporate note. Farmers', etc. Bank *v.* Colby, 64 Cal. 352 (1883); Nott *v.* Hicks, 1 Cow. 513 (1823); Billinger *v.* Bentley, 1 Hun, 562 (1874); Hascall *v.* Life Assoc., 5 Hun, 151 (1875); aff'd, 66 N. Y. 616; Morrill *v.* Segar Co., 32 Hun, 543 (1884), the court saying: "The rule now is that, where the instrument raises on its face a question as to the personal liability of the party signing it, parol evidence is admissible to show the intention of the parties:" Babcock *v.* Beman, 11 N. Y. 200 (1854); Whitney *v.* Wyman, 101 U. S. 392 (1879); Whitford *v.* Laidler, 94 N. Y. 145 (1883), where even a lease made out to an officer as such was held not enforceable against him; Holt *v.* Winfield, 25 Fed. Rep. 812 (1885), where an attempt was made to hold a president liable on an *ultra vires* subscription; Haight *v.* Sahler, 30 Barb. 218 (1859), where also the contract was sealed; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250 (1839); Stanton *v.* Camp, 4 Barb. 274 (1848); Draper *v.* Moss, etc. Co., 87 Mass. 338 (1862); Sharpe *v.* Belles, 61 Pa. St. 69 (1869); Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126 (1824), where also a seal was used, the body of the instrument being in the company's name. To same effect, Abbey *v.* Chase, 60 Mass. 54 (1850), and Ellis *v.* Pulsifer, 86 Mass. 165 (1862); McHenry *v.* Duffield, 7 Blackf. (Ind.) 41 (1843), where a due-bill was signed by a committee; Passmore *v.* Mott, 2 Binn. (Pa.) 201 (1809), where a secretary signed a ticket; Hovey *v.* Magill, 2 Conn. 680 (1818); McWhorter *v.* Lewis, 4 Ala. 198 (1842); Means *v.* Swormstedt, 32 Ind.

trary rule.[1] Thus, where a note is signed by two persons with the words "president" and "treasurer" following their names, they are liable individually, unless the plaintiff had notice that the note was a corporate note. The fact that the plaintiff had

87 (1869); Mann *v.* Chandler, 9 Mass. 335 (1812); Carpenter *v.* Farnsworth, 106 Mass. 561 (1871). An officer is not liable personally on a note payable to him as "Sec. and Treas.," and indorsed by him likewise. Falk *v.* Moebs, 127 U. S. 597 (1888). A note signed in the company's name, followed by the words "B. L. Brownell, Pres.," binds him personally. Heffner *v.* Brownell, 70 Iowa, 591 (1887). So also of a note signed "C. F. Clark, Trustee Omega Lodge." Coburn *v.* Omega Lodge, 71 Iowa, 581 (1887). A promissory note: "We promise to pay," etc., signed "Houston Flourmills Co., D. P. Shepherd, President," is enforceable against the company only. Latham *v.* Houston Flour Mills, 68 Tex. 127 (1887); Jefts *v.* York, 58 Mass. 371 (1849); S. C., 64 Mass. 392 (1852); Okell *v.* Charles, 34 L. T. Rep. 822 (1876). It may be a question of fact as to whether a treasurer, in buying, bought stock for himself or the company. Haynes *v.* Hunnewell, 42 Me. 276 (1856). See also Randall *v.* Van Vechten, 19 Johns. 60 (1821), holding a committee not liable on a sealed instrument; Stearns *v.* Allen, 25 Hun, 558 (1881). *Cf.* De Witt *v.* Walton, 9 N. Y. 571 (1853). In support of the text see also Dubois *v.* Delaware, etc. Co., 4 Wend. 285 (1830); Olcott *v.* Tioga, etc. R. R., 27 N. Y. 546 (1863). See also Lindley, Companies (5th ed.), p. 231, etc.; Green's Brice, Ultra Vires, p. 754. The denial of the directors' liability on a note signed by them as directors is raised by answer, not by demurrer. McKensey *v.* Edwards, 88 Ky. 272 (1889). A note drawn by the directors as directors of the company, and sealed with the seal of the company, is not enforceable against the directors individually. Aggs *v.* Nicholson, 1 H. & N. 165 (1856). The president is not liable on bonds which he signed as president and which the corporation had power to issue. McMasters *v.* Reed, 1 Grant, Cas. (Pa.) 36 (1854); 46 S. W. Rep. 1056.

[1] Where a note reads, "We promise to pay," etc., and is signed "D. M. Co. J. K., President," the president alone is liable. Mathews *v.* Dubuque Mattress Co., 87 Iowa, 246 (1893). Where a note is signed by the president and secretary in their individual names, except that they add the words "President" and "Secretary" respectively, there being nothing on the face of the note to show that it is a company note, they are liable personally on the note. They will not be allowed to show that it was the intention of all parties to bind the company only, or that the money went to the company only, or that the company authorized the note; nor can they file a cross-bill to relieve themselves from the note. San Bernardino, etc. Bank *v.* Andreson, 32 Pac. Rep. 168 (Cal., 1893). In the case of Hackemack *v.* Wiebrock, 49 N. E. Rep. 984 (Ill., 1898), the court held that the signers were individually liable on a note which recited, "We promise to pay," and was signed "Henry Hackemack, Pres., Raythe Nagel, Secy.," to a person who took the note supposing that they were personally liable. A note, "We promise to pay," etc., signed "E. H. Close, Treas., John Clark, Pres't," without referring to the corporation, may be enforced against Close and Clark personally, although in the border of the note the company's name appears. Merchants'

brought another suit on another similar note against the corporation after the note in this case had been issued does not prove such notice.[1] A *bona fide* purchaser of a promissory note which

Nat. Bank *v.* Clark, 64 Hun, 175 (1892); affirmed in 139 N. Y. 307 (1893). A treasurer is liable personally on a note signed personally by him, although the signature is followed by the word "Treasurer." Medberry *v.* Short, 15 N. Y. Week. Dig. 227 (1882); Tippets *v.* Walker, 4 Mass. 595 (1808). A note in the form "I promise to pay," and signed by "E., Pres. & Treas. C. Co.," has been held to be the note of E. and not of the corporation. Davis *v.* England, 141 Mass. 587 (1886); Stinchfield *v.* Little, 1 Me. 231 (1821), where a deed was to the agent; Bruce *v.* Lord, 1 Hilt. 247 (1856), holding the agent *prima facie* liable on a draft; Mare *v.* Charles, 5 El. & B. 978 (1856); Dayton *v.* Warne, 43 N. J. L. 659 (1881), involving a bond; Sawyer *v.* Winnegance Mill Co., 26 Me. 122 (1846), holding the company not bound by an agreement to arbitrate; Seaver *v.* Coburn, 64 Mass. 324 (1852), involving a lease; Drake *v.* Flewellen, 33 Ala. 106 (1858), holding the secretary *prima facie* liable; Dutton *v.* Marsh, L. R. 6 Q. B. 361 (1871), where the note was, "We, the directors of the Isle of Man Slate & Flag Co., Limited, do promise to pay J. D. £1,600." The company's seal was affixed; Tucker, etc. Co. *v.* Fairbanks, 98 Mass. 101 (1867); Barker *v.* Mechanics', etc. Co., 3 Wend. 94 (1829); Taft *v.* Brewster, 9 Johns. 334 (1812), involving a bond; Brockway *v.* Allen, 17 Wend. 40 (1837). Where a draft was drawn on an individual name, followed by the words "President Rosendale M'ng Co., New York," and accepted by him by the same signature, he is liable personally on it. Moss *v.* Livingston, 4 N. Y. 208 (1850); Hills *v.* Bannister, 8 Cow. 31 (1827). Persons signing and sealing a bond in their own names and under their own seals are individually bound, even though they intended to bind the corporation, and in the body of the instruments they are described as trustees. Cullen *v.* Nickerson, 10 Up. Can. C. P. Rep. 519 (1861). *Prima facie* a person is liable personally who signs a note as follows: "J. W. Parrott, President of Long Branch Hotel and Cottage Co." Terhune *v.* Parrott, 59 N. J. L. 16 (1896). A corporate agent who signs the corporate name to a note without authority is liable personally thereon. Frankland *v.* Johnson, 147 Ill. 520 (1893). An officer making a corporation note without authority is personally liable thereon. Miller *v.* Reynolds, 92 Hun, 400 (1895). A note in its body saying "we" and signed by two persons, the words "Prest." and "Treas." following their names, is their note, and they are personally liable. First Nat. Bank *v.* Wallis, 84 Hun, 376 (1895); affirmed in 150 N. Y. 455. See also Keokuk Falls Imp. Co. *v.* Kingsland, etc. Co., 5 Okla. 32 (1896). Where a note reads, "We promise to pay," etc., and is signed "William T. Wallis, President, Geo. T. Smith, Treasurer," they are liable personally to a *bona fide* holder. First Nat. Bank *v.* Stuetzer, 80 Hun, 435 (1894). The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon. Nelligan *v.* Campbell, 20 N. Y. Supp. 234 (1892). On this subject of liability see also § 245, *supra*, on the liability of trustees; § 705, *supra*, on the liability of promoters; § 508, *supra*, on the liability of officers of unincorporated associations; and § 888, *infra*, on the liability of committeemen.

[1] First Nat. Bank *v.* Wallis, 150 N. Y. 455 (1896).

does not disclose any corporate obligation, and is signed by the officers with their title attached, may enforce such note against the officers as individuals, if the holder has no notice of the fact that it was a corporate obligation. The fact that the name of the corporation is on the margin does not constitute notice.[1]

§ 725. *Requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities.*— It has been held that, where the charter prescribes that corporate contracts shall be signed by certain officers, a contract that is signed by only a part of them is not enforceable, even in *bona fide* hands.[2] But the harshness and the inconvenience of this rule have caused it to be widely departed from and practically abandoned.[3]

[1] Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (1893); Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314 (1893).

[2] Safford *v.* Wyckoff, 4 Hill, 442 (1842); Head *v.* Providence Ins. Co., 2 Cranch, 127 (1804); Badger *v.* American Ins. Co., 103 Mass. 244 (1869); Dawes *v.* North River Ins. Co., 7 Cow. 462 (1827); Hill *v.* Manchester, etc. Water-works Co., 2 Nev. & M. 573 (1833); S. C., 5 B. & Ad. 866; Corn Exchange Bank *v.* Cumberland Coal Co., 1 Bosw. 436 (1857). A corporate deed not countersigned by the secretary as required by statute is void as against a subsequent levy of execution. Galloway *v.* Hamilton, 68 Wis. 651 (1887). Where the articles prohibit a purchase on credit, a vendor who knew it cannot recover. Hotchin *v.* Kent, 8 Mich. 526 (1860). Where the charter prescribes who may be the corporate agents for particular purposes, the provision is a limitation upon the power of the corporation, and it cannot appoint other agents for such purposes. Washington Turnpike *v.* Cullen, 8 Serg. & R. (Pa.) 517, 521 (1822). And see U. S. Bank *v.* Dandridge, 12 Wheat. 64, 113 (1827); Royalton *v.* Royalton Turnp. Co., 14 Vt. 311 (1842); Union Turnpike *v.* Jenkins, 1 Cai. 381, 391 (1803); Beatty *v.* Marine Ins. Co., 2 Johns. 109 (1807); Commonwealth *v.* St. Mary's Church, 6 Serg. & R. (Pa.) 508 (1821); Como *v.* Port Henry Iron Co., 12 Barb. 27 (1851); *Re* General, etc. Co., 38 L. J. (Ch.) 320 (1869), where the general manager signed instead of two directors and the secretary. Time notes are void where the charter forbids all except demand notes. Root *v.* Godard, 3 McLean, 102 (1842); S. C., 20 Fed. Cas. 1159; Root *v.* Wallace, 4 McLean, 8 (1845); S. C., 20 Fed. Cas. 1167. The president cannot discount paper where the charter requires the board to pass on it. Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857). See also British Assur. Co. *v.* Brown, 12 C. B. 723 (1852); but here the contract, being unilateral, was held not to be within the statute; Edwards *v.* Cameron's, etc. Co., 11 Eng. L. & Eq. 565 (1852)—an acceptance of a bill; Halford *v.* Cameron's, etc. R'y, 16 Q. B. 442 (1851); Andrews, etc. Co. *v.* Youngstown, etc. Co., 39 Fed. Rep. 353 (1889).

[3] The custom of the corporation may have that effect. Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Kilgore *v.* Bulkley, 14 Conn. 362 (1841); Kenner *v.* Lexington, etc. Mfg. Co., 91 N. C. 421 (1884), holding also that the provision must be

A constitutional and statutory provision that debts shall be incurred only upon a vote of the stockholders does not apply

pleaded; Witte *v.* Derby Fishing Co., 2 Conn. 260 (1817). If the corporation ratifies or receives the benefits of the contract, the contract is valid. Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875); Curtis *v.* Leavitt, 15 N. Y. 1 (1857); Merchants' Bank *v.* Central Bank, 1 Ga. 418 (1846). Where the statute requires corporate contracts to be executed in a certain way, a contract not so executed cannot be enforced, although probably a *quantum meruit* would lie. Curtis *v.* Piedmont, etc. Co., 109 N. C. 401 (1891). A *bona fide* purchaser of bonds is protected against the defense that they were issued illegally and in violation of statutory provisions, the issue itself having been authorized. Webb *v.* Herne Bay, L. R. 5 Q. B. 642 (1870). A substantial compliance with a statutory provision that bills of exchange must be accepted by the corporation in a certain way is sufficient. Halford *v.* Cameron's, etc. R'y, 16 Q. B. 442 (1851). In regard to the method in which New York religious corporations contract for the services of the minister, see Landers *v.* Frank, etc. Church, 97 N. Y. 119 (1884). A statute requiring that no contract shall be binding upon a corporation unless made in writing is held to refer wholly to contracts executory. Foulke *v.* San Diego, etc. R'y, 51 Cal. 365 (1876); Reuter *v.* Electric Tel. Co., 6 El. & B. 341 (1856). In this case an agreement of the chairman was held to have been ratified by the corporation, though the deed of settlement required the signatures of three directors to contracts of the kind in controversy. Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855). Although the statute says that deeds of a corporation shall be signed by the president, yet signature by the vice-president is sufficient. Ballard *v.* Carmichael, 83 Tex. 355 (1892). Although the statutes require contracts of corporations involving a liability of over $100 to be in writing, and under the corporate seal, or signed by a corporate officer, yet a person performing work for the company may sue on a *quantum meruit*. Roberts *v.* Deming, etc. Co., 111 N. C. 432 (1892). A charter provision as to certain officers signing documents may be disregarded. *Re* Norwich, etc. Co., 22 Beav. 143 (1856), where three directors did not sign as required. The provision in Pennsylvania that certain corporations shall not make certain contracts except in writing signed by two directors does not apply to contracts made out of the state, and is waived if the corporation sues on the contract; and it does not apply to a contract executed on one side. Park, etc. Co. *v.* Kelly Axe Mfg. Co., 49 Fed. Rep. 618 (1892). Where the charter provides that property shall be purchased by five trustees, a purchase-money mortgage executed by the president and secretary, not sealed with the corporate seal and not authorized by the corporation, is void. McElroy *v.* Nucleus Assoc., 131 Pa. St. 393 (1890). A corporate lease not *mala prohibita* nor *mala in se*, but informal in that all the statutory formalities were not complied with, supports an action for past-due rent. Mayor, etc. *v.* Wylie, 43 Hun, 547 (1887). But where a statute prohibited transfers of securities over $1,000 in value by the cashier, unless the directors had previously authorized, a director taking such securities without there being a previous authorization takes nothing by the transfer and cannot recover back what he paid therefor, the corporation being in a receiver's hands. Gillett *v.* Phillips, 13 N. Y 114 (1855).

to ordinary business debts.[1] "Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter."[2] Provisions as to the mode in which a contract shall be made, such as that certain notice shall be given, may, if not followed, render the contract voidable, but not void.[3] Where the charter

Cf. Atkinson *v.* Rochester, etc. Co., 114 N. Y. 168 (1889). A statute providing that the president and two other members of a corporation shall sign deeds does not exclude the common-law method. Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884). A statute requiring corporate contracts for over $100 to be in writing does not apply to executed contracts. Clowe *v.* Imperial, etc. Co., 114 N. C. 304 (1894). Where the charter prohibits the directors making a contract for over $250, unless a stockholders' meeting authorizes the same, a contract for $2,000 without such authorization is void. Georgetown, etc. Co. *v.* Central, etc. Co., 34 S. W. Rep. 435 (Ky., 1896). A provision in the charter that contracts beyond a certain amount must be executed in a certain way, or else ratified by the board of directors, is satisfied if all of the directors assent to the contract. New York, etc. Co. *v.* Metropolitan Inv. Co., 10 N. Y. App. Div. 342 (1896). Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him. Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889). A deed of corporate land made by the president under his own name and seal is good when the statute said "the deed of the president." Warner *v.* Mower, 11 Vt. 385 (1839). But see Isham *v.* Bennington, 19 Vt. 230 (1847), where the deed was signed by the president and failed to recite a resolution authorizing it, and was held void. A statute authorizing a corporation to convey real estate by an agent appointed for the purpose does not exclude other means of conveyance, as by its officers. Morris *v.* Keil, 20 Minn. 531 (1874), where the deed was by a foreign corporation. And in general the ordinary contracts of the company may be made without observing this statutory provision as to what officers shall contract. Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326 (1820); Prince of Wales Ass. Co. *v.* Harding, El., Bl. & E. 183 (1857); Rockwell *v.* Elkhorn Bank, 13 Wis. 653 (1861); Merrick *v.* Burlington Plank-Road, 11 Iowa, 74 (1860); Dana *v.* Bank of St. Paul, 4 Minn. 385 (1860); De Groff *v.* American Linen T. Co., 21 N. Y. 124 (1860); Creswell *v.* Lanahan, 101 U. S. 347 (1879); Kelley *v.* Mayor of Brooklyn, 4 Hill, 263 (1843); Moreland *v.* State Bank, 1 Ill. 203 (1828); South Carolina Bank *v.* Hammond, 1 Rich. L. (S. C.) 281 (1845); Boisgerard *v.* N. Y. etc. Co., 2 Sandf. Ch. 23 (1844). See also Merritt *v.* Lambert, Hoffm. Ch. 166 (1840), where title to land was taken in the president's name instead of the company's. *Cf.* Farmers' Loan, etc. Co. *v.* Carroll, 5 Barb. 613 (1849). See also Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868), where no previous authorization by the stockholders was obtained; Agar *v.* Athenæum, etc. Soc., 3 C. B. (N. S.) 725 (1858), where a seal was required but was omitted; Lindley, Companies, p. 160.

[1] Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889).

[2] Demings *v.* Supreme Lodge, 131 N. Y. 522 (1892).

[3] Campbell *v.* Argenta, etc. Co., 51

provides that certain contracts may be made only after an act has been performed by the company, a third person may rely on the company's representation that the act has been done.[1] A by-law requiring that contracts be made only by certain officers, or that certain formalities shall be observed, is usually of little avail as against outside parties. Persons contracting with the corporation are not bound to know of the by-law, and the courts are reluctant to invalidate a contract by reason of it.[2]

Fed. Rep. 1 (1892). A *bona fide* purchaser of a negotiable corporation bond is protected in assuming that the acts of the corporation and relating to its management in the issue of the bonds have been complied with. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883); Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863), where the defense was set up that the stockholders had not voted on the matter, as required by statute. The court held that the regular execution of the corporate powers was conclusively presumed in favor of *bona fide* holders. Purchasers are not affected by informalities in the notice of and the conducting of meetings. Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868). It has been held that a purchaser of corporate securities may safely assume that all charter requirements in regard to notes relative to the securities have been complied with. Royal British Bank *v.* Turquand, 6 El. & B. 327 (1856); Colonial Bank *v.* Willan, L. R. 5 P. C. 417 (1874); London, etc. R'y *v.* M'Michael, 5 Exch. 855 (1850), where the company sued for subscriptions; Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859), where the stockholders acquiesced. See also Bank of U. S. *v.* Dandridge, 12 Wheat. 64 (1827). But compare the cases under the New York statute requiring the written consent of stockholders before a mortgage can be made by certain corporations. § 779, *infra*. See also § 808, *infra*. Where directors have power to bind the company, "but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed." *Re* Land Credit Co., L. R. 4 Ch. 460 (1869), where bills of exchange had been issued and the directors knew it and acquiesced. Where the statute requires the consent of the court to a mortgage, the mortgage cannot be foreclosed if such consent was not obtained. Dudley *v.* Congregation of St. Francis, N. Y. L. J., Sept. 2, 1891.

[1] Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883), where bonds were to be issued only after a certain amount of the capital stock had been paid in; Royal British Bank *v.* Turquand, 5 El. & B. 248 (1855), where a resolution was to precede all contracts. See also *Ex parte* American, etc. Co., 3 De G., J. & S. 147 (1865), and Prince of Wales Ass. Co. *v.* Harding, El., Bl. & E. 183 (1857). See also Akin *v.* Blanchard, 32 Barb. 527 (1860); Kingsley *v.* New England, etc. Ins. Co., 62 Mass. 393 (1851); Union, etc. Ins. Co. *v.* White, 106 Ill. 67 (1883); Irvine *v.* Union Bank of Australia, L. R. 2 App. Cas. 366 (1877).

[2] Fay *v.* Noble, 66 Mass. 1 (1853); Ten Broeck *v.* Winn, etc. Co., 20 Mo. App. 19 (1885); Walker *v.* Wilmington, etc. R. R., 26 S. C. 80 (1887); Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306

A limitation by by-law that no corporate liability shall be incurred unless expressly authorized by the directors does not

(1825); Manville *v.* Belden, etc. Co., 17 Fed. Rep. 425 (1883); Morrill *v.* Segar, etc. Co., 32 Hun, 543 (1884); Samuel *v.* Holladay, 1 Woolw. 400 (1869); S. C., 21 Fed. Cas. 306; Mechanics' Bank *v.* Smith, 19 Johns. 115 (1821). A company is bound by the customary contracts of its general freight agent, though he does not obtain the approval of the president as required by the by-laws. Medbury *v.* New York, etc. R. R., 26 Barb. 564 (1858). *Contra*, Susquehanna Ins. Co. *v.* Perrin, 7 Watts & S. (Pa.) 348 (1844). A by-law that contracts for over a year can be made by the directors only does not bind a person who, without knowledge thereof, makes a longer contract with the general manager. Moyer *v.* East Shore Term. Co., 41 S. C. 300 (1894). The treasurer cannot make a corporate note good by his sole signature where the by-laws require the signature of the president also. *Re* Millward-Cliff Cracker Co., 161 Pa. St. 157 (1894). A by-law requiring contracts to be signed by a certain officer does not invalidate a contract signed by another officer if the party contracting had no knowledge of the by-law. Smith *v.* Martin, etc. Co., 19 N. Y. Supp. 285 (1892). If the company receives the money on a note with knowledge, it cannot set up that the note was not signed by the treasurer as required by the by-laws. Grant *v.* Treadwell Co., 1 N. Y. App. Div. 367 (1896). The failure of the treasurer to sign a note as required by the by-laws does not avoid the note in *bona fide* hands. National Spraker Bank *v.* Treadwell Co., 80 Hun, 363 (1894). The general manager may sell a part of the product, even though a by-law requires the consent of the president. Cone *v.* Empire Plaid Mills, 12 N. Y. App. Div. 314 (1896). Although the by-laws require the secretary to sign notes, yet, if the treasurer is accustomed to sign them, notes signed by him are good. Milbank *v.* De Riesthal, 82 Hun, 537 (1894). So also as to notes signed by the president only when the by-laws require the treasurer to sign also. Grant *v.* Treadwell Co., 82 Hun, 591 (1894). A person contracting with a corporation is not bound to know that a by-law prohibits the officers from borrowing money except by order of the board of directors. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889). A by-law that all notes shall be made to the order of the company may be disregarded. Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887). Secret instructions limiting the apparent power of a general manager to contract do not affect strangers. Benesch *v.* John Hancock, etc. Co., 11 N. Y. Supp. 348 (1890). Officers entrusted with the management of the corporate business are general agents, and private restrictions imposed by the corporation are immaterial against third persons acting on the faith of the agency. Grafius *v.* Land Co., 3 Phila. 447 (1859). Where the by-laws provided that no contract of the corporation involving a liability of over $500 shall be voted unless signed by the president and treasurer and sealed with the corporate seal, a lease to the corporation on a rental of over $500, and signed by the president alone, was held to be void. In this case it seems that no proof of even an apparent authority of the president was given. Bohm *v.* Loewer's, etc. Co., 9 N. Y. Supp. 514 (1890); Johnston *v.* Milwaukee, etc. Co., 46 Neb. 480 (1895). A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced

invalidate corporate contracts made by agents acting "within the apparent scope of the agency."[1]

A by-law requiring the signature of the secretary to notes issued by the corporation does not bind a person taking a note without actual knowledge of the by-law, especially where it has been long in disuse.[2] A party contracting with a corporation is not bound to know of restrictions in the by-laws as to the method of authorizing and executing contracts, nor is he bound to take notice that a quorum of the directors was not present when the act was authorized.[3]

c. ADMISSIONS OF AND NOTICE TO THE VARIOUS OFFICERS AND AGENTS OF A CORPORATION.

§ 726. *Admissions and declarations of a director, president, cashier, general manager, treasurer, agent, or stockholder as regards the corporation.*—This subject is closely identified with the questions discussed in preceding sections. If a particular officer or agent has power to represent or contract for a corporation, he may in most cases bind the company by his admissions or declarations in regard thereto. But his power to do so must be shown.

The law is clear that the admissions of a stockholder do not bind the corporation.[4] The board of directors acting as a

in by them. The by-law does not bind strangers who do not know of it. Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892). The question of the regularity of the action of corporate agents and officers in making contracts, and more especially of waiving provisions in contracts in violation of the rules, has frequently arisen in insurance policies where provisions have been waived orally or without the consent of specified officers. Carrugi *v.* Atlantic, etc. Co., 40 Ga. 135 (1869). An insurance policy is good although not sealed and without a clause exempting the stockholders from liability as required by the by-laws. *Re* Athenæum, etc. Soc., 4 K. & J. 549 (1858). The same question has also arisen in regard to the contracts of municipal corporations.

[1] Rathbun *v.* Snow, 123 N. Y. 343 (1890).

[2] Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

[3] County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629.

[4] Polleys *v.* Ocean Ins. Co., 14 Me. 141 (1837); Mitchell *v.* Rome R. R., 17 Ga. 574, 586 (1855); Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); *Re* Kip, 1 Paige, 601 (1829); Soper *v.* Buffalo, etc. R. R., 19 Barb. 310 (1855); Hartford Bank *v.* Hart, 3 Day (Conn.), 491, 495 (1807); Morrell *v.* Dixfield, 30 Me. 157 (1849); City Bank *v.* Bateman, 7 Har. & J. (Md.) 104 (1826); Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 321 (1818); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267, 269 (1824); Hosack *v.* College of Physicians, 5 Wend. 547 (1830); N. Y. Code Civ. Pro., § 839; Angell & A. Corp., §§ 309,

board may bind the company by admissions and declarations, but a single director cannot do so except as a special agent of the company.[1] Neither do the admissions or declarations of the president bind the company unless he has extra powers given to him;[2] nor ordinarily those of the secretary and treas-

657–660; 1 Phill. Ev. 487, note 134, saying, "the admissions of corporators or quasi-corporators in the United States are received or rejected upon much the same principle as governs in respect to admissions of agents." The frequently cited case of Hartford Bank *v.* Hart, 3 Day (Conn.), 491, 495 (1807), where it was offered to prove that the president and directors of a bank knew, when they discounted a note, that the indorsement was forged, and to prove this by the confessions of said president and directors, *held*, that the evidence was inadmissible.

[1] Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317 (1818), holding that while acts and declaration of trustees and agents of the congregation, in their official capacities, are evidence against those whom they represent, yet their statements made not in the transaction of the business of their principal are not evidence. "A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who, in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual." O'Leary *v.* Board of Education, 93 N. Y. 1 (1883). Admissions of a director who is also a member of the discount board of a bank do not bind the corporation unless he was a duly authorized agent. East River Bank *v.* Hoyt, 41 Barb. 441 (1864). Declaration of a director that a certain person is a corporate agent does not bind the company. Florida, etc. R. R. *v.* Varnedoe, 81 Ga. 175 (1888); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267 (1824), where certain declarations of bank officers as to the disposition to be made of certain collaterals were held not evidence against the bank. Reports to stockholders and directors do not bind the company by reason of that fact. Hall *v.* Mobile, etc. R. R., 58 Ala. 10 (1877). The company is not bound by a director's declaration that an attorney would be paid. Hillyer *v.* Overman, etc. Co., 6 Nev. 51 (1870). Nor as to the purpose of a fund. Grayville, etc. R. R. *v.* Burnes, 92 Ill. 302 (1879). See also, in general, Peck *v.* Detroit, etc. Works, 29 Mich. 313 (1874); and § 712, *supra*.

[2] The admissions of the president of the construction company which is operating the road are not admissible against the railroad company which is sued for an accident. Chattanooga, etc. R. R. *v.* Liddell, 85 Ga. 482 (1890). His admissions cannot create a liability. Spyker *v.* Spence, 8 Ala. 333 (1845); Henry, etc. Co. *v.* Northern Bank, 63 Ala. 527 (1879). Admissions of the president of a bank that it did not own a note which was assigned to it are not admissible. Tuthill, etc. Co. *v.* Shaver, etc. Co., 35 Fed. Rep. 644 (1888). See also City Bank *v.* Bateman, 7 Har. & J. (Md.) 104 (1826), where a declaration by the president of a bank to an inferior officer, that certain money which had been brought into the bank by one of the directors was the money of the plaintiff, was held not

urer;[1] nor those of a cashier, except as to matters in the ordinary course of his duties.[2]

The power of a superintendent to bind the company by his admissions and declarations depends on whether they pertain to his work and duties.[3] The president and managing agent of

admissible. But his admissions may prove its actual indebtedness. Hoag *v.* Lamont, 60 N. Y. 96 (1875). And as an active agent his admissions may bind the company. Northrup *v.* Mississippi Val. Ins. Co., 47 Mo. 435 (1871); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28 (1848). So also, where the company itself first uses his admissions as evidence. Western Union Tel. Co. *v.* Baltimore, etc. Tel. Co., 26 Fed. Rep. 55 (1885), the court saying, "a corporation can only speak through its officers and agents; and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation." The president's admissions of what is due a laborer are not good in enforcing a stockholder's statutory liability, unless he was acting as agent of the company. Truesdell *v.* Chumar, 75 Hun, 416 (1894). The statement of the president as to an accident, he not being present, is not admissible. Lombard, etc. R'y *v.* Christian, 124 Pa. St. 114 (1889); Ricketts *v.* Birmingham St. R'y, 85 Ala. 600 (1889). Under the Alabama statute, evidence of a person interested in the suit as to a conversation between him and the deceased president of a corporation is inadmissible. Tabler *v.* Sheffield, etc. Co., 87 Ala. 305 (1889). See also § 716, *supra*.

[1] Alexander *v.* Cauldwell, 83 N. Y. 480 (1881); Tripp *v.* New, etc. Co., 137 Mass. 499 (1884), where the treasurer said that a condition had been performed; Kalamazoo, etc. Co. *v.* McAlister, 36 Mich. 327 (1877), where he stated a matter relative to a salary. Admissions or declarations of a secretary as to the amount due the corporation on a mortgage are not admissible unless it is shown that he was specially authorized to make them. Johnston *v.* Elizabeth, etc. Assoc., 104 Pa. St. 394 (1883). The secretary and assistant treasurer of a corporation has no authority to bind the corporation by an account rendered by him to a creditor of the corporation. Harvey *v.* West Side, etc. Co., 13 Hun, 392 (1878). The assignee of a contractor's claim against a company cannot enforce it on the ground that at the time of assignment the secretary of the company represented that it would be paid. Barnett *v.* South London, etc. R'y, L. R. 18 Q. B. D. 815 (1887). In a suit of ejectment against a corporation, evidence that a corporate officer had tried to buy it of plaintiff is not admissible as an admission by the corporation. Mobile, etc. R. R. *v.* Cogsbill, 85 Ala. 456 (1888). See also § 717, *supra*.

[2] He cannot admit that the signature of the person to whom a certificate of deposit is issued is genuine, Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96 (1845); nor that a new company is liable for the debts of an old one, Wyman *v.* Hallowell, etc. Bank, 14 Mass. 58 (1817); nor make representations as to an indorser's responsibility, Mapes *v.* Second Nat. Bank, 80 Pa. St. 163 (1875). But he may admit to a surety that a note has been paid. Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116 (1871).

[3] The admissions of a superintendent that a reward offered by his company is to go to a certain person is not binding, Blain *v.* Pacific Exp. Co.,

a corporation have authority to make admissions in regard to the fulfillment of contracts.[1] Such also is the rule in regard to other agents of the corporation.[2] "The declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestæ*, or in the performance of his duties as agent or officer."[3]

The admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters entrusted to him, are binding upon the corporation.[4] There are a large number of cases on this subject, and

69 Tex. 74 (1887); nor his representations as to the cost of mining. Hanover, etc. Co. *v.* Ashland, etc. Co., 84 Pa. St. 279 (1877). But he may admit the amount of damage caused by a nuisance. McGinness *v.* Adriatic Mills, 116 Mass. 177 (1874). May make admissions as to an assault made by an employee. Malecek *v.* Tower, etc. R'y, 57 Mo. 17 (1874).

[1] Bullock *v.* Consumers' Lumber Co., 31 Pac. Rep. 367 (Cal., 1892).

[2] Their admissions in regard to who paid for water in a ditch are evidence as to ownership thereof. Imboden *v.* Etowah, etc. Co., 70 Ga. 86 (1883). So, also, of a conductor as to a trunk, Morse *v.* Connecticut, etc. R. R., 72 Iowa, 450 (1856); of a freight agent relative to the delivery of freight, Lane *v.* Boston, etc. R. R., 112 Mass. 455 (1873); and of a bridge-tender as to the proper way to pass through, Toll, etc. Co. *v.* Betsworth, 30 Conn. 380 (1862); but not of a road-master as to trees that were cut down, Coyle *v.* Ball, etc. R. R., 11 W. Va. 94 (1877); nor as to an accident after it had happened, McDermott *v.* Hannibal, etc. R. R., 73 Mo. 516 (1881); nor of trainmen, Adams *v.* Hannibal, etc. R. R., 74 Mo. 553 (1881); nor of an engineer that a brakeman would be paid, Stiles *v.* Western R. R., 49 Mass. 44 (1844); nor of a telegraph operator, Sweatland *v.* Illinois, etc. Tel. Co., 27 Iowa, 433 (1869); nor of an engineer as to an accident, Robinson *v.* Fitchburg, etc. R. R., 73 Mass. 92 (1856). The admissions of a contractor may bind the company. Morris, etc. R. R. *v.* Green, 15 N. J. Eq. 469 (1862). Declarations of agents made and known by the officers bind the corporation. Toll-bridge Co. *v.* Betsworth, 30 Conn. 380 (1862).

[3] Cosgray *v.* New England P. Co., 22 N. Y. App. Div. 455 (1897).

[4] Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267 (1824); Hayward *v.* Pilgrim Soc., 38 Mass. 270 (1838); Sterling *v.* Marietta Co., 11 Serg. & R. (Pa.) 179 (1824); Westmoreland Bank *v.* Klinesmith, 7 Watts (Pa.), 523 (1838); Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 377 (1842); Farmers' Bank *v.* McKee, 2 Pa. St. 321 (1845); Hackney *v.* Allegheny Ins. Co., 4 Pa. St. 185 (1846); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28 (1848); Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851); Baptist Church *v.* Brooklyn Ins. Co., 18 Barb. 69 (1854); Devendorf *v.* Beardsley, 23 Barb. 656 (1857); Troy Ins. Co. *v.* Carpenter, 4 Wis. 20 (1855); Metropolis Bank *v.* Jones, 8 Pet. 12 (1834); Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96 (1845); Hartford Bank *v.* Hart, 3 Day (Conn.), 491 (1807); Osgood *v.* Manhattan Co., 3

the question of how far the corporation is bound by the declarations of subordinate agents frequently arises in the courts. The general rule is very much the same as prevails in regard to admissions made by agents of a large business copartnership. If the admission pertained to matters within the scope of that particular agent's powers, or apparent powers, the principal is bound, otherwise it is not. Thus an inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock, must be made of officers having authority to speak for the corporation.[1]

§ 727. *Notice to an incorporator, stockholder, agent, superintendent, treasurer, secretary, cashier, president, or director — When does their knowledge of facts constitute a notice of those facts to the corporation — When notice is chargeable to directors and stockholders — Notice of fraud perpetrated on the corporation.*— It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators[2] or stockholders[3] or clerk.[4] But the

Cow. 632 (1824); Polleys *v.* Ocean Ins. Co., 14 Me. 141 (1837); Ruby *v.* Abyssinian Soc., 15 Me. 306 (1838); Oldtown Bank *v.* Houlton, 21 Me. 507 (1842); Holman *v.* Norfolk Bank, 12 Ala. 369 (1847); Soper *v.* Buffalo, etc. R. R., 19 Barb. 310 (1855); Mitchell *v.* Rome R. R., 17 Ga. 574 (1855); Tollbridge Co. *v.* Betsworth, 30 Conn. 380 (1862); Morse *v.* Connecticut River R. R., 72 Mass. 450 (1856); McGinness *v.* Adriatic Mills, 116 Mass. 177 (1874). See also Green's Brice, Ultra Vires, pp. 500–504; Wood, Railw. Law, pp. 457–465.

[1] Browning *v.* Hinkle, 48 Minn. 544 (1892).

[2] Where an owner of a patent makes a contract to assign it, but afterwards, instead of doing so, forms a corporation and transfers the patent to it, the corporation is protected in its title, although the patentee was one of the incorporators and also a director of the corporation. Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884). Upon the reorganization of a corporation after bankruptcy the new company is not bound by the knowledge of its corporators as to the existence of incumbrances on property purchased from the old company. Burt *v.* Batavia Paper Mfg. Co., 86 Ill. 66 (1877). "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained." Iowa, etc. Co. *v.* American, etc. Co., 32 Fed. Rep. 735 (1887).

[3] A company formed to purchase a patent-right is protected in its title,

[4] Knowledge of a bank clerk of the place of residence of a party chargeable as indorser is not notice to the bank. Goodloe *v.* Godley, 21 Miss. 233 (1849).

corporation has notice of facts which come to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control. Thus, a corporation has been charged with notice of facts which were known at the time to its agent,[1] local agent,[2]

although some of its promoters and stockholders knew of an infirmity in the title. Racine, etc. Co. *v.* Joliet, etc. Co., 27 Fed. Rep. 367, 375 (1886); Housatonic Bank *v.* Martin, 42 Mass. 294, 308 (1840), where it was unsuccessfully sought by a mortgagor to defeat his deed by a subsequent assignment, on the ground that members of the corporation mortgagee had knowledge of the assignment; Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393 (1842), where, in a contest over title to land, evidence was held properly excluded which depended on the fact that a party was a stockholder in a company, and constructive notice of adverse claims was thereby sought to be established against the company. See Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881).

[1] "Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." Saint *v.* Wheeler, etc. Co., 95 Ala. 362 (1892). Notice to an agent, but not in the course of his business, is not notice to the corporation. Willard *v.* Denise, 50 N. J. Eq. 482 (1892). Where two corporations deal with each other through a common agent, the question of notice depends upon the circumstances of each case. Lyndon, etc. Co. *v.* Lyndon, etc. Inst., 22 Atl. Rep. 575 (Me., 1891). The corporation is given notice of a breach of trust by an attorney in fact for the transfer of stock, the attorney being one of its directors. Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). "In case of a corporation created for, and engaged in, trade or business, service of a notice on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in case of a natural person." State *v.* Felton, 52 N. J. L. 161 (1889). The knowledge of an agent, whose powers are no greater than those of the master of a ship, is not notice to a corporation. Craig *v.* Continental Ins. Co., 141 U. S. 638 (1891). In Consolidated, etc. Co. *v.* Kansas, etc. Co., 45 Fed. Rep. 7 (1891), the court said: "Facts coming to the knowledge of an agent or attorney while engaged about the business of his agency are, in law, presumed to be known to the principal or client." As to when a client is chargeable with knowledge of facts known to the attorney, see Slattery *v.* Schwannecke, 44 Hun, 75 (1887); aff'd, 118 N. Y. 543. A corporation taking an assignment of a patent without notice that another party was entitled to it is protected. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889).

[2] Knowledge of a local insurance agent that the insured is insuring for his firm is notice to the company. Keith *v.* Globe Ins. Co., 52 Ill. 518 (1869). Knowledge of a local

or superintendent.[1] So also as regards the higher officers of the company. Thus, the company has been charged with no-

agent that the insured had gone beyond the limits, and receipt of premiums thereafter, bind the company. Wing *v.* Harvey, 5 De G., M. & G. 265 (1854). Notice to insurance company of a subsequent insurance. Schenck *v.* Mercer, etc. Ins. Co., 24 N. J. L. 447 (1854). See also, in general, as to insurance, Troy, etc. Ins. Co. *v.* Carpenter, 4 Wis. 20 (1855); Bennett *v.* Maryland, etc. Co., 14 Blatchf. 422 (1878); S. C., 3 Fed. Cas. 229; McEwen *v.* Montgomery, etc. Co., 5 Hill, 101 (1843). And see text-books on insurance law. "Notice to an agent of a bank, or other corporation entrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of his authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion." Cragie *v.* Hadley, 99 N. Y. 131 (1885); Wood, Railw. Law, pp. 457–465; Smith *v.* Board, etc. Co., 38 Conn. 208 (1871). To this rule there are certain limitations more or less depending on the time of notice and the occasion of such notice; for example, while acting in the ordinary course of his employment as agent, notice to such agent of a corporation is notice to the corporation itself. But if such notice is given at an inopportune time, or upon an inappropriate occasion, constructive notice to the corporation may *ipso facto* be easily rebutted. Seneca County Bank *v.* Neass, 5 Denio, 329 (1848); Holden *v.* New York, etc. Bank, 72 N. Y. 294 (1878). It is well known that presumptive notice to a principal by reason of knowledge of an agent or trustee interested in concealing the fact from his principal cannot be imputed to the principal. Curtis *v.* Leavitt, 15 N. Y. 194, 195 (1857); Commissioners *v.* Thayer, 94 U. S. 631 (1876). This is equally true in the case of corporate agents. Seneca County Bank *v.* Neass, 5 Denio, 329 (1848). When the agent himself is the person charged with the fraud, notice to the principal through such an agent cannot be presumed, for it is the interest of the agent to conceal the facts from his principal. Cave *v.* Cave, L. R. 15 Ch. D. 639 (1880). Knowledge obtained by the corporate attorney and agent in another transaction does not bind the corporation. Constant *v.* Rochester University, 111 N. Y. 604 (1888); Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881). Notice to a bank clerk of matters not under his charge is not notice to the bank. Goodloe *v.* Godley, 21 Miss. 233 (1849).

[1] Knowledge of the general officers that an employee is incompetent is notice to the corporation, and it is liable for his negligence in running a train. Pittsburgh, etc. R'y *v.* Ruby, 38 Ind. 294, 313 (1871). Knowledge of the company's supervising engineer that the contractors in the construction of the bridge are innocently omitting certain things is notice to the company. Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151 (1850). Knowledge of a superintendent of an unrecorded lien is not notice to his company to which he conveys the property so subject. Wickersham *v.* Chicago, etc. Co., 18 Kan. 481 (1877). Knowledge by the superintendent of a coal mine of a dangerous roof is notice to the company. Quincy, etc. Co. *v.* Hood, 77 Ill. 68 (1875).

tice of facts known to the treasurer,[1] secretary,[2] cashier,[3] and manager.[4] Notice to the president of a bank is notice to the

[1] Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895). Where the treasurer of two corporations takes the funds of one and places them with the other to make good a defalcation from the latter, the latter corporation is liable, since it is chargeable with the knowledge of its treasurer. Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268 (1888). Payment to the treasurer, who enters the same on the books, is notice to the company, since the directors, if they did their duty, would know of such entry. New England, etc. Co. *v.* Union, etc. Co., 4 Blatchf. 1 (1857).

[2] Knowledge of the secretary that a vessel is being run, not by the owners, but by a third person, is notice to the corporation, and it cannot sue the owners for work done. Pontchartrain R. R. *v.* Heirne, 2 La. Ann. 129 (1847). Knowledge of the secretary that his wife, the owner of stock, had pledged that stock, is not notice to the corporation. Platt *v.* Birmingham, etc. Co., 41 Conn. 255 (1874). Notice to one acting for the secretary in his absence, and at his place of business, is as effectual as though given to the secretary himself. McKenney *v.* Diamond, etc. Assoc., 8 Houst. (Del.) 557 (1889). Notice to the secretary, who is also a director, that a note given by the corporation had been assigned by the payee to another, is sufficient notice. Love *v.* Anchor, etc. Co., 45 Pac. Rep. 1044 (Cal., 1896).

[3] Knowledge of the cashier and manager of a bank, acquired in the bank business, that an unrecorded deed has been made, defeats the bank's deed. Johnson *v.* Shortridge, 93 Mo. 227 (1887). A bank may be a *bona fide* purchaser of a draft from its cashier who has notice of defenses. Hummell *v.* Bank of Monroe, 75 Iowa, 689 (1888). Knowledge of the cashier of a bank that stock received in pledge is trust stock is notice to the bank. Loring *v.* Brodie, 134 Mass. 453 (1883). See also Second Nat. Bank *v.* Howe, 40 Minn. 390 (1889). The cashier's knowledge of fraud in a note is notice to the company. Fall, etc. Bank *v.* Sturtevant, 66 Mass. 372 (1853). Notice to the cashier of acceptance of the bank to receive payment in bonds is good notice. Branch Bank *v.* Steele, 10 Ala. 915 (1846). Notice to a cashier that bank funds have been loaned is notice to the bank. New Hope, etc. Co. *v.* Phenix Bank, 3 N. Y. 156 (1849). Where the directors acquiesce in the cashier's assumption of exclusive management of the bank's business, they will be held chargeable with knowledge of such things as by proper diligence they might and should have known as to the condition of business. Martin *v.* Webb, 110 U. S. 7 (1884). Knowledge of the cashier that a person turning in property to the bank is insolvent is notice to the bank. Witters *v.* Sowles, 32 Fed. Rep. 762 (1887). Notice to the cashier is notice to the bank. Bank of St. Mary's *v.* Mumford, 6 Ga. 44 (1849); Trenton, etc. Co. *v.* Woodruff, 2 N. J. Eq. 117 (1838). But knowledge obtained by the cashier outside of his duties is not notice to the bank (dictum). Seneca Co. Bank *v.* Neass, 5 Denio, 329, 337 (1848).

[4] Where the general manager and secretary does the corporate business entirely as he sees fit, his knowledge of facts is notice to the corporation. Anderson *v.* Kinley, 90 Iowa, 554 (1894). A pledgee is entitled to collect the dividends, and in some instances may do so, even though the stock is not transferred to him on the books, it being shown that the

company unless he is interested on the other side of the transaction.[1]

There are many conflicting decisions, however, on this subject of whether notice to the president is notice to the corporation, and in general the question may be said to be one of fact.[2] Where a corporation takes title to land through its

officers knew of the pledge. Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511 (1895). It may be a question of fact whether a sale of property to the corporation for stock was made, even though a certificate of stock was issued. The delivery of all the papers may have been in escrow. The knowledge of a promoter who then becomes general manager may be notice to the corporation. Huron, etc. Co. *v.* Kittleson, 4 S. D. 520 (1894). Notice prior to incorporation to a person who becomes an officer upon incorporation is not notice to the corporation, even though he transacts the business. Taylor *v.* Callaway, 7 Tex. Civ. App. 461 (1894). Although a managing director of one company is secretary of another company, yet knowledge that he has as to the latter company is not notice to the former company. *Re* Hampshire Land Co., [1896] 2 Ch. 743. Notice to a managing director while acting as such, and affecting business under his charge, is notice to the company. Dr. Jaeger's, etc. Ltd. *v.* Walker & Sons, 77 L. T. Rep. 180 (1897). Knowledge which a managing director had in regard to real estate three years prior to the organization of the corporation is not in itself notice to the corporation. Red River, etc. Co. *v.* Smith, 74 N. W. Rep. 194 (N. D., 1898).

[1] Louisville T. Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896); 50 N. E. Rep. 1079.

[2] The case of Kissam *v.* Anderson, 145 U. S. 435 (1892), reversed the decision below on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payments by the broker to the president. A corporation to which the principal stockholder, incorporator, and president conveys land is a purchaser with notice unless it proves the contrary. Billings *v.* Aspen, etc. Co., 51 Fed. Rep. 338, 349 (1892). A bank is not given notice as to defenses to notes of a cattle company presented to the bank by its president, but in behalf of the cattle company. Corcoran *v.* Snow Cattle Co., 151 Mass. 74 (1890). Knowledge which a trustee of a railroad mortgage receives as trustee binds another company in which he is president and superintendent. New York, etc. R. R. *v.* New York, etc. R. R., 52 Conn. 274, 280 (1884). Notice to the president that stock is held in trust is notice to the company. Porter *v.* Bank of Rutland, 19 Vt. 410 (1847). Notice to the president of a bank that the village is being sued for damage due to the bank's sidewalk is notice to the bank. Port Jervis *v.* First Nat. Bank, 96 N. Y. 550 (1884). See also Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). Knowledge of the president that a person who is turning property in to the bank is insolvent is notice to the bank. Gilman *v.* Second Nat. Bank, 23 Hun, 498 (1881). See also Central, etc. Bank *v.* Levin, 6 Mo. App. 543 (1879); First Nat. Bank *v.* Fricke, 75 Mo. 178 (1881). *Cf.* First Nat. Bank *v.* Sherburne, 14 Bradw. (Ill.) 566 (1884). Notice to the president and certain stockholders who are sent to investigate for the corporation is notice to the corpora-

incorporators, and all of them as well as the president had constructive or actual knowledge of a flaw in the title, the corpo-

tion. U. S. *v.* San Pedro, etc. Co., 4 N. M. 225 (1888). Knowledge of a president in regard to property which he sells to the company is not notice to the company. Barnes *v.* Trenton, etc. Co., 27 N. J. Eq. 33 (1876). Where it was attempted to impute to a corporation the knowledge of its president of a prior unrecorded conveyance, it was held this could not be done where the knowledge was general and not specific or official. U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381 (1851); S. C. on appeal, *sub nom.* General Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517 (1857). Knowledge by the president of outstanding equities to land mortgaged by him to the corporation is not notice thereof to the company. Winchester *v.* Baltimore, etc. R. R., 4 Md. 231, 239 (1853). Notice to a stockholder who is also president of another company is not notice to the latter. First Nat. Bank *v.* Anderson, 28 S. C. 143 (1888). The company is bound to take notice of the extent of a power of attorney given by a third person to its president. Mechanics' Bank *v.* Schaumberg, 38 Mo. 228 (1866). The knowledge of the vendor of personalty to a corporation that a chattel mortgage exists is not necessarily notice to the corporation, although he becomes its president and general manager. It is for the jury to decide whether there are not *bona fide* stockholders who would be injured by such a result. International, etc. Co. *v.* McMorran, 73 Mich. 467 (1889). Knowledge of one who is president of a railroad and also of a bank, where the bank discounts paper for the railroad, is notice to the bank if he took part in its action. Waynesville Nat. Bank *v.* Irons, 8 Fed. Rep. 1 (1881); and see the note. Notice to a member of a copartnership is not notice to a corporation of which that member is president. Miller *v.* Illinois, etc. R. R., 24 Barb. 312 (1857). The president and treasurer who stand by and allow another to purchase property without saying that the company has a claim thereon bind the company thereby. Mihills Mfg. Co. *v.* Camp, 49 Wis. 130 (1880). Knowledge of a president and director of a transfer of stock is notice to the company. Factors', etc. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879). Knowledge of a vice-president is not notice to the company. Fisher *v.* Murdock, 13 Hun, 485 (1878). Although the president and cashier are the discount committee and discount a note which is indorsed by the president, the bank is not charged with notice that the note was given for an illegal purpose. Graham *v.* Orange County Nat. Bank, 59 N. J. L. 225 (1896). The fact that the maker of a note tells the president of a bank, at the office of another company in which they are both directors, that a certain note was fraudulent, is not notice to the bank, although it afterwards discounts the note. Washington Nat. Bank *v.* Pierce, 6 Wash. 491 (1893). Where the president of a bank purchases for the bank a note from a corporation in which he is a director, the bank is chargeable with notice of defenses to the note known to the vendor of the note. Traders' Nat. Bank *v.* Smith, 22 S. W. Rep. 1056 (Tex., 1893). Knowledge acquired by an attorney, as attorney, of the execution of a mortgage, is chargeable to a corporation which takes a subsequent mortgage, where the attorney is the president of the corporation. Willard *v.* Denise, 50 N. J. Eq. 482 (1893). A bank is not chargeable with knowledge of the fact that its president, in depositing money to his

ration thereby had similar notice.[1] Where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.[2] Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement.[3] In general the test turns on whether the corporate agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for the corporation, cannot operate to its prejudice, and will not be imputed to it.[4]

The corporation is sometimes chargeable with knowledge of facts which are known to one of its directors;[5] but there are

individual credit, was depositing trust funds. *Re* Plankinton Bank, 87 Wis. 378 (1894). Where the president of a corporation sells property to it, the corporation is not chargeable with notice of defects in the title known to him. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where the treasurer of a corporation is also vice-president of a bank and draws out the funds of the former, taking in payment a draft running to himself individually, the bank is not chargeable with notice of a diversion of the corporate funds to his own use. Gunster *v.* Scranton Illuminating, etc. Co., 181 Pa. St. 327 (1897).

[1] Simmons, etc. Co. *v.* Doran, 142 U. S. 417, 436 (1892).

[2] National Conduit Mfg. Co. *v.* Connecticut Pipe Mfg. Co., 73 Fed. Rep. 491 (1896).

[3] Young Reversible, etc. Co. *v.* Young Lock-Nut Co., 72 Fed. Rep. 62 (1896).

[4] Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (1893); Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314 (1893). Concerning notice to an officer who is acting as a third party, and not for a company, see also First Nat. Bank *v.* Tompkins, 57 Fed. Rep. 20 (1893). Where the same persons are officers of a corporation and trustees for the benefit of its creditors, notice to them as such officers is not notice to them as trustees. New York Security, etc. Co. *v.* Lombard Inv. Co., 65 Fed. Rep. 271 (1895). Notice to an officer who is personally interested is not notice to the corporation. Victor, etc. Co. *v.* National Bank, 49 Pac. Rep. 826 (Utah, 1897). A corporation is not chargeable with notice of the fact that the parties conveying property to it for stock are doing so in breach of trust, even though such parties are directors in the corporation. This rule will be applied, especially where the beneficiary has been guilty of laches. Whittle *v.* Vanderbilt, etc. Co., 83 Fed. Rep. 48 (1897).

[5] A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the

so many exceptions to this rule that the only safety lies in a study of the cases themselves.[1]

bondholders of a foreclosed company. Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). Notice to a director is not notice to the company except "in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board." Buttrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882). The knowledge of a patentee that a label claims more than is correct is not notice to a corporation which purchased, owns, and operates the patent, although he is a director. Lawrence *v.* Holmes, etc., 45 Fed. Rep. 357 (1891). The fact that a director in a bank negotiates the sale of commercial paper to it does not charge the bank with notice of defenses to the paper. Koehler *v.* Dodge, 31 Neb. 328 (1891). If a director act in behalf of a bank in a transaction of which the bank takes the benefit, the bank is chargeable with a knowledge of all the director's acts in such transaction. Smith *v.* South Royalton Bank, 32 Vt. 341 (1859). Notice to a director who is acting as a special agent is notice to a bank. Fulton Bank *v.* Benedict, 1 Hall (N. Y.), 480, 557 (1829); Farmers' Bank *v.* McKee, 2 Pa. St. 318 (1845). Notice to three trustees and superintendent of repairs for a corporation that the water from the bank building was not properly conducted away is notice to the corporation. The "jury may presume that the trustee did his duty by communicating to the corporation the knowledge he had obtained, and which it was material that the corporation should know." Winne *v.* Ulster, etc. Inst., 37 Hun, 349 (1885). Knowledge of a firm dissolution imparted to the board by a director at a regular meeting is notice to the bank. Bank of Pittsburgh *v.* Whitehead, 10 Watts (Pa.), 397 (1840). In *Re* Carew's Estate Act, 31 Beav. 39 (1862), where a director and local manager of a bank obtained possession of certain acceptances without consideration, had them discounted by the bank, and carried to his account, which was largely overdrawn, the bank was held to have notice sufficient to prevent its being a *bona fide* owner. Notice once given to a board of directors is notice to its successor, although the individuals constituting it are all different. Mechanics' Bank *v.* Seton, 1 Pet. 299, 309 (1828). A director who, as attorney for the company, takes an acknowledgment of a mortgage to it binds the company with notice when he had previously taken an acknowledgment of an unrecorded deed. Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881). *Contra.* Houseman *v.* Girard, etc. Assoc., 81 Pa. St. 256 (1876).

[1] Although three of a body of city commissioners who have defrauded the city by a conspiracy in expending money are directors in a bank which advanced the money to the city, yet the bank may collect, it being proved that these three did not attend directors' meetings in reference to the matter, and did not act for the bank in any way in regard to it. Mayor, etc. *v.* Tenth Nat. Bank, 111 N. Y. 446 (1888). See also National Park Bank *v.* German, etc. Co., 53 N. Y. Super. Ct. 367 (1886). Knowledge of a majority of the directors that an unauthorized note has been given is not notice to the company. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). Knowledge of a director who sells a note to his bank that there is a defense to the note is not notice to the bank. Buffalo County Nat. Bank *v.* Sharpe, 40 Neb. 123 (1894). Where two of fifteen directors sell land to the corporation, their knowl-

A corporation has notice of facts which are known to all its officers and stockholders, and especially to a contracting firm

edge of a prior vendor's lien is not notice to the corporation. Bank *v.* Brett, 62 Minn. 4 (1895). Knowledge of a director that a note is tainted with illegal gambling is not notice to the bank, although he recommended it for discount. Shaw *v.* Clark, 49 Mich. 384 (1882). The fact that a cashier who discounts a note for a corporation payee is also a director in the latter is not notice to the bank of facts known to the corporation payee. First Nat. Bank *v.* Loyhed, 28 Minn. 396 (1881). Knowledge of a director that a member of a firm in which the director is also a member has withdrawn therefrom is not notice to the corporation. But it was proved that the director had no management or interference in the corporate affairs. Powles *v.* Page, 3 C. B. 16, 24, 81 (1846). Where a director causes his bank to discount a note which he holds as an indorsee, the bank is not chargeable with knowledge of facts which he knows and which would defeat payment. Loomis *v.* Eagle Bank, 1 Disney (Ohio), 285 (1859); Louisiana State Bank *v.* Senecal, 13 La. 525 (1839). Where a board of bank directors discounted a note for one of their number, who had knowledge of fraud in its inception, the maker was held liable on the ground that the knowledge of the director which was not communicated to any other director could not be considered notice to the bank. Terrell *v.* Branch Bank at Mobile, 12 Ala. 502 (1847). And see Lucas *v.* Bank of Darien, 3 Ala. (O. S.) 280, 321 (1830); Washington Bank *v.* Lewis, 39 Mass. 24 (1839); Commercial Bank *v.* Cunningham, 41 Mass. 270, 276 (1841); First Nat. Bank *v.* Christopher, 40 N. J. L. 435 (1878). Where a director had knowledge that certain bills which were discounted at the bank had been given originally as accommodation paper, but was not present when the board discounted them, and did not communicate his knowledge to any one, the bank was not regarded as having notice. Farmers', etc. Bank *v.* Payne, 25 Conn. 444 (1857); Westfield Bank *v.* Cornen, 37 N. Y. 320 (1867). But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the latter is affected with his knowledge. National Security Bank *v.* Cushman, 121 Mass. 490 (1877); Bank of U. S. *v.* Davis, 2 Hill, 451, 464 (1842). *Cf.* North River Bank *v.* Aymar, 3 Hill, 262, 274 (1842).

Notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. And even knowledge of the president that certain deposits were only to be drawn in a certain manner was held not to be knowledge of the bank so as to render it liable when such money had, unknown to the president, been wrongfully withdrawn. Fulton Bank *v.* New York, etc. Canal, 4 Paige, 127, 136 (1833). Knowledge of directors in a matter of their own in which they are not acting for the corporation is not notice to the latter. So held in a patent case where this defect of actual or constructive notice enabled the legal title to prevail over the equitable. Davis, etc. Wheel Co. *v.* Davis, etc. Wagon Co., 20 Fed. Rep. 699 (1884). An insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises will not be charged with constructive notice of such deed by the fact that the grantor and mortgagor was, at the date of the deed

that owns the corporation and uses it to carry on the firm's business.[1]

Where railroad property purchased at foreclosure sale is transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals holds that such corporation "paid no value, and held the property

and execution of the mortgages, a director in the insurance company. La Farge Fire Ins. Co. *v.* Bell, 22 Barb. 54, 61 (1856). Knowledge of a director, acquired by reading a notice thereof in a newspaper, that a firm has dissolved and that certain partners are no longer liable, is not notice to the corporation; he did not acquire the knowledge nor was it given to him for the corporation. National Bank *v.* Norton, 1 Hill, 572 (1841). On a question as to the ratification by a company of the unauthorized act of its president, where it is necessary to show knowledge on the part of the company, it is not enough to show an individual knowledge on the part of the minority of the board of trustees, even if a knowledge by all of them in their individual capacity, and not acting as a board, would be sufficient. Yellow Jacket, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). A corporation is not chargeable with any knowledge of a deed which a director discovers on examining the record unofficially. Farrell Foundry *v.* Dart, 26 Conn. 376 (1857). Notice to a director, not constituted an organ of communication between the parties, that a promissory note was made to be discounted for a special purpose, is not notice to the bank, although the director was present when the note was discounted. Custer *v.* Tompkins County Bank, 9 Pa. St. 27 (1848). Knowledge by a director of a deed drawn by him professionally is not notice to the corporation whose subsequent deed of the same property is first recorded. Armstrong *v.* Abbott, 11 Colo. 220 (1888). Notice of an unrecorded lien does not come to the corporation by the fact that a stockholder had notice and that he afterwards became an officer. The Admiral, 1 Fed. Cas. 178 (1856). Knowledge of a director that a bill purchased by the company is accommodation on the part of the drawee is not knowledge of the company if the director took no part in the purchase. *Re* Peruvian R'y, L. R. 2 Ch. 617 (1867). Knowledge acquired by a director while acting as a member of the firm which sells a note to the company is not notice to the company. Atlantic, etc. Bank *v.* Savery, 82 N. Y. 291 (1880). Corporations having common directors or officers are not chargeable with knowledge of each other's transactions and condition. *Re* Marseilles Extension R'y, L. R. 7 Ch. App. 161 (1871). See also, in general, Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882); West Boston Sav. Bank *v.* Thompson, 124 Mass. 506 (1878). Where the president of a corporation is vice-president and manager of a bank, and obtains money from the latter in the name of the former, but for his own use, the bank cannot recover from the corporation, the officers of the bank being cognizant of the transaction. Trapp *v.* Fidelity Nat. Bank, 41 S. W. Rep. 577 (Ky., 1897).

[1] Holly Mfg. Co. *v.* New Chester, etc. Co., 48 Fed. Rep. 879 (1891). See also § 663, *supra*.

subject to any equitable lien to which it was subject in the hands of its grantors."[1]

A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.[2] Where a company sells land to its president and secretary, they are charged with knowledge of facts known to the company, the latter having been present at the meetings.[3] The question sometimes arises whether a director or officer of a corporation is chargeable with notice of all facts contained in the corporate books. The general rule is that he is not chargeable with actual knowledge of such entries,[4] but such entries are admis-

[1] Vilas *v.* Page, 106 N. Y. 439, 465 (1887). See also ch. XL, *supra*. Where the officers of a bank use its funds to buy property which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property at their option. Farmers', etc. Bank *v.* Kimball Milling Co., 1 S. D. 388 (1890). A consolidated company takes with notice of facts known to one of the companies consolidated. Joy *v.* St. Louis, 138 U. S. 1 (1891). A tripartite agreement relative to a right of way through a park binds the successors of one of the companies. Joy *v.* St. Louis, 138 U. S. 1 (1891).

[2] Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896).

[3] Rapley *v.* Klugh, 40 S. C. 134 (1893). A discussion of what constitutes insolvency of a corporation, and stating that the directors are bound to know the condition of business, is given in Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7 (1891). Where the president discounts a note for the company and pays in the money therefor, he is a *bona fide* holder of it. Hitchings *v.* St. Louis, etc. Co., 68 Hun, 33 (1893).

[4] "There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder." Hence, in an action by the corporation for an accounting, the books of the company are not competent evidence to establish the account and hold him liable. Rudd *v.* Robinson, 126 N. Y. 113 (1891). A director sued by a stockholder for negligence in not attending to his duties is not presumed to have knowledge of all that is shown by the books of the company. This rule applies only to suits between the company and a stranger. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). A director is bound to take notice of calls, and cannot set up that he had no actual notice. Spellier, etc. Co. *v.* Geiger, 147 Pa. St. 399 (1892). Knowledge imparted to the corporation is not notice to its president, who buys a note from it. Peckham *v.* Hendren, 76 Ind. 47 (1881). The rule that a bank is estopped by the statement of its cashier to a surety that his principal had paid the note is not applicable where the surety is a director of the bank, for he will be conclusively presumed to know whether payment was made. His knowledge will also be imputed to a firm which

sible in evidence against him.[1] They are not admissible as evidence, however, as against strangers.[2]

A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto.[3]

But "a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."[4]

was the security and of which he was a member. Merchants' Bank *v.* Rudolf, 5 Neb. 528 (1877). See also § 714, *supra*. The directors' minute-book is evidence against a director. Allison *v.* Coal Creek, etc. Co., 87 Tenn. 60 (1888); First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881). A director cannot hold the president liable on a loan by the former to the corporation made on representations of the condition of the corporation. Hubbard *v.* Weare, 79 Iowa, 678 (1890).

[1] The books of a company are "competent as evidence so far as related to any entries legitimately contained in them, and so far as they were relevant to the issues on trial" in an action by creditors to hold a director liable. under the New York statute, for making a false report. Huntington *v.* Attrill, 118 N. Y. 365 (1890). Corporate books are admissible in evidence to show money received as against a corporate officer on trial for embezzlement, even though the entries were not made by him. Humphrey *v.* People, 18 Hun, 393 (1879). The minutes of a directors' meeting are evidence of who were present and what was done, so far as a suit between the corporation and one of those who were present is concerned. Olney *v.* Chadsey, 7 R. I. 224 (1862). A director and vice-president is chargeable with knowledge of what is on the corporate records. First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881). *Quære*, as to entries in miscellaneous corporate books. Billings *v.* Trask, 30 Hun, 314 (1883). The entries in the books of a business corporation during the period of his directorship are admissible in evidence against one who has been a director in the corporation, and as such took part in its affairs. Bedford *v.* Sherman, 68 Hun, 317 (1893). The books of the company are not, *per se*, evidence against a director. Powell *v.* Conover, 75 Hun, 11 (1894).

[2] A person contracting with a corporation is not bound to know what is contained in the corporate records. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885). Entries in the corporation books of matters relating to any property or right claimed by them can never be evidence for them unless made so by act of the legislature. They are not admissible in favor of the corporation as against strangers. Graville *v.* New York, etc. R. R., 34 Hun, 224 (1884). See also 15 Wend. 256, note; Wait, Insolv. Corp., § 528. As between claimants to the property of a corporation, the corporate records are not admissible as evidence to show the title of the corporation. Dolan *v.* Wilkerson, 48 Pac. Rep. 23 (Kan., 1897).

[3] See Abbott's Tr. Ev., p. 53.

[4] So held where a stockholder in a telegraph company sued it for negli-

The question of serving notice or papers upon corporations in judicial proceedings is discussed elsewhere.[1] The publication of a notice in a newspaper is not notice, unless the party notified is proved to have read the notice.[2]

gence in sending a message. Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256 (1890), aff'g 44 Hun, 532. A stockholder is not chargeable with knowledge of corporate contracts of which as a fact he knows nothing. Tarbox *v.* Gorman, 31 Minn. 62 (1883). But one who is a stockholder, director, and vice-president is chargeable with knowledge of entries on the corporate books. First Nat. Bank *v.* Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y. 655. See also ch. XXX, *supra*. One who is a stockholder and also director is as fully bound by entries in them as a partner is by entries in the partnership books. Montgomery *v.* Exchange Bank, 6 Atl. Rep. 133 (Pa., 1886). Minutes of the directors have been held to be evidence against a subscriber to disprove certain defenses set up by him to his subscription. Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). The cases of Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393, 398 (1842); and Graff *v.* Pittsburgh, etc. R. R., 31 Pa. St. 489, 495 (1858), hold that a stockholder present and assenting to an entry on the corporate books is bound by it. But Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833), per Parke, B., holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders. Corporate books are not only evidence of corporate acts when they are to be proved, but are to the same extent evidence against stockholders who are chargeable with knowledge of their contents. Blake *v.* Griswold, 103 N. Y. 429 (1886); Billings *v.* Trask, 30 Hun, 314 (1883). As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of a corporation. Hubbell *v.* Meigs, 50 N. Y. 480 (1872). See also Lindley, Companies, p. 312; Black *v.* Shreve, 13 N. J. Eq. 455 (1860); Haynes *v.* Brown, 36 N. H. 545 (1858); Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365 (1868). Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or its officers. Baker *v.* Woolston, 27 Kan. 185, 189 (1882). A pledgee of stock who takes no part in the stockholders' meetings is not chargeable with notice of a lien which the corporation has on property which he purchases. Baker *v.* Woolston, 27 Kan. 185 (1882).

[1] See § 752, *infra*.

[2] See § 119, *supra*. Though the company takes a newspaper, the announcement therein of a dissolution of partnership is not notice to it. Vernon *v.* Manhattan Co., 22 Wend. 183 (1839), aff'g 17 Wend. 524. *Cf.* 1 Hill, 578, n. *Contra*, Bank of South Carolina *v.* Humphreys, 1 McCord (S. C.), 388 (1821); Martin *v.* Walton, 1 McCord (S. C.), 16 (1821). Notice in a newspaper taken by an individual is not notice. Rawley *v.* Horne, 3 Bing. 2 (1825). But if contained in a newspaper taken by a marine insurance company, and is marine news, and the president knew the fact involved, the company has notice. Green *v.* Merchants' Ins. Co., 27 Mass. 402 (1830).

Where a party owns all the stock of another corporation, it has been held that he is chargeable with notice of entries upon its books.[1] The important principle of law that a person taking from a corporate officer corporate obligations in payment of a personal debt of such officer is not a *bona fide* holder of the same is considered elsewhere.[2]

[1] Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa, 364 (1893).

[2] See § 293, *supra*.

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN.

§ 728. Introductory.
729. Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy.
730. Express ratification herein — Transferee of stock that has been voted in favor of the act cannot complain.
731. Stockholder chargeable with laches only after he has a full knowledge of the facts.
732. What length of time constitutes laches herein—Statute of limitations.
733. Miscellaneous applications of the doctrine of laches herein.

§ 728. *Introductory.*— When a stockholder brings an action to remedy the frauds, *ultra vires* acts, or negligence of a director or third person, the most common and dangerous defense that he has to encounter is the defense that he has been guilty of laches in bringing his action. Like the defense of contributory negligence — a modern principle of law that defeats many actions for negligence — so the defense of laches, acquiescence, or ratification has sprung up to defeat stockholders' actions herein. The principles which govern, define, and explain this defense have become well settled. They form the subject of this chapter.

§ 729. *Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy.*— It has already been shown that a stockholder may bring an action to remedy frauds, negligence, or *ultra vires* acts. As regards the frauds and negligence of corporate officers, it is well settled that laches is a good defense to a stockholder's action herein. In reference to *ultra vires* acts, however, which are *mala prohibita* or *mala in se*, there is more difficulty. It is very clear that no assent or acquiescence of the stockholders can validate such acts.[1]

[1] See Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 186 (1879), where the court said: "A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them." A contract in which

But it is a different question to determine whether, after long acquiescence, the stockholder may take advantage of the invalidity of such acts. As regards acts *mala prohibita* — that is, acts expressly prohibited by statute — the stockholder may be barred by laches from complaining thereof, since the state, through its attorney-general, may protect the interests of the public.[1] The stockholder, however, may sue on the ground that unless the evil is corrected the state may forfeit the corporate franchises.[2] As regards acts *mala in se*, probably the rule will depend on the circumstances of the case. If the stockholder has participated in the act or knowingly accepted the benefit thereof, the court will not aid him, since he who comes into equity must do so with clean hands.[3] Thus, where a lease of a railroad is *ultra vires*, a bill in equity filed by one of the parties to the contract will not lie to set it aside. The court will aid neither party, they being *in pari delicto*.[4] When, however, a stockholder has not participated or knowingly accepted the benefit of corporate contracts which are *mala in se*, there

the directors are interested, where it is void by statute, cannot be enforced on the ground of waiver by the corporation. Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854). "Void" cannot be construed as "voidable" in a statute which is enacted from public policy, and not for the benefit of parties only. Rex *v.* Hipswell, 8 B. & C. 466 (1828), concerning a statute against binding out children. For a collection of the cases on *ultra vires* acts as *mala prohibita* and *mala in se*, see an article in The Counsellor, vol. 4, p. 151.

[1] See Stewart *v.* Erie, etc. Transp. Co., 17 Minn. 372 (1871); and Gray *v.* Chaplin, 2 Russ. Ch. 126 (1826), where the court held that the stockholder cannot claim that the public is wronged. If a public right is to be enforced, it must be at the suit of those to whom the protection of public rights belongs. *Cf.* Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653 (1875); S. C., L. R. 9 Exch. 224, 262. That which is forbidden by statute cannot be ratified. Nellis Co. *v.* Nellis, 62 Hun, 63 (1891); Taylor *v.* Chichester, etc. R'y, L. R. 2 Exch. 356 (1867). The state may at any time object. Alexander *v.* Searcy, 81 Ga. 536 (1889).

[2] Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857), where discounts were being improperly made.

[3] See § 39, *supra*. A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder by being a stockholder is estopped from complaining, and is presumed to have had knowledge of the facts from the time when he became a stockholder. Coquard *v.* National L. S. Co., 49 N. E. Rep. 563 (Ill., 1898).

[4] St. Louis, etc. R. R. *v.* Terre Haute, etc. R. R., 145 U. S. 393 (1892).

would seem to be no reason why mere delay on his part in bringing suit to set aside such acts should be fatal to his bill. As to the corporation itself, the fact of its participating in an act which is merely beyond the powers of a corporation, but is not prohibited by statute or pernicious in itself, may not be a bar to recovery upon the contract.[1]

§ 730. *Express ratification herein — Transferee of stock that has been voted in favor of the act cannot complain.*— There are in general two ways in which a stockholder may be said to have ratified an act of the directors which he is attempting to enjoin or set aside. The ratification may be by an express agreement or statement to that effect, or it may be by such laches or acquiescence as will amount to an implied ratification.[2] Cases involving the defense of an express ratification rarely arise, since this defense is easy to prove.[3] If the complaining stockholder participated in the act complained of, he of course is barred of his remedy.[4]

[1] Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24 (1896).

[2] Thus, in Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court said: "Consent might be either express or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors." See also Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 187 (1879).

[3] As an instance of express ratification, see Allen *v.* Wilson, 28 Fed. Rep. 677 (1886); Butterfield *v.* Cowing, 112 N. Y. 486 (1889). *Cf.* §§ 652, 662, 681, *supra.*

[4] See §§ 39, 40, *supra,* and § 735, *infra.* Acquiescence and ratification of the guaranty by one railroad of stock and bonds of another railroad, the stock and bonds being owned by directors of the former company, is a bar to an action to set the same aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Stockholders who have participated in a contract between the corporation and its officers cannot complain thereof. Clark *v.* Pittsburgh, etc. Co., 39 Atl. Rep. 86 (Pa., 1898). A stockholder who votes for an act cannot afterward complain of it. McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). Stockholders who participate in an alleged fraudulent reorganization cannot complain. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894). A stockholder who votes for the purchase of property from a director cannot afterwards complain. Barr *v.* Pittsburgh Plate Glass Co., 51 Fed. Rep. 33 (1892). See also ch. XXXIX, *supra.* A director who has voted for a sale cannot as a stockholder object. Holton *v.* Wallace, 66 Fed. Rep. 409 (1895). A stockholder who, as secretary, signed certificates of stock, cannot claim that they were watered stock, and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. Wisner *v.* Delhi, etc. Co., 46 La. Ann. 1223 (1894). Although a stockholder voted in favor of an *ultra vires* lease, yet, if the corporation has repudiated

Moreover, a stockholder who holds stock which has been voted in favor of the act complained of cannot bring suit as the holder of that stock.[1] In like manner, where the stock-

the lease, the estoppel is destroyed and the stockholder's suit may continue. Memphis, etc. R. R. *v.* Grayson, 88 Ala. 572 (1890). See also ch. XL, *supra*. A stockholder in a corporation which is acting practically for the profit of another corporation cannot, after he expressly assents to such an arrangement, object thereto. Hart *v.* Mt. Pleasant, etc. Co., 97 Iowa, 353 (1896). A stockholder who has participated in a consolidation cannot object thereto as being irregular. Bradford *v.* Frankfort, etc. R. R., 142 Ind. 383 (1895). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones *v.* Concord, etc. R. R., 30 Atl. Rep. 614 (N. H., 1892). See also, in general, Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder and who signs the mortgage, cannot do so. Perry *v.* Pearson, 135 Ill. 218 (1890). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). A stockholder who votes for the purchase of property from a director cannot afterwards complain. Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891). See also, in general, Branch *v.* Jesup, 106 U. S. 468, 476 (1882); U. S. *v.* Union Pac. R. R., 98 U. S. 569, 612 (1878). If all of the directors and stockholders know of a sale of property by a director to the corporation and do not object, and use the property, the transaction cannot be set aside. Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887). A bondholder who is a party to the reorganization plan, under which and as part of which the foreclosure sale is held, cannot object to the legality of the sale. Crawshay *v.* Soutter, 6 Wall. 739 (1867). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue. Pacific R. R. *v.* Missouri Pac. R'y, 111 U. S. 505 (1884). Unless inequitable, or rights of third persons have intervened. Pacific R. R. *v.* Missouri Pac. R. R., 111 U. S. 505 (1884). "A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business." Central, etc. Bank *v.* Walker, 66 N. Y. 424, 429 (1876). A stockholder in an old and new company who aids in the latter's improvement of property purchased by it from the former, and is instrumental in bringing about the sale and purchase, is estopped from objecting to the validity of the sale. St. Louis, etc. Co. *v.* Sandoval, etc. Co., 116 Ill. 170 (1886).

[1] See § 40, *supra*, and § 735, *infra*; *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883). The purchaser of stock which was issued to directors cannot complain

holder, with full knowledge, has accepted the benefit of the act, he cannot complain thereafter.[1] But the defense of an implied ratification is more difficult to establish. An implied

that the directors were guilty of fraud in the issue. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). In Brown *v.* Duluth, etc. R'y, 53 Fed. Rep. 889 (1893), the court refused to interfere where the transferee of the stock took with notice. The court said: "The complainant, as their transferee, is in no better situation than they are. He has no greater rights than his transferrers as regards a remedy invalidating the transaction. The maxim *in pari delicto* applies, and a court of equity will not aid him. He cannot bring suit in behalf of other stockholders against the corporation or other parties participating in the issue, as his own title is tainted with the same fraud." A purchaser of stock which was voted in favor of a reorganization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. Hollins *v.* St. Paul, etc. R. R., 9 N. Y. Supp. 909 (1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. *v.* Schneider, 110 Mo. 83 (1892). A stockholder who purchases his stock after the acts complained of took place cannot compel another stockholder to repay to the company dividends which he has received, due to contracts by which the company had sold coal to a railway company, for which railway company such latter stockholder was purchasing agent. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). This same principle — that stock which has participated in a fraudulent act cannot afterwards be the basis of a suit to set aside that fraud — has been applied to bonds, so far as enforcing the covenants of the mortgage is concerned, such covenants being waived by a former owner of the bonds which complainant now owns. Belden *v.* Burke. In regard to this case and the famous litigation in which it was but a part, see § 764, *infra*. In Alabama it is held that, if the stock passes into

[1] London Assur. Co.'s Case, 5 De G., M. & G. 465, 481 (1854). See also Weed *v.* Little Falls, etc. Co., 31 Minn. 154 (1883). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders, who under protest subscribe for the new stock and then wait eighteen months before commencing legal proceedings, are estopped from objecting. Post *v.* Beacon, etc. Co., 84 Fed. Rep. 371 (1898).

ratification is generally spoken of as laches. It is the subject of the remainder of this chapter.[1]

§ 731. *Stockholder chargeable with laches only after he has a full knowledge of the facts.*— Laches is a defense only when the stockholder, with a full knowledge of the facts, has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense.[2] Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence.[3] Where, however, the facts would be well known to any intelligent man, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.[4]

bona fide hands, the *bona fide* holder may object to the fraudulent or *ultra vires* act, even though the stock itself was tainted with the fraud by reason of being held by one of the guilty parties at the time of the act. Parsons *v.* Joseph, 92 Ala. 403 (1891). But the weight of authority holds that if the stock purchased is tainted with the fraud — that is to say, if the persons guilty of the act complained of owned that stock when they did the act — no action will lie by a *bona fide* transferee of that stock. Ffooks *v.* Southwestern R'y, 1 Sm. & G. 142 (1853). A transferee of stock that was voted in favor of the act cannot complain. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. Marbury *v.* Stone, 17 N. Y. App. Div. 352 (1897).

[1] See First Nat. Bank *v.* Drake, 29 Kan. 311 (1883), for a definition of ratification.

[2] See the leading case of Cumberland Coal Co. *v.* Sherman, 30 Barb. 553 (1859), quoting from Lewin on Trusts; and the equally important case of Hoffman, etc. Co. *v.* Cumberland, etc. Co., 16 Md. 456 (1860).

[3] Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). The statute of limitations does not begin to run against a promoter who takes a secret profit until the facts are known to the stockholders. *Re* Sale, etc. Co., 77 L. T. Rep. 681 (1897). Where there is not a full disclosure at a stockholders' meeting the members present are not bound by their assent. Ives *v.* Smith, 3 N. Y. Supp. 645 (1888).

[4] Laches must be denied in the bill, and details given of how and when knowledge was received of the act complained of. Means of knowledge

But it is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.[1] Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay.[2] A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original cap-

are equivalent to knowledge. Laches need not be pleaded as a defense. Credit Co. *v.* Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882). Thirteen years' delay in attacking a consolidation as not being in compliance with statutory provisions is a bar. "Whatever is sufficient to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." It is immaterial whether the court declare the consolidation void or voidable. Leavenworth County *v.* Chicago, etc. R. R., 18 Fed. Rep. 209 (1883); Taylor *v.* South, etc. R. R., 4 Woods (U. S.), 575 (1882), the court saying: "The means of knowledge are the same thing in effect as knowledge itself. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See also Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886). In Phosphate, etc. Co. *v.* Green, L. R. 7 C. P. 43 (1871), it was held that to show assent and acquiescence it is not necessary to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

[1] *Re* Agriculturists', etc. Co., L. R. 1 Ch. App. 161, 511 (1866), where the court said: "It is no part of the duty of a shareholder to look into the management of the business. . . . It is not enough to show that they might have become acquainted with the mismanagement of their affairs. It must be shown that they did so." Ryan *v.* Leavenworth, etc. R'y, 21 Kan. 365 (1879). Also Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875), holding that knowledge of a sale of property is not knowledge of an illegal dividend from the proceeds. See also Spackman *v.* Evans, L. R. 3 H. L. 171 (1868); Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868).

[2] Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court saying: "Lapse of time alone certainly would not make valid that which at the beginning was invalid. . . . Length of time may, in many cases, materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." Ashhurst's Appeal, 60 Pa. St. 290 (1869), where, however, the court says that "acquiescence is presumed from delay."

ital stock to the directors themselves, who were illegally elected, but who thereby acquire control of the company.[1]

§ 732. *What length of time constitutes laches herein — Statute of limitations.*— After a stockholder has knowledge of or is chargeable with knowledge of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter.[2] As to what will constitute a reasonable time depends on the circumstances of the case. The length of time during which a stockholder may delay in bringing his suit varies with each case, according to the circumstances of that case. The court requires that reasonable promptness be exercised so that large investments of new money or radical changes in the ownership of the stock or property may not be prevented or jeopardized by an unreasonable delay on the part of a stockholder in objecting to the transaction. Various illustrations of this principle of law are given in the notes below.[3]

[1] Morris *v.* Stevens, 178 Pa. St. 563 (1897).

[2] In Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875), Mr. Justice Miller gives a clear statement of the law herein. Taylor *v.* South, etc. R'y, 4 Woods (U. S.), 575 (1882); Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50 (1885); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821, 826 (1886).

[3] Where the trustee sells trust property to himself personally, and the *cestuis que trust* are cognizant thereof and do not object for several years, they cannot set the transaction aside. Hoyt *v.* Latham, 143 U. S. 553 (1892). See also Foster *v.* Mansfield, etc. R. R., 146 U. S. 88 (1892). Where a stockholder delays for a year in complaining of a sale of corporate property to two of the directors, and innocent third parties have acquired rights in the property in the meantime, the stockholder's remedy is barred by laches. Snow *v.* Boston, etc. Co., 158 Mass. 325 (1893). See § 733, *infra*. Although a shoe company employs as selling agents a firm in which the president and general manager of the corporation is a member, yet where this has been done for nine years without objection, a stockholder cannot claim for the corporation the benefit of the firm's profits from such contract. Warren *v.* Para, etc. Co., 166 Mass. 97 (1896). Where a person buys land for $24,000, and afterwards becomes a director and then sells it to the corporation for $80,000, a majority of the board being disinterested, the company cannot, nine years afterwards, claim that it should pay only the then market value of the land. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Delay for two years on the part of one who claims he is entitled to come into a reorganization is fatal. Farmers' L. & T. Co. *v.* Bankers', etc. Tel. Co., 119 N. Y. 15 (1890), the purchaser having denied any reorganization agreement during that time. A stockholder who objects, but waits from October 17 to March 7, and then at the annual meeting tries to have action taken, is not guilty of laches. Byrne *v.* Schuyler, etc. Co., 65 Conn. 336 (1895). A stockholder who is also a director cannot complain of a di-

There has been considerable doubt and difficulty in determining whether the statute of limitations will be applied by a

version of funds by the manager arising from an unauthorized "swapping" of checks, and is barred of relief where he had known of its continuance for two years. Streight *v.* Junk, 59 Fed. Rep. 321 (1893). Where for a long time an irrigation company acquiesces in a certain construction of an agreement to furnish water, and such construction is equitable, a stockholder cannot object, even though some of the directors are interested personally. Foster *v.* Bear Valley Irr. Co., 65 Fed. Rep. 836 (1895). A stockholder who delays nine years before intervening in a foreclosure suit cannot then intervene after the sale is completed and the money ready for distribution. Boston, etc. Trust Co. *v.* American Rapid Tel. Co., 67 Fed. Rep. 165 (1895). Where the directors of a failing linen-manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. Pinkus *v.* Minneapolis Linen Mills, 65 Minn. 40 (1896). Where the directors sell unissued stock at a discount to a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. Keeney *v.* Converse, 99 Mich. 316 (1894). Four years' delay in bringing suit to compel a corporate officer to account for property purchased by him at an execution sale is fatal. Horbach *v.* Marsh, 37 Neb. 22 (1893). A stockholder who for two years knows that an illegal salary is being paid cannot afterwards object. Brown *v.* De Young, 47 N. E. Rep. 863 (Ill., 1897). Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. Stetson *v.* Northern Inv. Co., 73 N. W. Rep. 869 (Iowa, 1898). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn., 1897); 26 N. Y. App. Div. 499.

A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly $25,000,000, wholly due, and bearing a high rate of interest." Carey *v.* Houston, etc. R'y, 52 Fed. Rep. 671 (1892). Three years' time having elapsed before a stockholder ascertained a fraudulent sale of the company's stock by the directors to themselves, relief will be denied where that sale has been of great benefit to the remaining stock. Squair *v.* Lookout Mountain Co., 42 Fed. Rep. 729 (1890). Thirteen years' delay by stockholders in complaining of a gift of town lots to the town by a committee of the stockholders upon the dissolution of the corporation is fatal. Norton *v.* Kellogg, 41 Fed. Rep. 452 (1890). A delay of twenty years in complaining that a lease taken by the company was due to the fact that a part of the directors were interested in the stock and bonds of the lessor company is fatal. Jesup *v.* Illinois Cent. R. R., 43 Fed. Rep. 483 (1890). "Means of

court of equity to cases of this nature. It has been held in England that the statute will be applied to a corporate action

knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge." Jesup *v.* Illinois Cent. R. R., 43 Fed. Rep. 483 (1890). Laches is a bar to a suit against a corporation the same as against individuals, especially as new stockholders are continually coming in. St. Paul, etc. R'y *v.* Sage, 49 Fed. Rep. 315 (1892). Eleven and one-half years is no bar to a stockholder's suit to set aside illegal bonds and a mortgage, where no attempt was made to enforce the bonds. Chicago *v.* Cameron, 120 Ill. 447 (1887). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock. Alexander *v.* Searcy, 81 Ga. 536 (1889). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. Rabe *v.* Dunlap, 51 N. J. Eq. 40 (1893). Where a fraudulent foreclosure was made on April 5th, and the fraud became known on June 5th, and suit was brought in September, the suit may be maintained, no one having been prejudiced by the delay. Ex-Mission, etc. Co. *v.* Flash, 97 Cal. 610 (1893). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1890). Where a pledgee bank, having a right to sell at private sale and without notice, sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond *v.* Palmer, 41 La. Ann. 425 (1889). Laches is a bar. Moore *v.* Silver, etc. Co., 104 N. C. 534 (1890). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky., 1890). Where a stockholder delays in bringing a suit for an unreasonable length of time for the purpose of ascertaining whether the act complained of will be profitable to him, his suit to set aside the act will fail. Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892). A director's purchase for the creditors and certain mortgage bondholders of the

to compel a director to pay over to the corporation money received by him as a bribe, and that the statute begins to run

mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money; and the stockholders knew of the condition of things, but made no effort to prevent a sale; and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne *v.* Monks, 21 S. W. Rep. 101 (Ky., 1893). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. Warren *v.* Bigelow Blue Stone Co., 74 Hun, 304 (1893). A hotel company having bought a competing hotel and paid for it in stock and held the property for two years, a stockholder cannot have the purchase set aside. Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894). In Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), it was held that where two corporations, having contract relations, are controlled by the same board of directors and a fraud is committed, the delay and acquiescence of a minority director did not prevent his suing to remedy the fraud. Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for ten years is fatal. U. S. etc. Co. *v.* Reed, 2 How. Pr. (N. S.) 253 (1885).

See also Downes *v.* Ship, L. R. 3 H. L. 343 (1868); Ashhurst's Appeal, 60 Pa. St. 290 (1869); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821, 826 (1886); London, etc. Assoc. *v.* Kelk, L. R. 26 Ch. D. 107 (1884); McLoughlin *v.* Detroit, etc. R'y, 8 Mich. 100 (1860); Gray *v.* Chaplin, 2 Russ. Ch. 126 (1826), where the stockholder had acquiesced forty-seven years in an *ultra vires* lease. In Mills *v.* Central R. R., 41 N. J. Eq. 1, 9 (1886), it was very properly held that a delay of fifty-four days was no bar, and also that a failure to vote against the act was no bar. In Gifford *v.* New Jersey R. R. & T. Co., 10 N. J. Eq. 171 (1854), a delay of twenty years was held to be a bar. In the following cases the court held delay to be a bar: Peabody *v.* Flint, 88 Mass. 52 (1863), the delay being three and a half years; Gregory *v.* Patchett, 33 Beav. 595 (1864), six years; International, etc. R. R. *v.* Bremond, 53 Tex. 96 (1880), two years; Graham *v.* Birkenhead, etc. Co., 2 Macn. & G. 146 (1850), eighteen months; Kitchen *v.* St. Louis, etc. R'y, 69 Mo. 224 (1878), five years; Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881); Ashhurst's Appeal, 60 Pa. St. 290 (1869), seven years; Sheldon, etc. Co. *v.* Eickemeyer, etc. Co., 90 N. Y. 607 (1882), four years; Pneumatic Gas Co. *v.* Berry, 113 U. S. 322 (1884); Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); *Re* Pinto Silver Min. Co., L. R. 8 Ch. D. 273 (1878); Royal Bank *v.* Grand Junction R. R., 125 Mass. 490 (1878); *Re* Magdalena, etc. Co., 6 Jur. (N. S.) 975 (1860), where a delay of two years was held a bar; Brotherhood's Case, 31 Beav. 365 (1862), twelve years; Hervey *v.* Illinois, etc. R'y,

from the time when the corporation discovers the facts.[1] In the United States, under the statutes of the different states of the Union, the courts often apply to a suit, brought to remedy

28 Fed. Rep. 169 (1884); Thompson *v.* Lambert, 44 Iowa, 239 (1876); Vigers *v.* Pike, 8 Cl. & F. 562, 650 (1840); Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859); Allen *v.* Wilson, 28 Fed. Rep. 677 (1886). *Cf.* Boardman *v.* Lake Shore, etc. R'y, 84 N. Y. 157 (1881); Badger *v.* Badger, 2 Wall. 87 (1864); Harwood *v.* Railroad Co., 17 Wall. 78 (1872); Rochdale Canal Co. *v.* King, 2 Sim. (N. S.) 78 (1851); §§ 161, 162, 198, *supra*. Seventeen years' delay bars the right of preferred stockholders to reach a fund which was to be given them as a compromise by first bondholders, a foreclosure by second bonds having subsequently followed. Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1877). Five years' delay in attacking a consolidation is too late. Bell *v.* Pennsylvania, etc. R. R., 10 Atl. Rep. 741 (N. J., 1887). But a delay of eleven years and a half was held not fatal to a stockholder's action to set aside an *ultra vires* issue of bonds, where the railroad had been abandoned, the bonds never dealt in nor enforced, and the complainant had in view the removal of the lien, and intended to proceed and construct the road. Chicago *v.* Cameron, 120 Ill. 447 (1887). Four years' delay in suing to set aside an *ultra vires* assignment of property held fatal. Descombes *v.* Wood, 91 Mo. 196 (1887). Where a corporation is insolvent, and turns in its property at a fair price to a creditor whose debt is also secured by the guaranty of the president of the corporation, and the creditor at once sells the property to the president at an advanced price, a stockholder who delays suit for two years, during which time the property becomes valuable and the president, who purchased, dies, is barred from complaining. Hancock *v.* Holbrook, 40 La. Ann. 53 (1888). Laches bars the right of preferred stockholders to object to an *ultra vires* lease. Emerson *v.* N. Y. etc. R. R., 14 R. I. 555 (1884), aff'g Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881). Three years' delay is fatal to a stockholder's suit to hold the president liable for illegal acts, where the former was also treasurer. Dunphy *v.* Traveller Assoc., 146 Mass. 495 (1888). A lease of corporate property may be ratified by one hundred days' delay of the company in repudiating it, the lessee in the meantime expending money thereon. Hoosac, etc. Co. *v.* Donat, 10 Colo. 529 (1888). A lessor railroad cannot, nineteen years after the lease, sue in equity to set aside the lease as *ultra vires*. Laches is a bar. St. Louis, etc. R. R. *v.* Terre Haute, etc. R. R., 33 Fed. Rep. 440 (1888); aff'd, 145 U. S. 393 (1892). Ten years' delay bars an action by a stockholder to set aside a fraudulent foreclosure of a mortgage given by the company. Foster *v.* Mansfield, etc. R. R., 36 Fed. Rep. 627 (1888); aff'd, 146 U. S. 88 (1892). A lease of a water company's property to an ice company, with the privilege to the stockholders of the former to take stock in the latter, will not be set aside at the instance of stockholders who did not offer to take such stock until too late, and who delayed complaining until after the ice company proved

[1] Metropolitan Bank *v.* Heiron, L. R. 5 Exch. D. 319 (1880). The statute of limitations is no bar to an action against a director for fraud, when notice of the fraud came only to the directors, part of whom were also implicated. *Re* Fitzroy, etc. Co., 50 L. T. Rep. 144 (1884).

the frauds, *ultra vires* acts, or negligence of directors, the regular statute of limitations.[1] It is established law that where equity and law have concurrent jurisdiction of a case, equity will apply the statute of limitations.[2]

Where there are a series of transactions between the president and the company, the statute of limitations does not begin to run until his official connection ceases.[3] If the running of

a success. Shaaber's Appeal, 17 Atl. Rep. 209 (Pa., 1889). The time consumed by the guilty officers in legal proceedings to collect their gains is not included in the time which constitutes laches on the stockholders' part. Davis *v.* Gemmell, 70 Md. 356 (1889).

[1] Watts's Appeal, 78 Pa. St. 370 (1875). See also Taylor *v.* South, etc. R. R., 4 Woods, 575 (1882). Also in California. See Dannmeyer *v.* Coleman, 11 Fed. Rep. 97 (1882), holding that under the statute in California the three-years' limitation to actions based on fraud after discovery thereof applies to directors' frauds herein. But see Philippi *v.* Philippe, 115 U. S. 151 (1885); Twin Lick, etc. Co. *v.* Marbury, 91 U. S. 587 (1875); Moyle *v.* Landers, 21 Pac. Rep. 1133 (Cal., 1889). See, in general, Coit *v.* Campbell, 82 N. Y. 509, 514 (1880); Farnam *v.* Brooks, 26 Mass. 212, 242 (1830); Godden *v.* Kimmell, 99 U. S. 201, 210 (1879); Preston *v.* Preston, 95 U. S. 200 (1877); Badger *v.* Badger, 2 Wall. 87 (1864); Meader *v.* Norton, 11 Wall. 442 (1870); Bowman *v.* Wathen, 1 How. 189 (1843); Beckford *v.* Wade, 17 Ves. Jr. 87 (1805). The statute of limitations is a bar to an action against directors for negligence in allowing overdrafts and illegal loans. Williams *v.* Halliard, 38 N. J. Eq. 373, 383 (1884). An action against a third person to recover money paid by the corporation to him for stock must be brought within six years or it is barred by the statute of limitations. Pierson *v.* McCurdy, 33 Hun, 520 (1884). But in Pierson *v.* Morgan, 20 Abb. N. Cas. (N. Y., 1887), and Brinckerhoff *v.* Bostwick, 99 N. Y. 185 (1885), the ten-year statute was applied to fraud. The statute of limitations may constitute a bar to an action by the corporation against its secretary for funds appropriated by him. Landis *v.* Saxton, 105 Mo. 486 (1891). The six-years' statute of limitations runs against an action to hold a director liable for investing corporate funds in the stock of another company. *Re* Lands Allotment Co., [1894] 1 Ch. 616. An action by a receiver to recover money from directors is barred in six years, but a similar action by a stockholder, being in equity alone, is barred in ten years, in New York. Mason *v.* Henry, 83 Hun, 546 (1895). The statute of limitations does not run as against the president's misappropriation of funds, where the delay was due to his misrepresentations. Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373 (1895). The statute of limitations at law applies, since it is a legal right that is being enforced in equity. As to negligence the time is within six years from the negligent act, in Tennessee. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six-years' statute of limitations is a bar to a stockholders' suit to hold them liable, no fraud being alleged. Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

[2] Baker *v.* Cummings, 169 U. S. 189 (1898).

[3] Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa., 1898). A national

the statute has been stopped as to one complaining stockholder it is stopped as to all.[1] In general a court of equity will apply the statute or will not apply it, as may seem most just, and will even shorten the time.[2]

The statute of limitations is no bar to a receiver's action to recover back from directors a salary which was paid in breach of trust.[3]

§ 733. *Miscellaneous applications of the doctrine of laches herein.*—It is well settled that the ratification of an act which the stockholder might have complained of does not authorize or ratify in advance a repetition of that act.[4] A stockholder's right to object to a director's act can be exercised by him alone.[5] It is also well established that the ratification which will bind a stockholder must be by himself alone. It cannot be by the other stockholders.[6] But the acquiescence of a stockholder bars an action by any transferee of that stock.[7]

If neither the defendants nor others have been induced by the delay to act upon the matters which are complained of, laches may not be a bar to the stockholder's action.[8] It is not

bank may hold its officers liable for making loans to an individual in excess of ten per cent of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897).

[1] Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194 (1885). See also Richmond *v.* Irons, 121 U. S. 27 (1887). But see Ashley's Case, L. R. 9 Eq. Cas. 263 (1870); also § 163, *supra*.

[2] Sullivan *v.* Portland, etc. R. R., 94 U. S. 806, 811 (1876). See also Ernest *v.* Croysdill, 2 De G., F. & J. 175 (1860); *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882).

[3] Ellis *v.* Ward, 137 Ill. 509 (1890). The statute of limitations is no bar. A court of equity is governed by the rules of laches instead. Ellis *v.* Ward, 137 Ill. 509 (1890).

[4] Irvine *v.* Union Bank of Australia, L. R. 2 App. 366 (1877); Bloxham *v.* Metropolitan R'y, L. R. 3 Ch. 337, 354 (1868).

[5] Taylor *v.* Chichester, etc. R. R., L. R. 2 Exch. 356, 378 (1867).

[6] Hazard *v.* Durant, 11 R. I. 195 (1875). This principle of law is substantially a mere restatement of the principle that the majority cannot bind the minority as regards *ultra vires* acts; nor can the directors. See Gallery *v.* National Exch. Bank, 41 Mich. 169 (1879). The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme. Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893).

[7] See §§ 40, 730, *supra*, and § 735, *infra*.

[8] Whitman *v.* Bowden, 27 S. C. 53 (1887).

necessary to allege that the stockholders have been free from acquiescence or laches.[1] The question of laches should be raised by answer and not by demurrer.[2]

Delay due to the fact that a bill had previously been filed and dismissed on technical grounds is not laches.[3] Where all the stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and does not object cannot complain.[4] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[5] Ratification does not arise from the mere fact that the directors' minutes were ratified at a stockholders' meeting.[6]

If it is evident that the stockholder waited to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief.[7] So also, if the stockholder, after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made, before he brings suit, he is guilty of laches, and his remedy is barred.[8] But delay after the damage

[1] Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196 (1889).

[2] A demurrer is not the proper way to raise the question of laches. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461 (1893); Sage *v.* Culver, 147 N. Y. 241 (1895). *Cf.* Crumlish *v.* Shenandoah Valley R. R., 28 W. Va. 623 (1886). The complainant need not allege that he did not take part in the transaction, but the question of laches may be raised by demurrer. George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894). The bill for relief from fraud perpetrated a long time prior thereto must explain in detail the reason of the delay. Laches may be raised by demurrer. Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898).

[3] Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892).

[4] Steinway *v.* Steinway, 2 N. Y. App. Div. 301 (1896).

[5] McFadden *v.* Leeka, 48 Ohio St. 513 (1891).

[6] Ives *v.* Smith, 8 N. Y. Supp. 46 (1889).

[7] Story, Eq. Jur. § 1539*a*; Kitchen *v.* St. Louis, etc. R'y, 69 Mo. 224 (1878); Gregory *v.* Patchett, 33 Beav. 595 (1864); Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236, 250 (1886); Banks *v.* Judah, 8 Conn. 145 (1830); Watts's Appeal, 78 Pa. St. 370 (1875); Sheldon, etc. Co. *v.* Eickemeyer, etc. Co., 90 N. Y. 607 (1882); Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892). Quoted and approved in Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894).

[8] See § 732, *supra*; also Houldsworth *v.* Evans, L. R. 3 H. L. 263, 276 (1868). Delay of eight months held fatal. Great Western R'y *v.* Oxford, etc. R'y, 3 De G., M. & G. 341 (1853). See also Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881); Aurora, etc. Soc. *v.* Paddock, 80 Ill. 263 (1875);

is done, and while the complaining stockholder served as a director in the hope of bettering things, is not a bar.[1]

Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him.[2]

Stewart *v.* Erie, etc. Transp. Co., 17 Minn. 372 (1871); Goodin *v.* Evans, 18 Ohio St. 150 (1868). In Covington, etc. R. R. *v.* Bowler, 9 Bush (Ky.), 468 (1872), however, the court held that a delay of six years was not a bar to the stockholder's remedy; and the court said that "merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or to alter their condition, and thereby render it unconscientious for him to enforce his rights." But see Pacific R. R. of Mo. *v.* Missouri Pac. R'y, 111 U. S. 505 (1884), reversing 12 Fed. Rep. 641, holding that delay pending appeal is not fatal. See also §§ 161, 162, *supra*. A stockholder who lies by and allows his corporation, which is not a success, to be merged with other property into a new company, payment being made in stock of the latter company, and the enterprise proves a success, cannot cause to be set aside an assessment to pay a debt incurred for expenses in bringing about such results. Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889).

[1] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[2] Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119 (1889).

CHAPTER XLV.

PARTIES, PLEADINGS, ETC., IN SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION—SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

§ 734. Jurisdiction of the court — Jurisdiction of the federal courts in such cases — Jurisdiction over foreign corporations — When is the remedy in equity and when at law?— The complainant in equity must sue in behalf of himself and all other stockholders — The results of the suit belong to the corporation.

735. Parties plaintiff — Who may bring the suit—Unregistered transferees — Trustees — Pledgees — Stock that has voted in favor of the act — Small stockholders — Corporate creditors — Receiver.

736. Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.

737. Ninety-fourth rule in federal courts against suits by transferees.

738. Parties defendant herein—The corporation—Directors—Third persons—The receiver.

739. Complainant's bill must not improperly join two or more causes of action herein.

740. Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so — Ninety-fourth rule of the federal courts on this subject — Request to receiver.

741. When such an allegation may be omitted.

742. Miscellaneous allegations of the complaint.

743. Prayer for relief.

744. Property received under the act objected to must be returned upon that act being set aside.

§ 745. Injunction restraining the corporate officers and others from doing specific acts.

746. Appointment of a receiver — Injunction against corporate officers acting at all — Removal of directors by the court or corporation.

747. Miscellaneous remedies.

748. The complaining stockholder controls the conduct of the suit — Costs and disbursements — Similar suits elsewhere.

749. No contribution among the directors.

B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL.

750. The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with by the courts — Intervention by stockholders.

751. Suits by and against the corporation — Must be in corporate name.

752. Service — Appearance — Answer.

753. Allegation and proof of incorporation.

754. Confession of judgment.

755. Injunction and contempt.

756. Contempt and sequestration.

757. Foreign corporations may sue and be sued — Stockholders' suits against foreign corporations — Garnishment — Statute of limitations — Usury.

758. Service in suits against a foreign corporation.

759. Jurisdiction of the federal courts — "Dummy" corporations — Residence of corporations — Jurisdiction where service is on an officer temporarily in the state — Federal corporations.

A. SUITS BY STOCKHOLDERS IN BEHALF OF THE CORPORATION.

§ 734. *Jurisdiction of the court — Jurisdiction of the federal courts in such cases — Jurisdiction over foreign corporations — When is the remedy in equity and when at law? — The complainant in equity must sue in behalf of himself and all other stockholders — The results of the suit belong to the corporation.* — There has been some difficulty in determining whether the federal courts have jurisdiction of a stockholder's suit herein when the corporation and such directors as must be made parties are citizens of one state and the complainant stockholder is a resident of another state. Inasmuch as the suit is for the benefit of the corporation, it has been claimed that the non-residence of the stockholder is insufficient to give jurisdiction. The federal courts have decided, however, that such jurisdiction exists, and it is in these courts that a large proportion of these suits are brought.[1] The defendant corpo-

[1] Dodge *v.* Woolsey, 18 How. 331 (1855); Barnes *v.* Kornegay, 62 Fed. Rep. 671 (1894); Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Pond *v.* Vermont Valley R. R., 12 Blatchf. 280 (1874); S. C., 19 Fed. Cas. 976, the court holding also that the complainant might omit as party plaintiff a stockholder residing in the state of the corporation. See also Hatch *v.* Chicago, etc. R. R., 6 Blatchf. 105 (1868); S. C., 11 Fed. Cas. 799; Foote *v.* Linck, 5 McLean, 616 (1853); S. C., 9 Fed. Cas. 366; Bell *v.* Donohoe, 17 Fed. Rep. 710 (1883), holding that the court has no jurisdiction if the stockholder and one of the defendants, a third person who is alleged to have defrauded the corporation, are citizens of the same state. See also Burke *v.* Flood, 1 Fed. Rep. 541 (1880). In Hawes *v.* Oakland, 104 U. S. 450 (1881), the court vigorously denounced transfers of stock made for the purpose of giving the federal courts jurisdiction. The ninety-fourth rule (see 104 U. S. ix) was made in consequence thereof. Where "the parties on one side of the controversy are citizens of New Jersey, and those on the other side of the controversy are a New Jersey corporation and other citizens of New Jersey, as well as a Pennsylvania corporation and citizens of Pennsylvania and of Maryland, . . . all the parties on one side of this controversy not being citizens of different states from all those upon the other side, the citizenship of the parties did not bring the case within the jurisdiction of the circuit court." New Jersey Cent. R. R. *v.* Mills, 113 U. S. 249 (1885); East Tennessee, etc. R. R. *v.* Grayson, 119 U. S. 240 (1886). If the two parties in interest are both corporations of the same state, it seems that a stockholder cannot sue in the federal court by reason of his living in another state. Quincy *v.* Steel, 120 U. S. 241 (1887); People *v.* State Treasurer, 24 Mich. 468 (1872). See also Huntington *v.* Palmer, 104 U. S. 482 (1881). In suits by one or more in behalf of others, others will not be allowed to come in as parties when to do so would oust the United States court of jurisdiction. Stewart *v.* Dunham, 115 U. S. 61 (1885); Jack-

ration cannot remove the case to the federal court where indispensable parties defendant are participants in the act complained of and are of the same state as the complainants.[1] A suit, however, commenced by the stockholder against the corporation and against another party who has defrauded the corporation may be removed to the federal court, even though the stockholder and his corporation are citizens of the same state, it being shown that such corporation is desirous of having the complainant succeed in the suit.[2] A suit by several stockholders against several of the directors to hold them liable for misappropriation of corporate funds cannot be removed to the federal court by one of the defendants on the ground that the controversy is separable.[3] The question of whether a court will entertain jurisdiction of a case against a foreign corporation when there is difficulty in obtaining service on the corporation or enforcing the decree of the court is discussed elsewhere in this chapter.[4]

It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or com-

son, etc. Co. *v.* Burlington, etc. R. R., 29 Fed. Rep. 474 (1887). *Cf.* Thouron *v.* East, etc. R'y, 38 Fed. Rep. 673 (1889). As to jurisdiction, see also Peninsular Iron Co. *v.* Stone, 121 U. S. 631 (1887). The United States court, which decreed a foreclosure, has jurisdiction to set aside a foreclosure as fraudulent, irrespective of citizenship in the latter case. Pacific R. R. of Mo. *v.* Missouri Pac. R'y, 111 U. S. 505 (1884), rev'g 12 Fed. Rep. 641. See also §§ 827, 562, notes, as to the jurisdiction of the United States courts. A stockholder may bring suit in the federal courts to remedy a corporate wrong, even though his interest as a stockholder is less than $2,000. The test is whether the corporate interests involved exceed $2,000. Hill *v.* Glasgow R. R., 41 Fed. Rep. 610 (1888). A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed. Leary *v.* Columbia River, etc. Co., 82 Fed. Rep. 775 (1897).

[1] Wilder *v.* Virginia, etc. Co., 46 Fed. Rep. 676 (1891).

[2] Hutton *v.* Joseph Bancroft, etc. Co., 77 Fed. Rep. 481 (1896).

[3] Fox *v.* Mackay, 60 Fed. Rep. 4 (1894). A stockholder's suit cannot be removed to the federal court on the ground of local prejudice, where one of the defendants is a citizen of the same state as most of the complaining stockholders, and the controversy is not separable. Gann *v.* Northeastern R. R., 57 Fed. Rep. 417 (1891).

[4] See §§ 757, 758, *infra*.

plainants must bring the suit in behalf of themselves and such others of the stockholders as care to come in.[1]

There has been considerable controversy as to whether a suit to hold directors liable for fraud, negligence, or *ultra vires* acts should be at law or in equity. The well-established rule is that such a suit, when brought by a stockholder, should be in equity, inasmuch as it is in the nature of an accounting or the prevention of illegal acts. A suit at law is not the proper remedy.[2] In such suit in equity the defendant cannot demand a trial by jury as a matter of right.[3]

[1] Wickersham *v.* Crittenden, 93 Cal. 17 (1892); Wallworth *v.* Holt, 4 Myl. & C. 619 (1840); Taylor *v.* Salmon, 4 Myl. & C. 134 (1838), on the ground "that where the parties interested are numerous, and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others;" Beman *v.* Rufford, 1 Sim. (N. S.) 550 (1851); Baldwin *v.* Lawrence, 2 Sim. & S. 18 (1824); Bromley *v.* Smith, 1 Sim. 8 (1826); White *v.* Carmarthen, etc. R'y, 1 Hem. & M. 786 (1863); Bailey *v.* Birkenhead, etc. R'y, 12 Beav. 433 (1850); Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840); Winsor *v.* Bailey, 55 N. H. 218 (1875); Blatchford *v.* Ross. 54 Barb. 42 (1869); Cunningham *v.* Pell, 5 Paige, 607 (1836); Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860); March *v.* Eastern R. R., 40 N. H. 548 (1860); Whitney *v.* Mayo, 15 Ill. 251 (1853); Bethune *v.* Wells, 94 Ga. 486 (1894). See Cass *v.* Ottawa, etc. Co., 22 Grant (U. C.), 512 (1875), and Hoole *v.* Great Western R'y, L. R. 3 Ch. App. 262 (1867), to the effect that the rule is otherwise as regards *ultra vires* acts. If the allegations show that the suit is in behalf of all, the omission of a direct allegation to that effect may not be fatal. Flynn *v.* Brooklyn, etc. R. R., 9 N. Y. App. Div. 269 (1896). Of course, if all the stockholders are made parties, there is no need of the suit being brought in behalf of others who may choose to come in. Rogers *v.* Lafayette Agric. Works, 52 Ind. 296 (1875). *Cf.* Bengley *v.* Wheeler, 45 Mich. 493 (1881). Several stockholders may join in bringing the suit. Marie *v.* Garrison, 83 N. Y. 14 (1880). The bill must be filed in behalf of all. Jefferson, etc. Bank *v.* Francis, 23 S. Rep. 48 (Ala., 1898).

[2] The leading case on this point is Smith *v.* Hurd, 53 Mass. 371 (1847), the court saying: "An injury done to the stock and capital by negligence or defeasance is not an injury to such separate interest, but to the whole body of stockholders in common." Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882); Craig *v.* Gregg, 83 Pa. St. 19 (1876). To same effect, Allen *v.* Curtis, 26 Conn. 456 (1857). "A fatal defect in the plaintiff's petition, both original and amended, is that it seeks no recovery in behalf of the corporation, but seeks a direct recovery of damages for the plaintiff individually, the case stated not entitling him to such a recovery." Evans *v.* Brandon, 53 Tex. 56 (1880); Kent *v.* Jackson, 2 De G., M. & G. 49 (1852). An action at law does not

[3] Brinckerhoff *v.* Bostwick, 105 N. Y. 567 (1887); MacNaughton *v.* Osgood, 114 N. Y. 574 (1889). *Cf.* People *v.* State Treasurer, 24 Mich. 468 (1872). See also § 701, *supra*.

Where a corporation sues its directors for neglect of duty, the action may be at law or in equity, according to the nature

lie at the instance of a stockholder against a director for mismanagement of the corporation. Howe *v.* Barney, 45 Fed. Rep. 668 (1891). A stockholder's remedy for wilful waste on the part of a director is in equity, and not at law. Hirsh *v.* Jones, 56 Fed. Rep. 137 (1893). A stockholder of a dissolved corporation cannot reach corporate assets which have been fraudulently diverted, except by a suit in equity. Under the statutes of New York an attachment cannot be obtained in a suit in equity. Shiel *v.* Patrick, 59 Fed. Rep. 992 (1894). The stockholder's action may be in the nature of a suit in equity for conspiracy. Fox *v.* Hale, etc. Co., 108 Cal. 369, 475, 478 (1895). Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. Sayles *v.* White, 18 N. Y. App. Div. 590 (1897). A stockholder's remedy against directors for negligence is in equity. Bloom *v.* National, etc. Loan Co., 81 Hun, 120 (1894). The stockholder's remedy is not at law, although money of the corporation misappropriated by the defendant constitutes all the assets of the corporation. Thompson *v.* Stanley, 20 N. Y. Supp. 317 (1892). The suit is in equity and will not be construed as a suit for dissolution. Watkins *v.* Watkins, etc. Co., 11 N. Y. App. Div. 517 (1896). A pledgor of stock cannot, in a suit brought by one of his creditors to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. McMullen *v.* Ritchie, 57 Fed. Rep. 104 (1893). A contract between a stockholder and a third person, by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. Kountze *v.* Flannagan, 19 N. Y. Supp. 33 (1892). A stockholder's remedy to restore land to the corporation, he claiming that the land was sold under a mortgage which did not cover such land, is at law and not in equity, although he might have a receiver appointed to recover the land. Knevals *v.* Florida, etc. R. R., 66 Fed. Rep. 224 (1894). See, in general, Gardiner *v.* Pollard, 10 Bosw. 674 (1863); Craig *v.* Gregg, 83 Pa. St. 19 (1876); and see § 701, *supra*. This principle of law is assumed in nearly all the cases cited in Part IV of this work. In a complicated case equity will take jurisdiction of a suit to hold a president liable for misappropriating funds. Warner *v.* McMullin, 131 Pa. St. 370 (1890). A vendee sued for the price of stock cannot set up that the plaintiff vendor had negligently managed the corporation and misappropriated its assets. Mealey *v.* Nickerson, 44 Minn. 430 (1890). In Priest *v.* White, 89 Mo. 609 (1886), an action at law by a corporate creditor for fraud and deceit failed. In Kimmel *v.* Stoner, 18 Pa. St. 155 (1851), and Kimmell *v.* Geeting, 2 Grant (Pa.), Cas. 125 (1853), where the corporation, through its directors, ordered an agent to purchase for the corporation certain shares of its stock which

of the relief sought.[1] An action by a receiver against directors for negligence should be at law, and there must be a separate suit against each director.[2] The money or property recovered from directors or third persons in a suit in equity instituted

the state was about to sell, and after the purchase the directors divided it among themselves, it was held that a stockholder could sue such directors in an action on the case and obtain damages for the proportionate loss sustained by himself. See also §§ 157, 355, 651, *supra*, and § 747, *infra*. *Cf.* Quincy *v.* Steel, 120 U. S. 241 (1887). In Hanley *v.* Balch, 94 Mich. 315 (1892), a stockholder sustained an action at law for damages against another stockholder who had wrecked the corporation and bought in the property in violation of an agreement to carry along the corporate debt. In a suit at law against corporate officers for damages for wrecking the corporation by creating false debts and causing all the property to be applied to their payment, the proceedings by which the property was so applied must be fully set forth. Cottrell *v.* Tenney, 48 Fed. Rep. 716 (1892). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the damage between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

[1] Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897). The remedy of a corporation against its manager for mismanagement, fraud, neglect, and wrongful acts may be in equity on the ground of an accounting, even though an action at law for tort would lie. Empire State Tel. Co. *v.* Bickford, 72 Hun, 580 (1893); Empire State Sav. Bank *v.* Beard, 81 Hun, 184 (1894), holding also that all the guilty parties should be joined as defendants. See also § 701, *supra*.

[2] O'Brien *v.* Fitzgerald, 143 N. Y. 377 (1894). A receiver cannot bring suit in equity against various directors for misconduct as to matters in some of which all of the directors are liable and in others only a part of them. There should be a separate suit at law against each. O'Brien *v.* Fitzgerald, 6 N. Y. App. Div. 509 (1896). The remedy of the receiver against the directors for negligence is at law. Dykman *v.* Keeney, 154 N. Y. 483 (1897). A receiver's action against the directors for negligence is at law. Higgins *v.* Tefft, 4

by a stockholder in behalf of all the stockholders belongs to all the stockholders and not to the complaining stockholder. It goes to the corporation.[1] The decree must be for the benefit of the corporation and not for the complainant stockholders.[2] Where, however, an illegal salary has been paid, with the consent of a majority of the stockholders, and a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.[3]

N. Y. App. Div. 62 (1896). A court of equity is the proper forum for a receiver to bring suit against directors for negligence and loss. Buist *v.* Melchers, 44 S. C. 46 (1895). If the receiver refuses to sue, a stockholder may sue. See § 701, *supra*, and § 740, *infra*.

[1] The proceeds of the suit go to the corporation. Howe *v.* Barney, 45 Fed. Rep. 668 (1891). The results of a stockholder's suit against the directors for negligence belong to the corporation, and not to him. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). The proceeds of the suit belong to the corporation. An agreement that the attorneys shall have a contingent fee is good where all the stockholders stood by and allowed the work to go on. Davis *v.* Gemmell, 73 Md. 530 (1891). Mismanagement by directors gives a right of action to the corporation or a stockholder for its benefit, but not to a stockholder for damages to him individually. McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). The results of the suit belong to the corporation. Grant *v.* Lookout Mountain Top Co., 93 Tenn. 691 (1894). The judgment is for the benefit of the corporation, and a receiver may be appointed to collect and distribute it. Fox *v.* Hale, etc. Co., 108 Cal. 475 (1895). Moneys recovered in a stockholder's suit belong to the corporation, and not to him. Thompson *v.* Stanley, 20 N. Y. Supp. 317 (1892). Where a stockholder sues directors and also parties to whom the directors have illegally transferred property, and asks for a personal judgment in his own behalf, the complaint is multifarious. Scharf *v.* Warren-Scharf, etc. Co., 5 N. Y. App. Div. 439 (1896). The complaining stockholder cannot ask for his share of the property or money involved. Pratt *v.* Bacon, 27 Mass. 123 (1830). That the money or property recovered belongs to the corporation, see Evans *v.* Brandon, 53 Tex. 56 (1880); Dewing *v.* Perdicaries, 96 U. S. 193, 198 (1877); Smith *v.* Poor, 40 Me. 415 (1855); Carter *v.* Ford, etc. Co., 85 Ind. 180 (1882). A plaintiff may upon the trial be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation. Brewster *v.* Hatch, 122 N. Y. 349 (1890). Where a stockholders' suit enjoining illegal taxation is successful, the purchaser of the property of the corporation at a foreclosure sale succeeds to the benefit of that suit, and may refuse to pay the tax. Secor *v.* Singleton, 41 Fed. Rep. 725 (1890).

[2] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1896).

[3] Brown *v.* De Young, 47 N. E. Rep. 863 (Ill., 1897). In Eaton *v.* Robinson, 32 Atl. Rep. 339 (R. I., 1895), where illegal salaries had been paid,

§ 735. *Parties plaintiff — Who may bring the suit — Unregistered transferees — Trustees — Pledgees — Stock that has voted in favor of the act — Small stockholders — Corporate creditors — Receiver.* — Ordinarily, a suit herein is instituted by one or more stockholders who are registered as such on the corporate books. It has been held, however, that the suit may be brought by a purchaser of a certificate of stock who has not as yet obtained a registry thereof in the corporate books.[1] A stockholder in a corporation which owns stock in another corporation may file a bill to enjoin an *ultra vires* act of the latter.[2] Stockholders who are disqualified from participating in the suit shall not be joined as parties plaintiff.[3]

the court ordered the guilty parties to pay to each stockholder his proportionate part of the money.

[1] Bagshaw *v.* Eastern Union R'y, 7 Hare, 114 (1849); Great Western R'y *v.* Rushout, 5 De G. & Sm. 290 (1852); Ervin *v.* Oregon, etc. Nav. Co., 28 Hun, 269 (1882); Parrott *v.* Byers, 40 Cal. 614 (1871). *Cf.* Landes *v.* Globe, etc. Co., 73 Ga. 176 (1884), where a stockholder had not paid his subscription; Mills *v.* Northern R'y, L. R. 5 Ch. 621 (1870), a *quære*. An unregistered stockholder brought suit in the case of Houston, etc. Co. *v.* Drew, 36 S. W. Rep. 802 (Tex., 1896), and the party in whose name the stock stood on the books intervened in support of the bill. *Contra*, Ramsey *v.* Erie R'y, 7 Abb. Pr. (N. S.) 156 (1869); Heath *v.* Erie R'y, 8 Blatchf. 347 (1871); S. C., 11 Fed. Cas. 976; Hersey *v.* Veazie, 24 Me. 9 (1844). An unregistered holder of certificates is very doubtfully entitled to bring the action. Moore *v.* Silver, etc. Co., 104 N. C. 534 (1889). Where the plaintiff's stock is transferred on the corporate books, until he obtains the stock again he cannot sue as a stockholder, even though he claims that the stock was transferred without consideration and on terms not performed. Lawson *v.* Stanley, 15 N. Y. Supp. 707 (1891). A stockholder may sue, although he is not a stockholder of record. Although he has transferred his stock to the president to enable him to control all the stock and wind up the company, he may bring a suit in behalf of the corporation for frauds upon it. Thompson *v.* Stanley, 20 N. Y. Supp. 317 (1892). But such a stockholder cannot maintain a suit against directors for fraud where his stock has been transferred to another, and he has no interest therein; nor can he maintain his suit on the ground that he owns a certificate of stock standing in the name of another and transferred in blank on the back by the administratrix of the stockholder of record, no proof being given of the administratrix's being such or of having executed the transfer. Thompson *v.* Stanley, 73 Hun, 248 (1893); aff'd, 147 N. Y. 713. A purchaser of a certificate of stock who has not yet obtained a transfer of the same on the corporate books cannot complain of fraudulent or *ultra vires* acts. Brown *v.* Duluth, etc. R'y, 53 Fed. Rep. 889 (1893).

[2] Carter *v.* Producers', etc. Co., 164 Pa. St. 463 (1894).

[3] Clements *v.* Bowes, 1 Drew. 684 (1853). *Cf.* Parrott *v.* Byers, 40 Cal. 614 (1871), holding that if one of the complainants is competent it is immaterial that the others are not. See

Where a person who holds stock as a trustee refuses to bring the suit, the *cestui que trust* may institute it, making the trustee a party defendant.[1] An administrator holding stock may bring the suit.[2] A person who has sold his stock cannot sue;[3] nor can a subscriber who has not paid as required by charter;[4] but an unregistered pledgee may sue.[5] A pledgor of stock may maintain the action.[6]

A stockholder cannot institute such a suit as this where his stock is all "water," and illegal,[7] or the original business of the corporation was illegal. Thus, where the real business of the corporation is an illegal one — a lottery — and where the stock is wholly fictitious, the courts will not aid a stockholder.[8] A

also State Line R. R.'s Appeal, 1 R'y & Corp. L. J. 139 (Pa., 1886); Burt *v.* British, etc. Assoc., 4 De G. & J. 158 (1859), where the court said that if the stockholders "sue by a plaintiff only who has personally precluded himself from suing, that suit cannot proceed." See House *v.* Mullen, 22 Wall. 42 (1874).

[1] Great Western R'y *v.* Rushout, 5 De G. & Sm. 290 (1852); Daft *v.* Daft, etc. Co., N. Y. L. J., Dec. 3, 1890. *Cf.* Mayer *v.* Denver, etc. R. R., 38 Fed. Rep. 197 (1889).

[2] Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894).

[3] A person who is the registered holder of stock, but has actually sold the certificates or scrip, cannot maintain the bill, nor will the bill be sustained on the theory that he represents the purchaser of the certificates. Doyle *v.* Muntz, 5 Hare, 509 (1846).

[4] Busey *v.* Hooper, 35 Md. 15 (1872).

[5] Baldwin *v.* Canfield, 26 Minn. 43 (1879). The pledgee may institute a suit where his security has been impaired. Green *v.* Hedenberg, 159 Ill. 489 (1896). A pledgee of stock is as fully protected against *ultra vires* acts as a stockholder is. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890). *Cf.* § 468, *supra*.

[6] Fisher *v.* Patton, 134 Mo. 32 (1895).

[7] A person to whom watered stock has been issued as full-paid stock is not such a *bona fide* stockholder as may compel a creditor to return bonds which were illegally issued. The stock is void under the Wisconsin statutes. Hinckley *v.* Pfister, 83 Wis. 64 (1892). Stock issued as full paid for no consideration whatsoever is void under the constitutional provision that stock shall be issued only "for labor done, services performed, or money or property actually received." The original holders of such stock cannot institute a suit to remedy a wrong done to the corporation by its president. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889).

[8] Le Warne *v.* Meyer, 38 Fed. Rep. 191 (1889). A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. Coquard *v.* National L. S. Co., 49 N. E. Rep. 563 (Ill., 1898).

stockholder cannot enjoin an issue of bonds by a corporation in which his corporation expects to become a stockholder.[1]

A stockholder who holds stock which has been voted in favor of the act complained of will fail in his suit. This stock is tainted with the fraud or illegality. This is a very important principle of law, and defeats many suits instituted by stockholders to remedy past wrongs. The law is clear that a stockholder who voted in favor of the transaction, or a holder of stock which at the time of the act complained of was held by a party who participated in the act, or acquiesced therein, or voted the stock therefor, cannot bring suit to set the transaction aside.[2] Where the corporation is insolvent a stockholder cannot maintain a suit to hold the directors liable for fraud unless he alleges that the relief asked for will be of some benefit to him; in other words, that there will be a surplus for the stockholders after the creditors are paid.[3]

A stockholder who has been guilty of laches, or against whom the statute of limitations has run, cannot complain.[4] The smallness of the stockholder's interest will not prevent his instituting a stockholder's suit to remedy a corporate wrong. An owner of one share is to be protected by a court of justice equally with the owner of a thousand shares. The old doctrine of *de minimis non curat lex* has sometimes been applied to this class of cases, but such decisions are not to be commended. If there are no suspicious circumstances connected with the suit,

[1] Mayer *v.* Denver, etc. R. R., 38 Fed. Rep. 197 (1889).

[2] See §§ 40, 730, *supra*. A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds, with nearly an equal amount of stock thrown in. Drake *v.* New York, etc. Co., 26 N. Y. App. Div. 499 (1898).

[3] Corning *v.* Barrett, 48 N. Y. Supp. 1013 (1898). See also Smith *v.* Hurd, 53 Mass. 371, 385 (1847). Where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had *no property at all* at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie. Smith *v.* Ferries, etc. R'y, 51 Pac. Rep. 710 (Cal., 1897). See also § 848, *infra;* Darragh *v.* Wetter Mfg. Co., 78 Fed. Rep. 7 (1897).

[4] See ch. XLIV, *supra*.

it is believed that this maxim of the law will not be applied to a case of this character.[1]

The stockholders cannot join with the corporation in bringing the suit.[2] Indeed, the proper party to institute the suit is the corporation, and it is only because the corporation fails to do so that a stockholder may bring the suit where fraud or *ultra vires* is involved. But both cannot join in the suit. The

[1] Armstrong *v.* Church Soc., 13 Grant, Ch. (U. C.) 552 (1867), the court saying: "Every member of a corporation has a right to object to any illegal diversions of its funds; and in this respect those who contribute most have no greater rights than those who contribute least;" Seaton *v.* Grant, L. R. 2 Ch. 459 (1867), where the court said the maxim did not apply, since the stockholder sued not on his own behalf alone, but for himself and others. However, in the case of Dannmeyer *v.* Coleman, 11 Fed. Rep. 97 (1882), the court said: "It is always a suspicious circumstance where a single stockholder among a large number in a corporation rushes into a court of equity to vindicate, unaided and alone, the rights of the corporation and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited that in case of success his own share of the recovery will be so small as to make the maxim *de minimis non curat lex* very properly applicable." *Cf.* Ithaca Gaslight Co. *v.* Treman, 93 N. Y. 660 (1883). If the complaining stockholder has but a small interest, he is aided only where he makes out a clear case. Benedict *v.* Western Union Tel. Co., 9 Abb. N. Cas. 214, 222 (1878); Reiff *v.* Western Union Tel. Co., N. Y. D. Reg., Aug. 23, 1887. In Charlton *v.* Newcastle, etc. R'y, 5 Jur. (N. S.) 1096 (1859), the court said: "A single shareholder, holding five or ten shares or less, is perfectly justified in applying to the court to restrain a company, on behalf of himself and the other shareholders, by injunction, from committing any illegal act beyond their powers. It does not signify if all the other shareholders are pitted together against this holder of ten shares; the court holds it is better for the real interests of the company that they should obey the law, and any one single shareholder who invokes the aid of the court is entitled to its aid for that purpose." See also, to the effect that the holder of a single share may bring the suit, Beman *v.* Rufford, 1 Sim. (N. S.) 550, 564 (1851); Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381, 395 (1859); Kean *v.* Johnson, 9 N. J. Eq. 401, 410 (1853), reviewing the cases; Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 5 (1882). As to the right of the owner of one share of stock to enjoin an election, see Greenough *v.* Alabama, etc. R. R., 64 Fed. Rep. 22 (1894).

[2] Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). Where a corporation has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. Tennessee, etc. Co. *v.* Ayers, 43 S. W. Rep. 744 (Tenn., 1897).

subject of the intervention of stockholders in suits carried on by the corporation is considered elsewhere.[1]

May a corporate creditor institute a suit to make the officers account for a fraudulent or *ultra vires* act? A simple creditor certainly cannot. Until judgment is obtained and execution is returned unsatisfied, the corporate creditor has no interest in any specific corporate property. Moreover, in case his debt is finally paid, he has no interest in the management or assets of the corporation, nor in the acts of its officers and stockholders.[2] The rule is different as to the trustee of a corporate mortgage or a bondholder secured by such mortgage. They may sue to protect the mortgaged property.[3] After judgment is obtained, however, and execution returned unsatisfied, a corporate creditor may follow the corporate assets into the hands of corporate officers or of third persons who have received such assets fraud-

[1] See § 750, *infra*.

[2] Simple contract creditors of a corporation, whose claims have not been reduced to judgment, and who have no express lien on its property, have no standing in a federal court of equity to obtain a seizure of their debtor's property and collect unpaid subscriptions and apply the same to the payment of their debts, even though they allege that an existing mortgage on the property is fraudulent, and that the company is insolvent, and a bill of foreclosure of the mortgage is going on. Under certain conditions they might intervene. Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371 (1893), stating also that the federal courts will not even follow a state statute authorizing such a suit, nor does the fact that the foreclosure suit is in the federal court give jurisdiction of the creditors' suit. "Neither the insolvency of a corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, give to a simple contract creditor of the corporation any lien on its property, or charge any direct trust thereon." Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371 (1893). The capital stock is a trust fund rather in the administration of the assets after possession by a court of equity than a trust attaching to the property as such for the direct benefit of either creditor or stockholder. Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371 (1893). A corporate creditor seeking to set aside a fraudulent sale to a director must allege a judgment at law, and execution unsatisfied, or that the company has no property. Kittel *v.* Augusta, etc. R. R., 65 Fed. Rep. 859 (1895). A simple contract creditor of a company cannot sustain a bill to restrain the company from dealing with their assets as they please, on the ground that they are diminishing the fund for payment of his debt. Mills *v.* Northern R'y, etc., L. R. 5 Ch. App. 621 (1870). A general creditor who has not obtained a judgment against the corporation cannot hold directors liable for unauthorized acts. Streight *v.* Junk, 59 Fed. Rep. 321 (1893). *Cf.* §§ 848, 788, 766, 863.

[3] A trustee of a mortgage may file a bill to prevent an illegal reduction of the rates of the mortgagor company. See ch. XLVIII, § 816, *infra*.

ulently and to the injury of creditors.[1] This principle applies where the corporation sells out all its property to another corporation in exchange for the stock or bonds of the latter.[2] Corporate creditors may also, under some circumstances, complain of the issue of "watered" stock,[3] illegal dividends,[4] and of the purchase by the corporation of its stock.[5] But there is no such fiduciary relation between the directors and the creditors as there is between the directors and the stockholders. Hence many acts which would be fraudulent or illegal as against the stockholders are not so as against the creditors.[6] Directors are

[1] Where the corporation has been dissolved, and hence a judgment against it cannot be obtained, general creditors may file a bill in equity to reach assets illegally transferred away by the corporation. The suit must be in behalf of all creditors. All the transferees may be brought into one suit. Pullman *v.* Stebbins, 51 Fed. Rep. 10 (1892). As to other exceptions, authorizing a simple creditor to sue, see Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7, 16 (1891). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow, without good security, an unreasonably large sum, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors, and the results of the suit will be administered by the court. Gores *v.* Day, 74 N. W. Rep. 787 (Wis., 1898).

[2] See ch. XL, §§ 669–671, *supra*.

[3] See ch. III, *supra*.

[4] See ch. XXXII, *supra*.

[5] See § 312, *supra*.

[6] "The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto; but as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust or subject to a lien in their favor in any other sense than does an individual debtor." Hollins *v.* Brierfield Coal, etc. Co., 150 U. S. 371, 385 (1893). Corporate creditors cannot object that the corporation sold property to directors, where the sale has been ratified by the stockholders as well as directors. Crymble *v.* Mulvaney, 21 Colo. 203 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. Hook *v.* Ayers, 63 Fed. Rep. 347 (1894). A creditor whose debt was incurred after the directors' negligence complained of cannot sue in equity for false representations. Nor are the directors liable as trustees for the stockholders. They are liable in equity for moneys belonging to the company and received by them, but no farther. Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895). Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company, who seeks to set the sale aside, on the ground that the mortgage was invalid, is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unforeclosed mortgage. He cannot in the same action ask that the purchaser at foreclosure sale, who is about to bond the property,

not liable to corporate creditors for negligence in the management of the affairs of the corporation.[1]

shall pay the judgment creditor's claim out of such bonds. Merriman *v.* Chicago, etc. R. R., 64 Fed. Rep. 535 (1894). Where one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply. Sidell *v.* Missouri Pac. R'y, 78 Fed. Rep. 724 (1897). Creditors cannot object to a contract between the corporation and a director, where the stockholders have assented thereto and the contract is a fair one. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). A creditor cannot complain of a mortgage or deed from his debtor, a corporation, even though the mortgage and deed were to another corporation having the same board of directors as the debtor corporation. A stockholder might complain, but there is no fiduciary relation between corporate creditors and directors. The mortgage was given when the company was solvent, and the deed after it became insolvent. O'Connor, etc. Co. *v.* Coosa Furnace Co., 95 Ala. 614 (1891). The creditors of a corporation are not allowed to attack a corporate mortgage on the ground that its stockholders did not authorize it, as required by statute. Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889). A general creditor cannot intervene the same as a stockholder. Kansas, etc. R'y *v.* Fitzgerald, 33 Neb. 137 (1891). It is difficult for a corporate creditor to seek collection by making out a conspiracy. Brackett *v.* Griswold, 13 N. Y. Supp. 192 (1891). A suit in equity by a creditor of a national bank against a director for mismanagement does not lie where the statutes prescribe the remedy through the receiver. National Exch. Bank *v.* Peters, 44 Fed. Rep. 13 (1890). A creditor holding an unpaid promissory note cannot, by a bill in equity to collect the debt, unite with a claim that the company was not duly incorporated a claim to hold the directors liable for false representations, and also bring in a subsequent corporation that took all the assets of the first, as well as the persons who finally obtained such effects. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). See also, in general, Columbus, etc. R. R. *v.* Burke, 20 Week. L. Bull. 287 (1888), and Belden *v.* Burke, referred to in § 766, note, *infra;* Mills *v.* Northern R'y, L. R. 5 Ch. 621 (1870); Consolidated, etc. Co. *v.* Kansas City Varnish, etc. Co., 45 Fed. Rep. 7 (1891), and §§ 830, 870, *infra.* For various cases which corporate creditors have sustained in this connection, see Warner *v.* Hopkins, 111 Pa. St. 328 (1885); Lothrop *v.* Stedman, 42 Conn. 583 (U. S. C. C., 1875); S. C., 15 Fed. Cas. 922; Brown *v.* Orr, 112 Pa. St. 233

[1] Deadrick *v.* Bank of Com., 45 S. W. Rep. 786 (Tenn., 1898). Bank directors who are guilty of negligence in the management of the bank may be held liable by a depositor. Wolf *v.* Simmons, 23 S. Rep. 586 (Miss., 1898).

A judgment creditor's remedy is not at law,[1] but is in equity.[2] Where a receiver has been appointed, it is for him and not for a stockholder to hold the directors responsible for mismanagement of the corporation.[3] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[4]

(1886); but see Balliet *v.* Brown, 103 Pa. St. 546 (1883); Pond *v.* Framingham, etc. Co., 130 Mass. 194 (1881); Gravenstine's Appeal, 49 Pa. St. 310 (1865); Heath *v.* Erie R'y, 8 Blatchf. 347 (1871); S. C., 11 Fed. Cas. 976; Currier *v.* New York, etc. R. R., 35 Hun, 355 (1885). See N. Y. Code Civ. Pro., §§ 1781, 1782; also Conro *v.* Gray, 4 How. Pr. 166 (1849); Fisk *v.* Union Pac. R. R., 10 Blatchf. 518 (1873); S. C., 9 Fed. Cas. 167; Irons *v.* Manufacturers' Nat. Bank, 6 Biss. 301 (1875); S. C., 13 Fed. Cas. 100; Van Weel *v.* Winston, 115 U. S. 228 (1885); Cole *v.* Knickerbocker, etc. Co., 23 Hun, 255 (1880); aff'd, 91 N. Y. 641; Mills *v.* Northern R'y, L. R. 5 Ch. 621 (1870); Paulsen *v.* Van Steenbergh, 65 How. Pr. 342 (1883). In Bewley *v.* Equitable Life Ass. Soc., 61 How. Pr. 344 (1881), where a policy-holder sought to hold liable for misuse of funds the directors who were elected by the holders of the $100,000 of stock of that corporation, it was held that the action by him would not lie. If he had been a judgment creditor and the corporation had been insolvent, a different rule would have applied, thus distinguishing Evans *v.* Coventry, 5 De G., M. & G. 911 (1854); Aldebert *v.* Leaf (or Kearns), 1 Hem. & M. 681 (1864); *Re* State F. Ins. Co., 11 W. R. 746 (1863); Belknap *v.* North America, etc. Co., 11 Hun, 282 (1877). Judgment creditors may attack a preference to other creditors forbidden by statute. Wood *v.* Sidney, etc. Co., 92 Hun, 22 (1895). Where all the corporate assets have been misappropriated by the stockholders, corporate creditors may unite in a bill in equity to compel restitution. Ellis *v.* Pullman, 95 Ga. 445 (1895). A bill by judgment creditors to set aside illegal conveyances to directors, and to enforce a statutory liability and also a subscription liability, is multifarious. Von Auw *v.* Chicago Toy, etc. Co., 70 Fed. Rep. 939 (1895). Directors are liable for damages in an action on the case brought by depositors in a bank after it was insolvent, the directors having neglected to know of the insolvency. Delano *v.* Case, 121 Ill. 247 (1887), aff'g 17 Ill. App. 531. See § 701, *supra*, as to a request to the receiver to sue. For a suit by a creditor against directors under the Wisconsin statute, see Hurlbut *v.* Marshall, 62 Wis. 590 (1885). A stockholder who participates in a corporate act cannot, as a corporate creditor, attack that act. Fort Madison Bank *v.* Alden, 129 U. S. 372 (1889). See Mellen *v.* Moline, etc. Works, 131 U. S. 352 (1889); Le Warne *v.* Meyer, 38 Fed. Rep. 191 (1889).

[1] Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508 (1891).

[2] Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7 (1891); Pullman *v.* Stebbins, 51 Fed. Rep. 10 (1892); Cummings *v.* American Gear, etc. Co., 87 Hun, 598 (1895).

[3] Howe *v.* Barney, 45 Fed. Rep. 668 (1891).

[4] Mason *v.* Henry, 152 N. Y. 529 (1897). As to whether the suit is at law or in equity, see also § 701, *supra*.

A receiver may bring an action against directors to hold them liable for negligence.[1] But a stockholder or creditor may sometimes hold a director liable for negligence where a receiver cannot.[2] The receiver of an insolvent railroad corporation may file a bill in equity to compel the directors and their attorney to disgorge corporate funds which they divided among themselves.[3] A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation and the company becomes insolvent.[4] A receiver may bring suit to set aside illegal transfers of property which have been made by the corporation to the directors.[5] Where a receiver has been appointed, he alone can bring an action to compel stockholders to refund corporate moneys which they have taken after paying in the same on their subscriptions.[6] But if the receiver refuses to bring such an action, a creditor may apply to the court for permission to bring it, making the receiver a party defendant.[7] A stockholder may bring a suit in behalf of the corporation where the directors are guilty of a fraud, even though a receiver of the

[1] Robinson *v.* Hall, 59 Fed. Rep. 648 (1894); O'Brien *v.* Fitzgerald, 143 N. Y. 377 (1894). A receiver of a national bank may sue the directors for negligence and fraud on their part. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). A receiver may sue them for negligence, as the corporation might have done. Movius *v.* Lee, 30 Fed. Rep. 298 (1887). As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see Warner *v.* Hopkins, 111 Pa. St. 328 (1886). Where a receiver sues directors for negligence, stockholders are not proper parties. Kimball *v.* Ives, 30 Hun, 568 (1883). See also § 701, *supra.*

[2] Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). See also p. 870 *infra.*

[3] Gindrat *v.* Dane, 4 Cliff. 260 (1874); S. C., 10 Fed. Cas. 434.

[4] Pierson *v.* Cronk, 13 N. Y. Supp. 845 (1890); Mason *v.* Cronk, 125 N. Y. 496 (1891). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the insolvent bank through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. Bridgens *v.* Dollar Sav. Bank, 66 Fed. Rep. 9 (1895).

[5] Jones *v.* Blun, 145 N. Y. 333 (1895); Varnum *v.* Hart, 119 N. Y. 101 (1890); Dutcher *v.* Importers', etc. Nat. Bank, 59 N. Y. 5 (1874); Robinson *v.* Bank of Attica, 21 N. Y. 406 (1860); Brouwer *v.* Harbeck, 9 N. Y. 589 (1854); Milbank *v.* De Riesthal, 82 Hun, 537 (1894); French *v.* Andrews, 81 Hun, 272 (1894); Nealis *v.* American Tube, etc. Co., 76 Hun, 220 (1894); Milbank *v.* Welch, 74 Hun, 497 (1893); Kingsley *v.* First Nat. Bank, 31 Hun, 329 (1884).

[6] South Bend, etc. Co. *v.* Pierre F. & M. Ins. Co., 4 S. D. 173 (1893).

[7] See § 740, *infra.*

corporation has been appointed in another state.[1] A stockholder in this class of cases should not sue in the double capacity of stockholder and creditor.[2]

§ 736. *Rule when the plaintiff stockholder sues in the interest of a rival company, or purchases stock for the purpose of bringing suit.*— The law is well settled that if a stockholder institutes a suit in behalf of himself and other stockholders to enjoin or to bring to an accounting the corporate directors, and such suit is instituted, not to protect and benefit the stockholders' interest in the corporation, but to benefit some other corporation, the court will refuse to entertain the suit and will dismiss it.[3] The application of a stockholder herein to a court of equity will not be denied merely because it is for the interest of the public or of the corporation, or of the stockholder himself, that the act complained of be allowed to stand. The law does not depend on the opinion of the court as to the benefit of the act.[4]

In regard to purchases of stock for the very purpose of bringing a stockholder's suit herein, there is some difference of opinion. The common law clearly is that such a stockholder has the same right to bring the suit that his transferrer had.[5] Such

[1] Fitzgerald *v.* Fitzgerald, etc. Constr. Co., 41 Neb. 374 (1894).

[2] See § 739, *infra*.

[3] The difficulty herein is in proving that the complainant is suing for the rival company. If, however, the latter is paying the costs of the suit, that is sufficient proof. Forrest *v.* Manchester, etc. R'y, 4 De G., F. & J. 126 (1861); Belmont *v.* Erie R'y, 52 Barb. 637 (1869); Filder *v.* London, etc. R'y, 1 Hem. & M. 489 (1863); Camblos *v.* Philadelphia, etc. R. R., 4 Brewst. 563 (U. S. C. C., 1873); S. C., 4 Fed. Cas. 1089; Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867); Rogers *v.* Oxford, etc. R'y, 2 De G. & J. 662 (1858). Where the stockholder's suit is brought at the instance of a competing company, which directs the suit and pays the costs, the suit will fail. Beshoar *v.* Chappell, 6 Colo. App. 323 (1895). See, however, Dinsmore *v.* Central R. R., 19 Fed. Rep. 153 (1883), holding that the fact that the complainant stockholder has business relations with the rival company and is aided by it in preparing his case is no bar, and that, if it were, the objection is to be raised by a plea in abatement. Ffooks *v.* Southwestern R'y, 1 Sm. & G. 142 (1853). See also, where this defense failed, Sandford *v.* Railroad, 24 Pa. St. 378 (1855); Colman *v.* Eastern Counties R'y, 10 Beav. 1 (1846), where a rival company instigated the suit; Central R. R. *v.* Collins, 40 Ga. 582 (1869), where the plaintiff was interested in a rival company; 27 N. Y. App. Div. 553.

[4] Hoole *v.* Great Western R'y, L. R. 3 Ch. 262 (1867); Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851).

[5] Winsor *v.* Bailey, 55 N. H. 218 (1875); Bloxam *v.* Metropolitan R'y, L. R. 3 Ch. 337 (1868), where the complainant, on December 13, 1867, advertised to induce the stockholders to combine; on January 15, 1868, purchased stock himself, and on Janu-

is the rule even though the stock was purchased for the purpose of bringing the suit. The law has nothing to do with the motive of a legal act.[1]

ary 25, 1868, commenced suit. So also see Seaton *v.* Grant, L. R. 2 Ch. 459 (1867), where the court sustained the suit, although it said: "He buys five shares in the company, and then files this bill in order to induce the company to buy off the litigation. That, no doubt, is a course of conduct which would meet with little approval in this court, or, indeed, in any other court; and such conduct might be material at the hearing with reference to the amount of relief which the plaintiff could obtain, or whether he was entitled to any relief at all." Nevertheless the court said, also, that however questionable the mode of the plaintiff's introduction to the company may have been, he has an actual interest in the subject-matter of the suit. Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). See also Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886); Ervin *v.* Oregon, etc. Nav. Co., 35 Hun, 544 (1885); S. C. 28 Hun, 269 (1882); Young *v.* Drake, 8 Hun, 61 (1876); Kingman *v.* Rome, etc. R. R., 30 Hun, 73 (1883). If, however, the transferrer participated or acquiesced in the act complained of, then the transferee is also barred. See §§ 40, 730, *supra*. A person who acted as a broker in purchasing the stock of one railroad corporation for another railroad corporation cannot, by purchasing shares in the latter corporation, hold its directors personally liable for the *ultra vires* purchase. Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

[1] Cases *supra;* also Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 5 (1882); Ramsey *v.* Gould, 57 Barb. 398 (1870), where the motive was "bringing men to justice;" Salisbury *v.* Metropolitan R'y, 38 L. J. (Ch.) 249 (1869). The right of a stockholder to enjoin an interference with an election is not defeated by the fact that a rival company purchased his stock for him. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). Parties buying stock for the mere purpose of bringing suit are not favored by the courts, and an injunction will be denied where their rights can be preserved by damages. Kingman *v.* Rome, etc. R. R., 30 Hun, 73 (1883). A person may purchase stock for the purpose of bringing suit. Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877). A bondholder's foreclosure is valid even though he purchased the bonds at the instigation of certain interests hostile to the railroad, and even though he expects those interests to protect him from loss. If he owns the bonds himself this is sufficient. McFadden *v.* May's Landing, etc. R. R., 49 N. J. Eq. 176 (1891). A purchaser of stock for the very purpose of enjoining an *ultra vires* act which will injure another enterprise of the plaintiff may obtain an injunction. Carson *v.* Iowa City, etc. Co., 80 Iowa, 638 (1890). A person may buy stock to commence a suit. Frothingham *v.* Broadway, etc. R. R., 9 N. Y. Civ. Proc. 304 (1886). But where a railroad contracts to run trains on Sunday, and afterwards a person buys five shares of stock and brings suit to enjoin the company, his real object being to preserve the Sabbath, equity will not aid him. Sparhawk *v.* Union Pass. R'y, 54 Pa. St. 401, 453 (1867). As regards the motive of a stockholder, see also Clark *v.* American Coal Co., 86 Iowa, 436 (1892). The motive of a bondholder foreclosing a mortgage is immaterial. Toler *v.* East Tennessee, etc. R'y, 67 Fed. Rep. 168, 177 (1894).

But where the transfer is merely nominal the transferee cannot bring suit herein, since he has no pecuniary interests of his own to protect, and equity will not aid him.[1]

§ 737. *Rule 94 in federal courts against suits by transferees.* In the federal courts peculiar rules prevail. It was found that transfers of stock were frequently made for the purpose of securing jurisdiction of the case in the federal courts. Litigation that properly belonged to the state courts was added to the already overburdened calendars of the United States courts.[2] Accordingly the supreme court of the United States made it a rule of the federal courts that a transferee of stock cannot sustain a stockholder's suit to remedy a corporate wrong which was perpetrated before he became a stockholder.[3] Where the complainant is merely the nominal holder of the stock, the defendant may set up that the complainant holds the stock merely

[1] M'Donnell *v.* Grand Canal Co., 3 Ir. Ch. Rep. (N. S.) 578 (1853); Robson *v.* Dodds, L. R. 8 Eq. 301 (1869).

[2] See the vigorous denunciation of such transfers by Mr. Justice Miller, in Hawes *v.* Oakland, 104 U. S. 450 (1881).

[3] Rule 94, as follows: "Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance." Promulgated January 23, 1882. (See 104 U. S. ix.) See Dimpfell *v.* Ohio, etc. R'y, 110 U. S. 209 (1884). But see Leo *v.* Union Pac. R'y, 17 Fed. Rep. 273 (1883); S. C., 19 Fed. Rep. 283. In Lafayette Co. *v.* Neely, 21 Fed. Rep. 738 (1884), it is held that this rule does not bar the stockholder's right to bring the action after a dissolution of the corporation. Rule 94, in the United States court, against a purchaser of stock bringing suit on certain causes of action accruing before he purchases the stock, does not apply to causes removed from the state court. Evans *v.* Union Pac. R'y, 58 Fed. Rep. 497 (1893). "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock." United Elec. Securities Co. *v.* Louisiana Elec. Light Co., 68 Fed. Rep. 673, 675 (1895). See also Whittemore *v.* Amoskeag Nat. Bank, 26 Fed. Rep. 819 (1885); Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886). Under equity rule 94, one who purchases shares of stock in a corporation after a plan of reorganization has been adopted and partially carried out is not in a position to maintain a suit to set the same aside on the ground of fraud and neglect of duty by its trustees and other parties. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

to give jurisdiction to the United States court.[1] In Georgia the rule of the federal courts has been adopted that a subsequent stockholder cannot complain.[2]

§ 738. *Parties defendant herein — The corporation — Directors — Third persons — The receiver.*— The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong which the corporation itself should have remedied.[3] This rule is due to the fact that a similar possible suit by the corporation is thereby prevented, the rights of the corporation are duly ascertained, and the remedy made effectual against the corporation as well as others. It is not necessary or proper to join the directors of the corporation as parties defendant where the only object of the suit is to enjoin an act or to set aside an *ultra vires* act. The decree against the corporation is effective and binding upon all the officers of the corporation.[4] Where, however, the object of the

[1] MacVeagh *v.* Denver City W. W. Co., 85 Fed. Rep. 74 (1897).

[2] Alexander *v.* Searcy, 81 Ga. 536 (1888).

[3] Davenport *v.* Dows, 18 Wall. 626 (1873); Coxe *v.* Hart, 53 Mich. 557 (1884); Black *v.* Huggins, 2 Tenn. Ch. 780 (1877); Samuel *v.* Holladay, Woolw. 400 (1869); S. C., 21 Fed. Cas. 306; Allen *v.* New Jersey, etc. R. R., 49 How. Pr. 14 (1875); Bagshaw *v.* Eastern Union R'y, 7 Hare, 114 (1849); Gregory *v.* Patchett, 33 Beav. 595 (1864); Charleston, etc. Co. *v.* Sebring, 5 Rich. Eq. (S. C.) 342 (1853); Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882); Bruschke *v.* Nord Chicago, etc. Verein, 145 Ill. 433 (1893); Mount *v.* Radford Trust Co., 93 Va. 427 (1896); Hamilton *v.* Desjardins Canal Co., 1 Grant, Ch. (Can.) 1 (1849); Cunningham *v.* Pell, 5 Paige, 607 (1836), holding also that, if the corporation is foreign, service may be by publication; Putnam *v.* Ruch, 54 Fed. Rep. 216 (1893); Byers *v.* Rollins, 13 Colo. 22 (1889); Chicago *v.* Cameron, 120 Ill. 447 (1887); Stromeyer *v.* Combes, 2 N. Y. Supp. 232 (1888); American, etc. Co. *v.* Linn, 93 Ala. 610 (1890). As to why the company must be made a party, see Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892). In a stockholder's suit against a foreign corporation holding a majority of the stock of a domestic corporation and fraudulently refusing to perform its contract with the latter, the latter is a necessary party, and the case cannot be removed to the federal courts. Douglas *v.* Richmond, etc. R. R., 106 N. C. 65 (1890). In Consolidated Water Co. *v.* Babcock, 76 Fed. Rep. 243 (1896), the court held that where the owner of the bonds and most of the stock of a water company wished to enjoin the city from contracting with another water company in violation of the rights of the former water company, the former water company was a necessary party to the suit. The company is a necessary party defendant and may be compelled to make a disclosure of the facts. Spokes *v.* Grosvenor Hotel Co., 76 L. T. Rep. 679 (1897).

[4] See §§ 745, 746, 752, 755, *infra;* Winch *v.* Birkenhead, etc. R'y, 5 De G. & Sm. 562 (1852), where the court said: "I do not think it is necessary that

suit is to hold the directors personally liable for frauds or for negligence, the rule is different. In such cases they of course are necessary parties defendant.[1] As regards outside parties, they are to be joined as parties defendant whenever the relief asked would affect their rights.[2] After a receiver has been

the directors should be parties. The act that is sought to be restrained is the act of the company. The company itself cannot act except by means of its officers;" Pioneer, etc. Co. *v.* Baker, 20 Fed. Rep. 4 (1884); Heath *v.* Erie R'y, 8 Blatchf. 347 (1871); S. C., 11 Fed. Cas. 976; Chase *v.* Vanderbilt, 62 N. Y. 307, 314 (1875); Bagshaw *v.* Eastern Union R'y, 7 Hare, 114 (1849); Allen *v.* New Jersey, etc. R. R., 49 How. Pr. 14 (1875), the court saying: "They are represented by the corporation of which they are alleged to be directors, and when the corporation itself is made a party defendant it is improper to add the trustees or directors as parties when no personal claim or judgment is asked against them." But see Ribon *v.* Railroad Cos., 16 Wall. 446 (1872); Slattery *v.* St. Louis, etc. Co., 91 Mo. 217 (1886). Where the minority sue to set aside fraudulent acts of the majority, the guilty directors are not necessary parties defendant. Woodroof *v.* Howes, 88 Cal. 184 (1891).

[1] The director who sold property to the corporation is a necessary party defendant in a stockholder's action attacking the transaction. Tutwiler *v.* Tuskaloosa, etc. Co., 89 Ala. 391 (1889). The omission of part of the guilty directors as parties defendant is not fatal. Anderton *v.* Wolf, 41 Hun, 571 (1886). The directors taking part in an *ultra vires* transfer of property are proper parties defendant to an injunction suit. Small *v.* Minneapolis, etc. Co., 10 N. Y. Supp. 456 (1890). See also cases in ch. XXXIX and ch. XLII, *supra;* Duckett *v.* Gover, L. R. 6 Ch. D. 82 (1877); Mason *v.* Harris, L. R. 11 Ch. D. 97 (1879); Ferguson *v.* Wilson, L. R. 2 Ch. App. 77, 90 (1866); Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558; Bryson *v.* Warwick, etc. Co., 1 Sm. & G. 447 (1853). The president should not be joined as a party defendant for purposes of discovery only. Tutwiler *v.* Tuskaloosa, etc. Co., 89 Ala. 391 (1889). Where a person in control of a company obtains control of a rival company, and allows judgments against the latter and the sale of its bonds at execution at nine cents on the dollar, and executes a mortgage and controls the business all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897).

[2] Russell *v.* Wakefield, etc. Co., L. R. 20 Eq. 474 (1875), the court saying: "When you have got the second corporation or person a party to the suit, it may happen that, in addition to the relief that you are entitled to as regards the first, you are entitled to have relief against the second for something that has been done under the *ultra vires* agreement. You may be entitled to have money paid back which has been paid under the *ultra vires* agreement, . . . and you may be entitled to have property returned or other acts done;" Hare *v.* London, etc. R'y, 1 Johns. & H. 252 (1860), holding that in an action to set aside a traffic contract all the corporations who were parties to the contract are necessary parties; Tyson *v.* Virginia, etc. R. R., 1 Hughes, 80 (1871); S. C., 24

appointed, a stockholder's suit against officers to compel them to account for fraudulent misappropriations of corporate property must join the receiver as a party defendant.[1]

Fed. Cas. 493, to the effect that, in an action to set aside a consolidation, the other corporation is a necessary party; Bell *v.* Donohoe, 17 Fed. Rep. 710 (1883); Taylor *v.* Miami, etc. Co., 5 Ohio, 162 (1831), where a guilty stockholder was made a party defendant; Abbot *v.* American Hard Rubber Co., 4 Blatchf. 489 (1861); S. C., 1 Fed. Cas. 13; Bengley *v.* Wheeler, 45 Mich. 493 (1881); Shawhan *v.* Zinn, 79 Ky. 300 (1881), holding that the objection to a defect of parties herein may be raised at the trial, and need not be raised by demurrer; Cass *v.* Ottawa, etc. Co., 22 Grant (U. C.), 512 (1875), holding that the attorney-general is not a necessary party defendant. *Cf.* Ryan *v.* Ray, 33 Alb. L. J. 321 (Ind., 1886). Sometimes the directors of another corporation are proper parties defendant. See Terhune *v.* Midland R. R., 38 N. J. Eq. 423 (1884). In a suit by a minority of the stockholders of a railroad company to restrain it and a trust company from issuing bonds to a construction company, the charge being made that the majority stockholders controlled also the construction company and the issue of bonds was corrupt, the trustee is a necessary and not a merely nominal party. Mayer *v.* Denver, etc. R. R., 41 Fed. Rep. 723 (1890). The action may be continued against the executor of a deceased defendant. Fox *v.* Hale, etc. Co., 108 Cal. 478 (1895). Parties in league and the guilty officers may be made parties defendant. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888).

A person may be made a party defendant for purposes of discovery only. See Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878). In an action by a person against a corporation for any cause of action, a secretary and book-keeper may be made a party defendant for the purpose of getting an answer of discovery under oath, which the corporation cannot make. Wych *v.* Meal, 3 P. Wms. 310 (1734). See also § 519, *supra;* Chase *v.* Vanderbilt, 62 N. Y. 307, 314 (1875); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841); Masters *v.* Rossie, etc. Co., 2 Sandf. Ch. 301 (1845); Brumly *v.* Westchester, etc. Soc., 1 Johns. Ch. 366 (1815); McIntyre *v.* Union College, 6 Paige, 239 (1837); Vermilyea *v.* Fulton Bank, 1 Paige, 37 (1828). But not where the corporation is not a party. Ellsworth *v.* Curtis, 10 Paige, 105 (1843). In a stockholder's suit in behalf of a dissolved corporation, the receiver is a necessary party. Clark *v.* San Francisco, 53 Cal. 306 (1878). In a suit to set aside a lease, both the lessor and lessee railroad companies are necessary parties. New Jersey Cent. R. R. *v.* Mills, 113 U. S. 249 (1885); East Tennessee, etc. R. R. *v.* Grayson, 119 U. S. 240 (1886). A director who resigned before the acts complained of were done is not to be made a defendant, even though the resignation was never accepted. Nor is a director liable who was absent by reason of sickness. Movius *v.* Lee, 30 Fed. Rep. 298 (1887). In a suit to compel directors to turn over the corporation profits improperly realized by them, a separate action may be brought against each director. Langdon *v.* Fogg, 18 Fed. Rep. 5 (1883); but see Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), holding that the liability is joint and sev-

[1] Porter *v.* Sabin, 149 U. S. 473 (1893); Swope *v.* Villard, 61 Fed. Rep. 417 (1894). See also § 740, *infra*, on request to receiver.

§ 739. *Complainant's bill must not improperly join two or more causes of action herein.*— If the complainant's bill is multifarious, it of course cannot succeed as against the objection of the defendants. Thus, it has been held that the stockholders cannot join an action in reference to dividends with one for an injunction to restrain the corporate directors from committing a fraud.[1] A bill combining an action to restrain the corporation from investing in the stock of another company, and one to restrain it from aiding that company, has been held to be multifarious.[2] The stockholders cannot join a suit against the corporation with one against third persons in behalf of the corporation.[3] An action to be allowed to enter a reorganized company and one to hold its officers liable for fraud cannot be joined.[4] The plaintiff cannot join causes of action accruing to himself personally with the cause of action which he brings suit upon in behalf of the company.[5] A bill seeking to attack a fraudulent sale of property by a director to the corporation, and also to enjoin a sale of complainant's stock under a forfeiture for non-payment of a subscription, is multifarious.[6] A bill is multifarious where there are several defendants and no combination between them is shown.[7] Although the complaint is multifarious and obscure, yet a demurrer does not necessarily lie.[8] A stockholder cannot join a personal action against parties with an action brought as a stockholder in behalf of

eral, the court saying: "When the conduct of parties operates as a fraud or deceit upon third persons, whatever their private intention, the relation of partnership may be said to exist as to such third persons." To same effect, Ervin *v.* Oregon, etc. Nav. Co., 20 Fed. Rep. 577 (1884). See § 656, *supra*.

[1] Winsor *v.* Bailey, 55 N. H. 218 (1875). A stockholder's suit is not multifarious, although it is to compel the treasurer to pay back certain funds, and also to have a dividend declared therefrom. Dunphy *v.* Traveller Newsp. Assoc., 146 Mass. 495 (1888); 78 L. T. Rep. 729 (1898).

[2] Salomons *v.* Laing, 12 Beav. 339 (1850). But a bill by stockholders and creditors to restrain acts and have a dissolution is not multifarious. Mills *v.* Hurd, 32 Fed. Rep. 127 (1887).

[3] Thomas *v.* Hobler, 8 Jur. (N. S.) 125 (1862). And see, in general, on multifariousness herein, Merchants', etc. Line *v.* Waganer, 71 Ala. 581 (1882); Smith *v.* Rathbun, 22 Hun, 150 (1880); Lewarne *v.* Mexican Int. Imp. Co., 38 Fed. Rep. 629 (1889).

[4] Stanton *v.* Missouri Pac. R'y, 15 N. Y. Civ. Pro. 296 (1888).

[5] Whitney *v.* Fairbanks, 54 Fed. Rep. 985 (1893).

[6] Tutwiler *v.* Tuskaloosa, etc. Co., 89 Ala. 391 (1889).

[7] American, etc. Co. *v.* Linn, 93 Ala. 610 (1890).

[8] Moyle *v.* Landers, 83 Cal. 579 (1890).

himself and other stockholders against the same parties defendant.[1] A suit to enforce the statutory liability of stockholders cannot include a cause of action against the directors for mismanagement.[2] A stockholder's bill to compel others to pay their subscriptions and to hold some of them liable for illegal acts is multifarious.[3] The bill is multifarious where it seeks to hold certain directors liable for acts done in one year and other directors for acts in another year.[4] A bill by a stockholder and creditor in behalf of himself and all other stockholders and creditors, to set aside a sale of the corporate property for stock to be divided between the creditors and preferred stockholders, is multifarious in that the stockholders' rights may clash with each other or with creditors' rights, and the same complainant cannot represent all.[5] A bill asking for a dissolution and a distribution of assets so as to pay first those stockholders who were fraudulently induced to purchase is multifarious. The averment, moreover, must be definite and certain.[6] A creditor's bill to hold the president liable for fraud in converting the corporate assets, and also to collect unpaid subscriptions, is multifarious.[7] A bill to rescind a subscription on the ground of fraud and also to have a receiver appointed on account of the mismanagement of directors is multifarious.[8] A bill is not multifarious even though the defendants are not to be held liable to the same extent or in the same way, inasmuch as the court may mould its decree so as to do equity to all.[9] Various other instances of multifariousness are given in the notes below.[10]

[1] Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893).

[2] Sturtevant-Larrabee Co. *v.* Mast, etc. Co., 69 N. W. Rep. 324 (Minn., 1896).

[3] Holton *v.* Wallace, 66 Fed. Rep. 409 (1895).

[4] Nash *v.* Hall Signal Co., 90 Hun, 354 (1895). If the various acts complained of were committed by different directors, the bill is multifarious. Higgins *v.* Tefft, 4 N. Y. App. Div. 62 (1896). See also note 2, p. 1593.

[5] Ward *v.* Sittingbourne, etc. R'y, L. R. 9 Ch. App. 488 (1874). See also Hoole *v.* Great Western R'y, L. R. 3 Ch. App. 262 (1867), holding that where there are different classes of stockholders a stockholder may file a bill in behalf of his class.

[6] Watson *v.* U. S. Sugar Ref., 68 Fed. Rep. 769 (1895).

[7] Montserratt Min. Co. *v.* Johnson, etc. Co., 42 S. W. Rep. 822 (Mo., 1897).

[8] Davis *v.* Peabody, 49 N. E. Rep. 750 (Mass., 1898).

[9] Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897). *Cf.* note 4, *supra*.

[10] A suit to determine what stock is watered stock (alleged to be over-issued stock) and also to set aside transactions by which the corporate

§ 740. *Complainant must allege that he requested the corporation to bring the suit, and that the corporation refused or neglected to do so — Rule 94 of the federal courts on this subject — Request to receiver.* — Inasmuch as a fraudulent, *ultra vires*, or negligent act of the directors of a corporation is an injury done to the corporation itself, it is the duty and proper function of the corporation to institute any action that may be brought to remedy the injury to the corporation. As already explained, however, a stockholder may bring the action if the corporation improperly refuses or neglects to institute such suit. Before the stockholder brings suit he must make a formal request to the corporate officers that suit be instituted by the corporation. Upon its refusal or neglect to comply with that request, he may then bring suit himself. It is well settled, however, that he must allege in his bill in equity that such a

property has been misapplied is multifarious. Church *v.* Citizens' Street R'y, 78 Fed. Rep. 526 (1897). A judgment creditor's bill is multifarious where it asks to hold the defendant liable on a subscription for stock, and as an officer for causing the corporation to buy its own stock, and as an outsider for obtaining real estate of the company without consideration, and as an outsider misrepresenting the condition of the company. First Nat. Bank *v.* Peavey, 75 Fed. Rep. 154 (1896). Where the directors for the sum of $15,000 resign and put in other directors, and the new directors mismanage the company and cause its insolvency, the receiver of the company cannot join a suit for the $15,000 with a suit to hold the resigning directors liable for breach of trust. The complaint is multifarious. McClure *v.* Wilson, 13 N. Y. App. Div. 274 (1897). Stockholders and corporate creditors cannot join in the same bill, the former to rescind their subscriptions and to bring the officers to an account, and the latter to bring the officers to an accounting, even though the officers have been guilty of all the frauds in the category. Brown *v.* Bedford City, etc. Co., 91 Va. 31 (1895). As to not being multifarious, see Stevens *v.* South, etc. Co., 47 Pac. Rep. 81 (Utah, 1896). A bill in equity is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v.* Heppenheimer, 36 Atl. Rep. 966 (N. J., 1897).

request has been made and has not been complied with.[1] There has been considerable discussion as to whether the stockholder, in addition to his request to the corporate officers to institute the suit, should not also be required to attempt to induce the

[1] Holton *v.* New Castle, etc. R'y, 138 Pa. St. 111 (1890); Byers *v.* Rollins, 13 Colo. 22 (1889). Failure to request the corporation to bring suit is fatal. Bad faith on the part of the complainant is fatal. Weidenfeld *v.* Allegheny, etc. R. R., 47 Fed. Rep. 11 (1891). Three directors cannot sue as stockholders where, for all that appears, they are a majority of the board and could cause the corporation to sue. Hodgson *v.* Duluth, etc. R. R., 46 Minn. 454 (1891). A stockholder's action to restrain a levy of execution by a judgment creditor on the property of the corporation fails where he does not allege a request and show his interest in the corporation. Southwest Nat. Gas Co. *v.* Fayette Fuel Gas Co., 145 Pa. St. 13 (1892). A request made to a railroad corporation to prevent a competing railroad from voting its stock is sufficient to authorize a stockholder's suit. Memphis, etc. R. R. *v.* Woods, 88 Ala. 630 (1889). See also Cogswell *v.* Bull, 39 Cal. 320 (1870); Hazard *v.* Durant, 11 R. I. 195 (1875), the court saying that the allegations of request "will be sustained by proof of a request to the stockholders in corporate meeting, or to the directors in office when the suit began, or in any other mode so that it be in legal effect a request to the corporation;" Talbot *v.* Scripps, 31 Mich. 268 (1875); Ware *v.* Bazemore, 58 Ga. 316 (1877); Merchants', etc. Line *v.* Waganer, 71 Ala. 581 (1882); Hersey *v.* Veazie, 24 Me. 9 (1844); Memphis *v.* Dean, 8 Wall. 64 (1868); House *v.* Cooper, 30 Barb. 157 (1858); Wilkie *v.* Rochester, etc. R'y, 12 Hun, 242 (1877); O'Brien *v.* O'Connell, 7 Hun, 228 (1876); Abbott *v.* Merriam, 62 Mass. 588 (1851); Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). But a request to bring the suit in a federal court is insufficient. See Newby *v.* Oregon Cent. R'y, 1 Sawyer, 63 (1870); S. C., 18 Fed. Cas. 42. The leading case of Foss *v.* Harbottle, 2 Hare, 461 (1843), failed by reason of a failure to make this effort to induce the corporation to act. See also the important case of Greaves *v.* Gouge, 69 N. Y. 154 (1877); Cogswell *v.* Bull, 39 Cal. 320 (1870); McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893); Putnam *v.* Ruch, 56 Fed. Rep. 416 (1893); Atchison, etc. R. R. *v.* Sumner County, 51 Kan. 617 (1893); New, etc. Co. *v.* Blevins, 34 S. W. Rep. 828 (Tex., 1896); Palmer *v.* Hawes, 73 Wis. 46 (1888). The defendant cannot raise this point in the appellate court for the first time. See Bulkley *v.* Big Muddy Iron Co., 77 Mo. 105 (1882). The request to the directors must be made in good faith, and the actual wrong set forth, and the directors must not be charged in the request as being guilty unless they really are so. Bacon *v.* Irvine, 70 Cal. 221 (1886). A simple allegation that the corporation neglected is insufficient. Refusal must be alleged. Leslie *v.* Lorillard, 31 Hun, 305 (1883). It need not be alleged specifically that the present board of directors have refused to act. Brown *v.* Buffalo, etc. R. R., 27 Hun, 342 (1882). A stockholder suing in behalf of his corporation, which has been dissolved many years, must nevertheless show that he sought to have the directors bring suit. Taylor *v.* Holmes, 127 U. S. 489 (1888). Where the corporation is dissolved, but by statute suits may be brought during the three succeed-

stockholders in meeting assembled to take action by directing the directors to bring suit, or by refusing to re-elect them at the next election. The facts, however, that the stockholders in meeting assembled cannot control the discretion of the directors in bringing such a suit; that the remedy of refusing to re-elect them involves delay, and involves the assumption that a minority of the stockholders can by the election control such a suit; that irreparable injury or the vesting of great financial interests may occur in the meantime; and that laches may arise as a bar to the stockholder's suit — have settled the rule that the stockholder's request to the corporate directors to institute the suit is sufficient. He need not also apply to a stockholders' meeting.[1] The law on this subject seems to be as follows: First, as to acts *ultra vires* of both the directors and majority of stockholders, the directors or majority of stockholders cannot ratify the same, and hence no request to the stockholders to vote on the subject is necessary,[2] and it has been

ing years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken. General Electric Co. *v.* West Asheville Imp. Co., 73 Fed. Rep. 386 (1896). Where a stockholder brings suit for an injunction and receiver on the ground that the president is using the assets to construct an insolvent road organized by himself, and is misappropriating the corporate funds, and controls a majority of the directors and also of the stock, the allegations are insufficient where it appears that no member of the board excepting the president is interested in the railroad company, and no effort has been made to induce the directors to bring the suit. Roman *v.* Woolfolk, 98 Ala. 219 (1893).

[1] Mason *v.* Harris, L. R. 11 Ch. D. 97 (1879), holding also that the court has no power to order such a meeting. See a discussion of this question in Brewer *v.* Boston Theater, 104 Mass. 378 (1870). See also Gregory *v.* Patchett, 33 Beav. 595 (1864). In MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13, 22 (1875), the difficulty herein probably arose from cases where a stockholder sought to enjoin acts which the directors could not do, but which the majority of stockholders could do. If the stockholders have the power to remove the directors, a request to the stockholders to act must be made before suit is brought by a stockholder. Rathbone *v.* Parkersburg Gas Co., 31 W. Va. 798 (1888). In Miller *v.* Murray, 17 Colo. 408 (1892), the court refused to sustain an action by the minority stockholders to set aside an alleged fraudulent sale of the corporate property at foreclosure sale, the property having been subsequently purchased by one of the officers, inasmuch as the complaining stockholders had votes enough to elect a board of directors, and thus have the suit brought in the corporate name. In Latimer *v.* Richmond, etc. R. R., 39 S. C. 44 (1893), the court seemed to follow the federal rule that an effort must be made to induce the stockholders to act as well as the directors.

[2] A stockholder may file a bill to enjoin or set aside an *ultra vires* act,

held, with much reason, that not even a request to the directors is necessary;[1] second, as to acts *ultra vires* of the directors, but *intra vires* of the stockholders, a single stockholder cannot sue if the majority of the stockholders confirm such acts of the directors, and hence a vote of the stockholders is necessary;[2] third, as to frauds perpetrated on the corporation by outside parties, such causes of action are like other causes of action which the corporation may have, and the discretion of the directors as to the advisability of suing, not suing, compromising, or settling such claims is final;[3] fourth, as to acts of the directors themselves which are fraudulent in the eye of the law, but which the majority of the stockholders might have authorized, there is reason for requiring a stockholders' vote thereon before a single stockholder sues to remedy the wrong;[4] and fifth, as to acts of the directors which are fraudulent, and which not even the majority of the stockholders could have authorized, no stockholders' vote would be of any avail, and hence such a vote is unnecessary.[5]

In the federal courts the necessity of an allegation that the corporation has been requested to sue and has refused is fixed by a rule of the court.[6] The request may be made to the presi-

even though every other stockholder is opposed to him. Hoole *v.* Great Western R'y, L. R. 3 Ch. App. 262 (1867); Beman *v.* Rufford, 1 Sim. 550 (1851), where a majority of the stockholders had even voted to ratify the illegal act; Bagshaw *v.* Eastern Union R'y, 19 L. J. (Ch.) 410 (1850); Hare *v.* London & N. W. R'y, 30 L. J. (Ch.) 817, 829 (1861); Winch *v.* Birkenhead, etc. R'y, 16 Jur. 1035 (1852).

[1] No request is necessary to the board of directors before a stockholder brings suit to cancel an illegal subscription to stock by a municipality, inasmuch as said subscription is *ultra vires*. Stebbins *v.* Perry County, 47 N. E. Rep. 1048 (Ill., 1897). A request must be made to the board of directors, even though the act complained of is an *ultra vires* act. Hutton *v.* Bancroft, etc. Co., 83 Fed. Rep. 17 (1897). No request to the directors is necessary if the act is *ultra vires*. Botts *v.* Simpsonville, etc. Turnp. Co., 88 Ky. 54 (1888).

[2] See § 684, *supra*.

[3] See § 750, *infra*.

[4] See ch. XXXIX, *supra*, for illustrations, especially § 662.

[5] See ch. XXXIX, *supra*, for illustrations.

[6] Rule 94 (104 U. S. ix): "It [the bill] must set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees; and, if necessary, of the shareholders, and the causes of his failure to obtain such action." McHenry *v.* New York, etc. R. R., 22 Fed. Rep. 130 (1884); S. C., 25 Fed. Rep. 65, 114. See Leo *v.* Union Pac. R'y, 19 Fed. Rep. 283 (1884); S. C., 17 Fed. Rep. 273; Converse *v.* Dimock, 22 Fed. Rep. 573 (1884); Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 14 (1883); Quincy *v.* Steel, 120 U. S. 241

dent,[1] although this is denied in Tennessee.[2] If a receiver is in charge the request is to be made to him.[3] A request to the

(1887); Foote *v.* Cunard Min. Co., 17 Fed. Rep. 46 (1883), holding that an allegation that the corporation would probably refuse relief is insufficient. This cannot be omitted merely because the guilty party owns a majority of the stock. Allen *v.* Wilson, 28 Fed. Rep. 677 (1886), holding also that the fact that the guilty party elected the existing board of directors does not excuse request. A suit by a stockholder to remedy frauds on the part of the president does not come within the ninety-fourth rule, and, even if it does, an allegation that the guilty parties control the board of directors excuses any request to them to sue. Ranger *v.* Champion, etc. Co., 52 Fed. Rep. 611 (1892). Concerning the United States rule as to the request to the company, see also Whitney *v.* Fairbanks, 54 Fed. Rep. 985 (1893). Under rule 94, in the federal courts (104 U. S. ix), it is not enough to allege that the guilty parties are in control of the corporation. This is not enough to dispense with a request to the directors to bring suit. Squair *v.* Lookout Mountain Co., 42 Fed. Rep. 729 (1890). In the federal courts the stockholder must set out in his pleading when or how the request to sue was made, upon what showing of facts, and that the directors so requested are still in office. Swope *v.* Villard, 61 Fed. Rep. 417 (1894). Where the guilty parties control the board of directors, the ninety-fourth rule does not re-

[1] A request to and refusal by the president, who is also the manager, suffices, even though he is the party guilty of the acts complained of. Chicago *v.* Cameron, 120 Ill. 447 (1887). A request made to the president is good, though he replies that he had resigned two years previously, it appearing that his resignation had not been accepted and no meetings held since the resignation. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). A request by one of the stockholders to the officers and president is sufficient. Becker *v.* Gulf City, etc. Co., 80 Tex. 475 (1891).

[2] In a stockholder's suit to hold the directors liable for negligence the request must be to the board of directors. A request to the president is insufficient. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891).

[3] Nelson *v.* Burrows, 9 Abb. N. Cas. 280 (1881); Fisher *v.* Andrews, 37 Hun, 176 (1885); Kelsey *v.* Sargent, 40 Hun, 150 (1886). That it is the duty of a receiver to bring suit, see § 735, *supra*. The request of the stockholders should be to the receiver, and upon his refusal to bring the suit the stockholder may bring it. Streight *v.* Junk, 59 Fed. Rep. 321 (1893). Redress must first be sought through the board of directors, or through the receiver who is in charge of the property. Holton *v.* Wallace, 77 Fed. Rep. 61 (1896). It is not enough that the receiver has refused to sue. The stockholder must apply to the court to order the receiver to sue. Swope *v.* Villard, 61 Fed. Rep. 417 (1894). The statute authorizing suit against receivers without previous request does not apply to a stockholder's suit to remedy wrongs committed before the receiver was appointed. Swope *v.* Villard, 61 Fed. Rep. 417 (1894). After a receiver has been appointed, a stockholder's suit against officers to compel them to account for fraudulent misappropriations of corporate property must join the receiver as a party defendant. Porter *v.* Sabin, 149 U. S. 473 (1893).

executive committee is sufficient.[1] A request by a stockholder to the trustee in insolvency of a corporation is sufficient to enable the former to bring suit to hold the directors liable for negligence if the trustee refuses to sue.[2]

§ 741. *When such an allegation may be omitted.*— There are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves.[3] Nevertheless, instead of this allegation,

quire the complainant stockholder to set forth with particularity his efforts to have the directors act. De Neufville *v.* New York & Northern R'y, 81 Fed. Rep. 10 (1897). No attempt to get the officers to bring suit need be made under rule 94, where the officers themselves are the guilty parties complained of. Excelsior, etc. Co. *v.* Brown, 74 Fed. Rep. 321 (1896). Under the ninety-fourth equity rule, if the board of directors is controlled by the guilty parties "it is still required that an effort should be made to induce action by the body of the corporation,— by the stockholders,— and that if action cannot be obtained either from the board of directors or from the body of the stockholders, the bill shall show the character and extent of the efforts, and shall particularly show the reasons why the party who brings his suit failed to obtain remedial action within the body of the corporation." Church *v.* Citizens' Street R'y, 78 Fed. Rep. 526 (1897). Equity rule number 94 does not apply to suits removed into the federal court from state courts. Earle *v.* Seattle, etc. R'y, 56 Fed. Rep. 909 (1893). A request to the directors is first necessary, and is not excused by vague and general averments as to complicity on the part of the directors in the wrongs complained of. Ziegler *v.* Lake Street Elev. R. R., 76 Fed. Rep. 662 (1896).

[1] Hazard *v.* Durant, 11 R. I. 196 (1875).

[2] Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891).

[3] Wayne Pike Co. *v.* Hammonds, 129 Ind. 368 (1891); Hannerty *v.* Standard Theater Co., 109 Mo. 297 (1891); Wickersham *v.* Crittenden, 93 Cal. 17 (1892); Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890); Barr *v.* Pittsburgh, etc. Co., 40 Fed. Rep. 412 (1889); Smith *v.* Dorn, 96 Cal. 73 (1892); Eschweiler *v.* Stowell, 78 Wis. 316 (1890); Ponca Mill Co. *v.* Mikesell, 75 N. W. Rep. 46 (Neb., 1898); Anderton *v.* Wolf, 41 Hun, 571 (1886); Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483 (1892). No request is necessary where the owners of a majority of the stock cause the directors to sell the property to a person who buys for them. Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320 (1892); Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882); Rogers *v.* La Fayette, etc. Works, 52 Ind. 296 (1875); Tazewell County *v.* Farmers', etc. Co., 12 Fed. Rep. 752 (1882); Davis *v.* Gemmell, 70 Md. 356 (1889); Tippecanoe County *v.* La Fayette, etc. R. R., 50 Ind. 85 (1875); Wilcox *v.* Bickel, 11 Neb. 154 (1881), where the officers had

the complainant must allege the facts which excuse such a demand or request to the directors, and these facts must be stated

absconded; Currier *v.* New York, etc. R. R., 35 Hun, 355 (1885); Ramsey *v.* Gould, 57 Barb. 398 (1870); Kelsey *v.* Sargent, 40 Hun, 150 (1886); Moyle *v.* Landers, 21 Pac. Rep. 1133 (Cal., 1889); Parrott *v.* Byers, 40 Cal. 614 (1871); Fisher *v.* Andrews, 37 Hun, 176 (1885); Young *v.* Drake, 8 Hun, 61 (1876); Higgins *v.* Lansingh, 154 Ill. 301 (1895); Young *v.* Alhambra Min. Co., 71 Fed. Rep. 810 (1895); Sage *v.* Culver, 147 N. Y. 241 (1895); Green *v.* Hedenberg, 159 Ill. 489 (1896); Gerry *v.* Bismarck Bank, 47 Pac. Rep. 810 (Mont., 1897); George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894); Bell *v.* Montgomery Light Co., 103 Ala. 275 (1894); Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894); Pondir *v.* New York, Lake Erie, etc. R. R., 72 Hun, 384 (1893); Mount *v.* Radford Trust Co., 93 Va. 427 (1896); Cowles *v.* Glass, 30 S. W. Rep. 291 (Tex., 1895); Loftus *v.* Farmers', etc. Assoc., 65 N. W. Rep. 1076 (S. Dak., 1896); Heath *v.* Erie R'y, 8 Blatchf. 347 (1871); S. C., 11 Fed. Cas. 976, the court saying: "It would be a mockery to require or permit a suit against them to be brought and prosecuted under their management to obtain relief sought by this bill;" Mussina *v.* Goldthwaite, 34 Tex. 125 (1870); Doud *v.* Wisconsin, etc. R'y, 65 Wis. 108 (1886); Pond *v.* Vermont Valley R. R., 12 Blatchf. 280 (1874); S. C., 19 Fed. Cas. 976. But an allegation that the management is under the control of persons appointed by the guilty parties is insufficient. See McMurray *v.* Northern R'y, 22 Grant (U. C.), 476 (1875). And an allegation that the directors are "nearly if not entirely" in league with the guilty parties is insufficient. Cogswell *v.* Bull, 39 Cal. 320 (1870). If the directors are the guilty parties, a stockholder suing to prevent their running the corporation for the benefit of a partnership need not allege a request to them to sue. Rothwell *v.* Robinson, 39 Minn. 1 (1888). If the fraud has been by the majority of the stockholders on the minority, no request to the directors to sue need be made. Nathan *v.* Tompkins, 82 Ala. 437 (1887). No request is necessary to the directors to undo an illegal lease when they cannot undo it except with the consent of another company. Tippecanoe County *v.* Lafayette, etc. R. R., 50 Ind. 85 (1875). A request to the directors is not excused by the fact that the guilty party — the corporate treasurer — owns a majority of the stock. Dunphy *v.* Traveller Newsp. Assoc., 146 Mass. 495 (1888). In North Carolina it would seem that a demand on the guilty officers is necessary in any case. Moore *v.* Silver, etc. Co., 104 N. C. 534 (1889). In a stockholder's suit to enjoin a rival company from voting stock in the stockholder's company, a request to the directors to sue is unnecessary where the directors are controlled by such rival company. Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). A stockholder may be permitted to bring suit against the receiver of the corporation to set aside a fraudulent assessment by him on stock, and a request need not be made to the receiver to bring the suit, he being guilty of the fraud. Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896). A request is unnecessary in a suit to recover back an illegal salary where the guilty parties are in control. Eaton *v.* Robinson, 18 R. I. 396 (1893). A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription where the president is in control of the company and refuses to pay such subscription. No request to the di-

with particularity and definiteness.[1] The stockholder may bring his suit although the corporation has been dissolved.[2]

§ 742. *Miscellaneous allegations of the complainant.*— The allegations which set forth the complaining stockholder's cause of action will of course depend largely on the particular facts of each case. It is necessary, however, to determine first whether the allegations are to make out a case of fraud, or of an *ultra vires* act, or of a negligent act. If an *ultra vires* act is complained of, the gist of the action is not fraud, and fraud need not be and should not be alleged.[3] But where the action

rectors is necessary in such a case. Knoop *v.* Bohmrich, 49 N. J. Eq. 82 (1351). A request is not excused by the fact that a majority of the stockholders sustain the acts complained of. Decatur, etc. Co. *v.* Palm, 21 S. Rep. 315 (Ala., 1896). In Barnes *v.* Kornegay, 62 Fed. Rep. 671 (1894), the court very properly held that no request need be made where the state owned most of the stock and controlled the directors and was about to destroy an exemption from taxation. See also § 740, *supra*.

[1] See cases in preceding note. An allegation that frequent protests had been made is not a sufficient allegation of a request to sue. Boyd *v.* Sims, 87 Tenn. 771 (1889), holding also that it is insufficient to show that a majority of the directors are large stockholders in a competing company, although the charge is that such directors are fraudulently favoring the latter company. It is not sufficient to allege that a majority of the directors "are acting in the interest of, and are under the control of," the guilty directors. It must be alleged that they are wilfully disregardful of the interests of the corporation, or would be if informed of the injurious effect of their actions, or would yield to the influence or control of the guilty directors if aware of the purposes and uses for which that influence is exercised. Brewer *v.* Boston Theatre, 104 Mass. 378 (1870). A request is not excused by an allegation that the complainant had offered to assume the expense and conduct of the litigation. Warren *v.* Para Rubber Shoe Co., 166 Mass. 97 (1896). A request is necessary, and it is insufficient that the plaintiff had demanded his part of what he would have received if the illegal act had not been committed. Flynn *v.* Brooklyn City R. R., 9 N. Y. App. Div. 269 (1896). No request is necessary where, in case the directors brought suit, the suit would be subject to the control of persons opposed to its success, and where the directors themselves are the wrongdoers or the partisans thereof. The allegation of these facts must be statements of fact and not conclusions of law. The manner in which the directors are interested must be pointed out. Steiner *v.* Parsons, 103 Ala. 215 (1893).

[2] Lafayette Co. *v.* Neely, 21 Fed. Rep. 738 (1884); Taylor *v.* Holmes, 127 U. S. 489 (1888).

[3] Clinch *v.* Financial Corp., L. R. 5 Eq. 450, 482 (1868). If the pleadings charge fraud as the basis of the suit, fraud must be proved; otherwise the suit fails, even though the evidence shows a right to relief on the ground of account, discovery, or some other ground of equitable jurisdiction. Spies *v.* Chicago, etc. R. R., 40 Fed. Rep. 34 (1889).

is to remedy a fraud, the allegations must clearly charge to that effect. The word "corrupt" has been held insufficient herein.[1] If the action is to set aside an *ultra vires* act, the act itself must be stated with particularity.[2] The complaint need not allege who the other stockholders are, how numerous, or whether a majority.[3] The stockholder need not allege that he was a stockholder at the time of the act, or that his stock has since come to him by operation of law.[4] It is not necessary to allege that the stockholders have been free from acquiescence or laches.[5]

In North Carolina it is held that the complaining stockholder must aver that he is a "*bona fide* owner of the stock; that he bought the same in good faith, and not for mere vexatious purposes."[6] Fraud need not be alleged if there has been a breach of the fiduciary relation.[7] A general allegation that the board of directors were negligent does not render a particular director liable.[8] A demurrer is not the proper way to raise the question of laches.[9]

§ 743. *Prayer for relief.*— The relief for which prayer is made in the bill will depend upon the character of the act complained of, and also of the facts in the particular case. Generally it is to compel the director or third parties to turn over to the corporation money or property fraudulently held by the defendants, or to enjoin acts, or to set aside transactions, or for a receiver, or for dissolution, or for more than one of these. It

[1] Russell *v.* Wakefield Waterworks Co., L. R. 20 Eq. 474 (1875).

[2] Leo *v.* Union Pac. R'y, 19 Fed. Rep. 283 (1884); S. C., 17 Fed. Rep. 273. The plaintiff must allege that the corporation is one for profit. Applegarth *v.* McQuiddy, 77 Cal. 408 (1888).

[3] Descombes *v.* Wood, 91 Mo. 196 (1886).

[4] Parsons *v.* Joseph, 92 Ala. 403 (1890).

[5] Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889).

[6] Moore *v.* Silver, etc. Co., 104 N. C. 534 (1889). For the various allegations to be made in a complaint to set aside an illegal alienation of corporate property, see Beecher *v.* Schieffelin, 4 N. Y. Civ. Proc. 230 (1883).

[7] Warren *v.* Para Rubber Shoe Co., 166 Mass. 97 (1896). Where stockholders desire to attack a deed of the corporation on the ground of fraud, they must do so affirmatively, and not by simply denying its execution. Morrill *v.* Little Falls, etc. Co., 53 Minn. 371 (1893). In a suit against an officer to recover back moneys, his position as officer may be proved by his signatures as such officer. Putnam *v.* Gunning, 162 Mass. 552 (1895).

[8] Fisher *v.* Graves, 80 Fed. Rep. 590 (1897).

[9] Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461 (1893). See also § 733, *supra*.

is well settled that the prayer for relief may be in the alternative.[1] The relief granted cannot exceed that which is asked.[2]

§ 744. *Property received under the act objected to must be returned upon that act being set aside.*— This is a principle of law that applies to all the remedies given by a court of equity in remedying the frauds or *ultra vires* acts of the directors or third persons against the corporation. He who seeks equity must do equity. An *ultra vires* act will not be set aside unless the money or property received by the corporation from third persons thereby is returned to such persons.[3] But a tender prior

[1] Colton *v.* Ross, 2 Paige, 396 (1831); Thomas *v.* Hobler, 4 De G., F. & J. 199 (1861).

[2] Latimer *v.* Eddy, 46 Barb. 61 (1864).

[3] The benefits received by the corporation must be returned in order to sustain an action setting aside a fraudulent contract. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Stockholders complaining of a reorganization must offer to pay their share of what may be found due if the transaction is set aside. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894). Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock *v.* Barrett, 50 Fed. Rep. 653 (1892); Buford *v.* Keokuk, etc. Co., 69 Mo. 611 (1879); Harpending *v.* Munson, 91 N. Y. 650 (1883); New Castle, etc. R. R. *v.* Simpson, 23 Fed. Rep. 214 (1885), allowing to the party outlays, compensation, and interest. *Cf.* Gray *v.* New York, etc. Co., 5 Thomp. & C. 224 (1875); Thomas *v.* Railroad Co., 101 U. S. 71 (1879); Louisiana *v.* Wood, 102 U. S. 294 (1880); Chapman *v.* Douglas County, 107 U. S. 348 (1882); Salt Lake City *v.* Hollister, 118 U. S. 256, 263 (1885); Green's Brice, Ultra Vires, 717. The consideration must be returned. Pierson *v.* McCurdy, 33 Hun, 520 (1884), where a receiver sued a director for funds used to purchase stock. See also Gould *v.* Cayuga, etc. Bank, 86 N. Y. 75 (1881); but see Allerton *v.* Allerton, 50 N. Y. 670 (1872). Where the president of a corporation by fraud causes a purchase of property by the company from himself at an excessive price, he cannot demand that he be put *in statu quo* before relief is granted the company. Gerry *v.* Bismarck Bank, 47 Pac. Rep. 810 (Mont., 1897). Payment by bondsmen of moneys used by the directors in illegal purchases of bonds prevents action by the receiver of the corporation against the directors. Hun *v.* Van Dyck, 26 Hun, 567 (1882). As to the right of the fraudulent possessor to compensation for improvements, see Jackson *v.* Ludeling, 99 U. S. 513 (1878). If, however, the complainant never received the consideration and cannot compel others to return it, it is not necessary for him to offer to return it. See Lamb *v.* San Pedro, etc. Co., 3 N. M. 632 (1886). Where the majority have fraudulently caused the directors to sell land to them and to buy stock of them, the minority need not offer to restore

to the suit need not be made, where the amount to be tendered is an unascertained amount. It is sufficient to offer in the complaint to pay or perform whatever obligations may exist.[1] A stockholder who brings suit to have a municipal subscription canceled on the ground that it is illegal need not first return to the municipality bonds which have been received in payment of the subscription.[2] Where, at the instance of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed.[3]

§ 745. *Injunction restraining the corporate officers and others from doing specified acts.*— The ordinary remedy of the stockholder is an injunction by a court of equity restraining the corporate officers from doing the specified fraudulent or *ultra vires* act which the stockholder complains of.[4] Generally the

anything in order to institute suit. Woodroof *v.* Howes, 88 Cal. 184 (1891). A stockholder need not make a tender to a purchaser in bad faith of corporate property fraudulently sold by the directors. The action was to enjoin and set aside the sales. Gray *v.* New York, etc. Co., 3 Hun, 383 (1875). Where two religious corporations united by one conveying its property to the other and the latter paying the debts of the former, a judgment setting aside such sale will also require the former to restore to the latter the money advanced by it. Madison Ave. Bapt. Ch. *v.* Oliver St. Bapt. Ch., 73 N. Y. 82 (1878). A stockholder seeking to have corporate bonds canceled must offer to return the consideration. Spencer *v.* Clarke, 1 N. Y. Supp. 533 (1888). It is clear, however, that the stockholder himself cannot be expected to repay this consideration. A just rule would allow him to pray in his bill that the corporation repay the consideration. *Cf.* Atlantic, etc. Tel. Co. *v.* Union Pac. R'y, 1 McCrary, 541 (1880), holding that though a contract be *ultra vires* a corporation will be restrained from recovering possession of property conveyed by it, except by due process of law and after return of the consideration. A stockholder suing to set aside need not tender if the party sued knew of the stockholder's dissent at the time when he entered into the act. Metropolitan Elev. R'y *v.* Manhattan Elev. R'y, 11 Daly, 373 (1884).

[1] Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461 (1893).

[2] Stebbins *v.* Perry County, 47 N. E. Rep. 1048 (Ill., 1897).

[3] Ponca Mill Co. *v.* Mikesell, 75 N. W. Rep. 46 (Neb., 1898).

[4] Where a proposed consolidation is attacked by a stockholder, a preliminary injunction granted so as not to render useless the whole suit, in case it is successful, will not be disturbed by the court of appeals. Young *v.* Rondout, etc. Co., 129 N. Y. 57 (1891); River Dun Nav. Co. *v.* North Midland R'y, 1 R'y Cas. 135, 153 (1838); Blatchford *v.* Ross, 54 Barb. 42 (1869). In

injunction runs to the corporation itself; and this is sufficient to make it effective and binding upon all corporate officers to whose notice it comes.[1]

§ 746. *Appointment of a receiver — Injunction against corporate officers acting at all — Removal of directors by the court or corporation.*— The law is well settled that the courts have no power to remove corporate officers.[2] Nor can the stockholders, in meeting assembled, remove the officers.[3] It is also well established that a court of equity will not practically remove corporate officers by enjoining them from performing any of their customary duties, and by appointing a receiver to manage the corporate affairs.[4]

Indiana it is held that no injunction will be granted against the payment of an unfounded claim by the directors. but that the action will proceed and other relief be granted. Rogers *v.* Lafayette Agric. Works, 52 Ind. 296 (1876).

[1] See § 738, *supra*, and § 755, *infra;* also Hatch *v.* Chicago, etc. R. R., 6 Blatchf. 105 (1868); S. C., 11 Fed. Cas. 799; Trimmer *v.* Pennsylvania, etc. R. R., 36 N. J. Eq. 411 (1883), holding, however, that the officers are not liable herein for contempt by reason of the acts of subcontractors. See People *v.* Sturtevant, 9 N. Y. 263 (1853); People *v.* Pendleton, 64 N. Y. 622 (1876). A director may resign after the company and officers have been enjoined from interfering with the corporate assets and may then pursue his remedies as a corporate creditor. Mexican Ore Co. *v.* Mexican, etc Co., 47 Fed. Rep. 351 (1891).

[2] Neall *v.* Hill, 16 Cal. 145 (1860), the court saying: "It is well settled that there is no jurisdiction in equity with regard to the removal of corporate officers of any description." Also Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), and §§ 618, 711, *supra.*

[3] Imperial Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 1 (1882). See § 711, *supra.*

[4] People *v.* Albany, etc. R. R., 55 Barb. 344, 383 (1869); Einstein *v.* Rosenfeld, 38 N. J. Eq. 309 (1884); Howe *v.* Deuel, 43 Barb. 504 (1865); Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867); Cicotte *v.* Anciaux, 53 Mich. 227 (1884); La Grange *v.* State Treasurer, 24 Mich. 468 (1872). In New York an injunction order suspending "the general and ordinary business" of a foreign or domestic corporation in New York can be obtained only after notice to the corporation. Code Civ. Proc., § 1809. *Cf.* § 1787. Hence an *ex parte* injunction against the removal of the treasurer is void. Wilkie *v.* Rochester, etc. R'y, 12 Hun, 242 (1877). An injunction against an officer doing any corporate business during the pendency of a suit against him for maladministration, etc., will not always be set aside, even under the rule that, where the defendant specifically denies under oath all charges, the injunction must be dissolved. Hayt *v.* Malone, 9 N. Y. Supp. 877 (1890). The court will not enjoin the officers from acting. Foss *v.* Harbottle, 2 Hare, 461 (1843); Mozley *v.* Alston, 16 L. J. (Ch.) 217 (1847); Hattersley *v.* Shelburne, 31 L. J. (Ch.) 873 (1862). So also Manneck, etc. Co. *v.* Manneck, 23 Alb. L. J. 216 (1881).

The appointment of a receiver as a remedy for the frauds or *ultra vires* acts of the directors is a punishment of the innocent and complaining party for the acts of the guilty party. As was well said by an Illinois court, "In principle this is very much like sending the creditor to jail because his debtor cannot pay him, and is so opposed to that spirit of justice which pervades all the true doctrines of equity jurisprudence that it will not bear discussion."[1] It must be conceded that a court

[1] Hyde Park Gas Co. *v.* Kerber, 5 Ill. App. 132 (1879), where a decree had been made that a receiver be appointed unless the officers paid over money received by them in fraud of corporate rights. The court set aside the decree. United Elect. Securities Co. *v.* Louisiana Elect. Light Co., 68 Fed. Rep. 673 (1895). A court will not appoint a receiver merely because some of the stockholders disapprove of the management. Edison *v.* Phonograph Co., 52 N. J. Eq. 620 (1894). Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893). A court has no power to appoint a receiver in a stockholder's suit for fraud. Fischer *v.* San Francisco Super. Ct., 110 Cal. 128 (1895); Stockton *v.* Harmon, 32 Fla. 312 (1893). A receiver was denied in Downing *v.* Dunlap Coal, etc. Co., 93 Tenn. 221 (1893), where all the allegations of the bill were denied in the answer. A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. Mason *v.* Equitable League, 77 Md. 483 (1893). A stockholder cannot have a receiver appointed on the ground of mismanagement, where it appears that the company is solvent, and that the officer charged with fraud is responsible, and that the usual remedies are sufficient. Rumney *v.* Detroit, etc. Co., 74 N. W. Rep. 1043 (Mich., 1898). A receiver appointed at the instance of minority stockholders without notice is illegally appointed. State *v.* Second, etc. Court, 50 Pac. Rep. 852 (Mont., 1897). The court refused to appoint a receiver in McGeorge *v.* Big Stone Gap, etc. Co., 57 Fed. Rep. 262 (1893), and discharged a temporary receiver who had been appointed in a stockholders' and bondholders' suit. In Lowe *v.* Pioneer Threshing Co., 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. It is no ground for a receivership that the business has been largely contracted, no fraud, negligence, or *ultra vires* acts being shown. Hunt *v.* American Grocery Co., 80 Fed. Rep. 70 (1897). Although there are but two stockholders, and the whole property of

of equity has power to appoint a receiver where there is such fraud or dissensions as to make it impossible for the corporation to carry on its business honestly and to the advantage of its stockholders, but such receivership should be granted rarely,

the corporation consists of stock in another corporation, and these two stockholders disagree, yet one of them cannot have a receiver appointed. Wallace *v.* Pierce, etc. Co., 70 N. W. Rep. 216 (Iowa, 1897). The court stated that it would require a very strong case to justify the appointment of a receiver. A receiver will not be appointed although bonds have been issued in excess of the charter limit, and although the directors are not managing for the best interests of the stockholders. Peatman *v.* Centerville, etc. Co., 69 N. W. Rep. 541 (Iowa, 1896). Even though the directors have sold preferred stock held by them to the corporation, and taken its notes therefor, when the corporation was insolvent, yet a receiver should not be appointed at the instance of a stockholder. The remedy is an injunction and accounting. Empire Hotel Co. *v.* Main, 98 Ga. 176 (1896). A general creditor of an insolvent corporation cannot have a receiver appointed and obtain a marshaling of the assets. Neither can a stockholder. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329 (1896). A receiver will not be appointed. New, etc. Co. *v.* Blevins, 34 S. W. Rep. 828 (Tex., 1896); Wenzel *v.* Palmetto, etc. Co., 26 S. E. Rep. 1 (S. C., 1896). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made, and illegal elections held, even though the illegal officers are running the business; nor will a receiver be appointed although the purpose of the company is impracticable, the member bringing the suit having been a party thereto. Equity will not interfere although the company is wholly illegal and unauthorized. The remedy is at law. Crombie *v.* Order of Solon, 157 Pa. St. 588 (1893). No receiver for fraud of directors. People's Inv. Co. *v.* Crawford, 45 S. W. Rep. 738 (Tex., 1898). Dissatisfaction by the minority with the management of the majority is not sufficient for the appointment of a receiver of the corporation. Fluker *v.* Emporia City R'y, 48 Kan. 577 (1892); American, etc. Co. *v.* Toledo, etc. R'y, 29 Fed. Rep. 416 (1886). A receiver will not be appointed for mere mismanagement. The proceeding must comply with the statutory provisions for dissolution of the corporation. Port Huron, etc. R'y *v.* St. Clair Circuit Judge, 31 Mich. 456 (1875). The court will not appoint a receiver of a solvent corporation, even though the president has embezzled some of the funds and is disposing of his property, and is apparently sustained by a majority of the stockholders. Ranger *v.* Champion, etc. Co., 52 Fed. Rep. 609 (1892). See also Bayles *v.* Orne, Freem. Ch. (Miss.) 161 (1841); People *v.* Conklin, 5 Hun, 452 (1875); Hand *v.* Dexter, 41 Ga. 454 (1871); Baker *v.* Backus, 32 Ill. 79 (1863); People *v.* Albany, etc. R. R., 7 Abb. Pr. (N. S.) 290 (1869); Belmont *v.* Erie R'y, 52 Barb. 637 (1869); Overton *v.* Memphis, etc. R. R., 10 Fed. Rep. 866 (1882); Smith *v.* Wells, 20 How. Pr. 158 (1860). Even where two rival boards of directors are litigating their respective rights, the court cannot turn the corporate affairs over to a receiver. See Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867); Gravenstine's Appeal, 49 Pa. St. 310 (1865), holding that the appointment of a receiver is

is also general manager and has entire charge of the business of a corporation, he may bind it by his contract to pay for pro-

and mill, and also to open a mine of his own, all without the knowledge of the company or of the employees, who supposed they were working for the company, the company is liable for their wages. Oro, etc. Co. *v.* Kaiser, 4 Colo. App. 219 (1893). A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. American, etc. Co. *v.* Maurer, 10 Atl. Rep. 762 (Pa., 1887). A contract for a corporation by its general superintendent to give a right of way to another railroad may become binding by acquiescence. Alabama, etc. R. R. *v.* South, etc. R. R., 84 Ala. 570 (1887). The president and manager of a milling company cannot purchase flour. Getty *v.* Barnes, etc. Co., 40 Kan. 281 (1888). As to insurance agents, see Insurance Co. *v.* McCain, 96 U. S. 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under a judgment. Phillips *v.* Campbell, 43 N. Y. 271 (1870). A general manager has implied power to make a time contract of employment. Stahlberger *v.* New Hartford Leather Co., 92 Hun, 245 (1895). A general manager has no power to engage an employee for five years. Camacho *v.* Hamilton, etc. Co., 2 N. Y. App. Div. 369 (1896). An executive officer having power to employ persons does not thereby have power to employ a person for life. Carney *v.* New York L. Ins. Co., 19 N. Y. App. Div. 160 (1897). The managing agent may employ a person, but not for a long time in the future. Smith *v.* Cook, etc. Assoc., 12 Daly, 304 (1884). He cannot employ a broker. Allegheny, etc. Co. *v.* Moore, 95 Pa. St. 412 (1880). The general manager of a mining company has no inherent power to contract for it for machinery. Victoria, etc. Co. *v.* Fraser, 2 Colo. App. 14 (1892). The general manager of a live-stock company has implied power to sell a part of such stock. Hamm *v.* Drew, 83 Tex. 77 (1892). Long acquiescence in a person's assuming to act for the company is the same as expressly authorizing his action. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 560 (1891). A general manager has no power to deed the company's real estate, and a purchaser other than a *bona fide* one from the vendee cannot retain the title. Allowance was made for improvements. Especially is the deed invalid where the grantee was a director. Schetter *v.* Southern, etc. Co., 19 Oreg. 192 (1890). The president and general manager of a lumber company may engage a lawyer for the season. Ceeder *v.* Loud, etc. Co., 86 Mich. 541 (1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as manager assents to the modifications, the company is bound thereby. Nichols *v.* Scranton Steel Co., 137 N. Y. 471 (1893). A general manager has no power to sell rights for a particular state, and a power of attorney which has been revoked is insufficient to be relied upon. Johnson *v.* Alabama, etc. Co., 90 Ala. 505 (1890). Where the by-laws give the general manager power to sell, he has power to sell the product for a certain space of time in the future. Robert, etc. Min. Co. *v.* Omaha, etc. Co., 16 Colo. 118 (1891). For a discussion of what constitutes the appointment of a resident gen-

moting-expenses.[1] The by-laws may give to the general manager power to carry on the business of the company.[2] Although a general manager exceeds his authority in agreeing to an arbitration, yet, if the company does not repudiate his agreement promptly, it is bound.[3] A managing director may, by a by-law, be given the powers of the board. An outside party need not inquire as to whether his appointment was validly made, and may assume that such director has the powers which the board might delegate to him.[4]

A railroad superintendent may employ a physician in cases of accident,[5] and may offer rewards for the conviction of per-

eral agent by a corporation, see Rathbun *v.* Snow, 123 N. Y. 343 (1890). A general manager has no power to employ a person on a long-time contract. Smith *v.* Co-operative, etc. Assoc., 12 Daly, 304 (1884). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. Decker *v.* Gutta Percha, etc. Co., 61 Hun, 516 (1891).

[1] Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894).

[2] Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896). A general manager authorized to "take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," may appoint a local agent and empower him to hire a barge. Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1 (1893).

[3] Central Trust Co. *v.* Ashville Land Co., 72 Fed. Rep. 361 (1896). Where a corporation allows its manager to largely control its business, it is liable on a contract made by him in the name of the company, and in the line of its business. Carrigan *v.* Port Crescent Imp. Co., 6 Wash. 590 (1893). So also as to its president and secretary. Duggan *v.* Pacific Boom Co., 6 Wash. 593 (1893). Where a party who buys a mine does not object to a lease thereof made by the superintendent without authority, but on the contrary allows the lessee to proceed and receives the rent, he thereby ratifies the lease. Bicknell *v.* Austin Min. Co., 62 Fed. Rep. 432 (1894).

[4] Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93.

[5] Pacific R. R. *v.* Thomas, 19 Kan. 257 (1877); Toledo, etc. R'y *v.* Rodrigues, 47 Ill. 188 (1868); Atlantic, etc. R. R. *v.* Reiser, 18 Kan. 458 (1877). *Contra*, Stephenson *v.* New York, etc. R. R., 2 Duer, 341 (1853); Shriver *v.* Stevens, 12 Pa. St. 258 (1849), holding that the agent of a stage line cannot. A yardmaster cannot employ a physician for the company. Marquette, etc. R. R. *v.* Taft, 28 Mich. 289 (1873). Nor an engineer. Cooper *v.* New York, etc. R. R., 6 Hun, 276 (1875). Nor a station agent. Tucker *v.* St. Louis, etc. R. R., 54 Mo. 177 (1873); Cox *v.* Midland, etc. R. R., 3 Exch. 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. Cairo, etc. R. R. *v.* Mahoney, 82 Ill. 73 (1876); Toledo, etc. R. R. *v.* Prince, 50 Ill. 26 (1869). The general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. Dale *v.* Donaldson Lumber Co., 48 Ark. 188 (1887); Wood, Railw. Law, pp. 439–444.

§ 747. *Miscellaneous remedies.*— It has been held and clearly established that a stockholder cannot bring about the dissolution of the corporation merely because the officers have been

point another at the instance of the controlling stockholders who are charged with fraud, where the receiver's management has been able and impartial. Street *v.* Maryland Central R'y, 58 Fed. Rep. 47 (1893). A receiver was appointed in a stockholder's suit in Aiken *v.* Colorado River Irr. Co., 72 Fed. Rep. 591 (1896), where it was charged that the control had been obtained by spurious stock and the funds had been diverted. Where an improvement company and a development company have practically the same officers, and the business is conducted largely as one concern, and the real estate involved is being sold for taxes and judgments obtained, and the accounts are not properly kept and the funds misapplied, a stockholder of the latter company may have a receiver appointed, it being shown that the officers are so implicated in the confusion that they will not properly conduct the business. Bridgeport Development Co. *v.* Tritsch, 110 Ala. 274 (1895). Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy *v.* Transportation, etc. Co., 82 Md. 408 (1896). A policyholder in a mutual benefit association may have a receiver appointed where it is alleged that the officers have converted three-quarters of the assets to their own use, and that the officers refused to call meetings of the directors, and refused to publish the proceedings as required. Order of Iron Hall *v.* Baker, 134 Ind. 293 (1893). Where, at the instance of a stockholder, the court sets aside a transfer of corporate property to a director, the stockholder, however, being obliged to repay the consideration, for which the decree gives him a lien upon the property therefor, the stockholder may foreclose such lien and may have a receiver of the corporation appointed. Ponca Mill Co. *v.* Mikesell, 75 N. W. Rep. 46 (Neb., 1898). A stockholder may have a receiver appointed of a foreign corporation which is insolvent and is in the hands of a receiver in the state creating it. Phœnix, etc. Co. *v.* North River, etc. Co., 33 Hun, 156 (1884). A receiver will be appointed if the corporation is practically defunct and there has been a breach of trust. Hall *v.* Astoria, etc. Co., 5 R'y & Corp. L. J. 412 (Louisville Ct., 1889). See also, in general, Frostburg Bldg. Assoc. *v.* Stark, 47 Md. 338 (1877). In Haywood *v.* Lincoln Lumber Co., 64 Wis. 639 (1885), the corporation was insolvent. In Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829), the court appointed a receiver to preserve the corporate property, there having been no officers elected by the stockholders. In Forbes *v.* Memphis, etc. R. R., 2 Woods, 323 (1872); S. C., 9 Fed. Cas. 408, a receiver was appointed upon default of the defendants to answer, the bill being filed by a stockholder, a bondholder, and the trustee for the bondholders on behalf of themselves and all other stockholders and bondholders to prevent the directors of the insolvent company from fraudulently disposing of the property.

guilty of a breach of trust.[1] Nor can he defeat an action for his subscription by alleging such a defense.[2] There are various other remedies and rules which govern this subject.[3]

Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re* Belton, 47 La. Ann. 1614 (1895). The court may appoint a receiver to prevent waste and destruction. Houston, etc. Co. *v.* Drew, 36 S. W. Rep. 802 (Tex., 1896); Stevens *v.* South, etc. Co., 47 Pac. Rep. 81 (Utah, 1896). Where the stockholder alleges that the president is fraudulently contracting a debt to himself, and is about to sell out the whole property illegally, a receiver will be appointed. Stewart *v.* Belt, 19 S. Rep. 957 (Miss., 1896). A receiver may be appointed under the New York statutes in a stockholder's action for fraud on the part of the directors. Halpin *v.* Mutual Brewing Co., 91 Hun, 220 (1895). In Duncan *v.* Treadwell Co., 82 Hun, 376 (1894), the court upheld a discharge of a receiver appointed by reason of directors' wrong doing, new directors having been elected since the appointment. Where the majority take all the profits, keep false books, buy a worthless franchise, and mortgage the corporate property in order to wreck the corporation, a receiver will be appointed pending suit to cancel the mortgage. State *v.* Second Judicial, etc. Court, 15 Mont. 324 (1895). A receivership in one state in a suit between claimants for office does not prevent a receivership in another state in behalf of the bondholders to take charge of the property in such latter state. Schmidt *v.* Mitchell, 98 Ky. 218 (1895). The appellate court, in Florida Constr. Co. *v.* Young, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former, although the order appointed a receiver of the former and granted an injunction. See also § 684, *supra*. As to the appointment of a receiver for the purpose of distributing the assets, see § 629, *supra*.

[1] See § 629, *supra*. A stockholder's prayer for relief that the corporation be dissolved and the assets distributed because a director has sold property to it at an overvaluation will be denied. Tutwiler *v.* Tuskaloosa, etc. Co., 89 Ala. 391 (1889). Where a corporation has abandoned its authorized business and engaged in another, it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re* Crown Bank, L. R. 44 Ch. D. 634 (1890).

[2] See § 187, *supra;* also Chetlain *v.* Republic L. Ins. Co., 86 Ill. 220 (1877); South Georgia, etc. R. R. *v.* Ayres, 56 Ga. 230 (1876). Nor can the stockholder enjoin a call. *Ex parte* Booker, 18 Ark. 338 (1857). If an illegal consolidation is set aside, the stockholders of the new company may recover back the amount paid in by them. *Re* Bank of Hindustan, L. R. 16 Eq. 417 (1873).

[3] Where money is recovered and is to be distributed among the stockholders, see Pacific R'y of Mo. *v.* Cutting, 27 Fed. Rep. 638 (1886). The corporation may appeal from the judgment. Sheridan *v.* Sheridan Electric L. Co., 38 Hun, 396 (1886). Even though the plaintiff proves fraud, yet if the findings are not full enough to sustain the judgment, the higher court will reverse a judgment in the plaintiff's favor. Beach *v.* Cooper, 72 Cal. 99

§ 748. *The complaining stockholder controls the conduct of the suit — Costs and disbursements — Similar suits elsewhere.*— It is a principle of equity practice, when a person brings a suit in behalf of himself and such others as may wish to come in who are similarly situated, that the complaining stockholder controls the case and may continue, compromise, abandon, or discontinue it at his pleasure.[1] In case the suit is successful the complaining stockholder is entitled to have his costs and attorney's fees paid by the corporation.[2]

Judgment rendered in one stockholder's suit is a bar to a similar suit by another stockholder, even though the latter commenced his suit before judgment was rendered in the former.[3] A stockholder may institute a suit although there is already one pending in another court at the instance of another

(1887). Before an accounting is ordered the fact of misapplication must be proved. Stokes *v.* Stokes, 91 Hun, 605 (1895). Pledgees of a majority of the corporate stock who, by voting their stock, cause men of their choice to be elected directors, are not liable for the misconduct of such directors. Higgins *v.* Lansingh, 154 Ill. 301 (1895).

[1] "The plaintiff, as he acts upon his own mere motion and at his own expense, retains (as in other cases) the absolute dominion of the suit until decree, and may dismiss the bill at his pleasure. After decree, however, he cannot, by his conduct, deprive other persons of the same class of the benefit of the decree, if they think fit to prosecute it." 1 Daniells, Ch. Pl. (6th Am. ed.) 244; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194 (1885); Allen *v.* New Jersey, etc. R. R., 49 How. Pr. 14 (1875); Tremain *v.* Guardian, etc. Ins. Co., 11 Hun, 286 (1877), allowing discontinuance, and reviewing cases. See also the valuable briefs in this case. But see Seaton *v.* Grant, L. R. 2 Ch. 459 (1867); and see Salisbury *v.* Binghamton Pub. Co., 85 Hun, 99 (1895), refusing to allow a creditor to discontinue. In Belmont *v.* Erie R'y, 52 Barb. 637 (1869), the court held that the other stockholders could intervene in the management of the case. If the guilty directors settle with the complaining stockholder by paying him out of the corporate treasury, the corporation may subsequently recover back the money so paid. Erie R'y *v.* Vanderbilt, 5 Hun, 123 (1875). See also Derby *v.* Yale, 13 Hun, 273 (1878). The stockholder who sues may discontinue or go on. Mattison *v.* Demarest, 1 Rob. (N. Y.) 717 (1863). *Cf.* Thouron *v.* East Tennessee, etc. R'y, 38 Fed. Rep. 673 (1889); Innes *v.* Lansing, 7 Paige, 583 (1839). The suit stops if the complaining stockholder is paid. Scarth *v.* Chadwick, 14 Jur. 300 (1850). After other creditors have come in as parties plaintiff, the original plaintiff cannot dismiss the suit except with their consent. Belmont, etc. Co. *v.* Columbia, etc. Co., 46 Fed. Rep. 336 (1891). See 27 N. Y. App. Div. 189.

[2] See § 879, *infra*.

[3] Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892). Where two suits for the same purpose, one by a stockholder and one by the corporation itself, are pending in different states, the first decision will be followed in the other state, although the suit in the latter state was com-

stockholder, bearing on the same question, but after judgment in one case the other cases cease.[1]

Where the company itself has already brought suit on a cause of action and has been defeated, a stockholder cannot bring suit on the same cause of action on behalf of the corporation, even though the former case was decided in another state.[2]

§ 749. *No contribution among the directors.*— There is no contribution among directors guilty of a breach of trust for which a part are held liable.[3] A director cannot claim a set-off,[4] or bankruptcy, where he has been guilty of fraud.[5]

B. SUITS BY OR AGAINST THE CORPORATION IN GENERAL — SERVICE AND JURISDICTION.

§ 750. *The discretion of the directors in refusing to institute or to defend an action involving corporate interests is not generally interfered with — Intervention by stockholders.*— It frequently happens that the corporation has a cause of action

menced first, unless there is collusion. Memphis, etc. R. R. *v.* Grayson, 88 Ala. 572 (1889).

[1] Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194 (1885). But if the company has instituted a suit a stockholder cannot. Memphis *v.* Dean, 8 Wall. 64 (1868); Black *v.* Huggins, 2 Tenn. Ch. 780 (1877). See also, as to who may be a complainant herein, Green's Brice, Ultra Vires (2d ed.), 649. In Dannmeyer *v.* Coleman, 11 Fed. Rep. 97 (1882), the court queries whether each stockholder may institute a separate suit herein. The party with whom the alleged illegal contract was made cannot sustain a bill in equity to prevent a multiplicity of stockholders' suits. Manhattan R'y *v.* New York Elev. R. R., 29 Hun, 309 (1883). Although a creditor has brought suit in behalf of himself and others, yet another creditor may institute another similar suit. After judgment in one, the other ceases. Innes *v.* Lansing, 7 Paige, 583 (1839). As to demurrer on the ground that another suit is pending for the same relief, see Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461 (1893). A corporate creditor's suit in equity in behalf of himself and all others to enforce the stockholders' statutory liability does not, even though it goes to a decree, prevent other creditors filing a subsequent bill for the same purpose. Palmer *v.* Woods, 149 Ill. 146 (1894).

[2] Alexander *v.* Donohoe, 68 Hun, 131 (1893); aff'd, 143 N. Y. 203 (1894).

[3] Wilkinson *v.* Dodd, 40 N. J. Eq. 123 (1885); Ervin *v.* Oregon, etc. Nav. Co., 20 Fed. Rep. 577 (1884); Peck *v.* Ellis, 2 Johns. Ch. 131 (1816). See Power *v.* O'Connor, 19 W. R. 923 (1871). In Lingard *v.* Bromley, 1 Ves. & B. 114 (1812), contribution was enforced between assignees in bankruptcy, one of whom had improperly paid a loss with the concurrence of the others. In Ramskill *v.* Edwards,

[4] *Re* Anglo-French Co-op. Soc., L. R. 21 Ch. D. 492 (1882).

[5] Emma Min. Co. *v.* Grant, L. R. 17 Ch. D. 122 (1880).

against a third party which the directors think best not to press, or that the corporation is sued and the directors think best not to defend, or, where an action is pending, the directors decide to compromise the matter. The judgment of the directors may, in the opinion of a stockholder, be erroneous, and yet it cannot be controlled or changed by the stockholders except by refusing to re-elect the directors to office. The stockholder cannot go into court and attempt to change the policy of the directors as regards the management of the suit.[1] A stockholder cannot control the discretion of the directors as to whether to bring a suit or not.[2] A stockholder cannot bring a suit to recover for goods sold by the corporation. The corporation is the proper party to sue.[3] In general, a corporation

L. R. 31 Ch. D. 100 (1885), contribution was enforced against a director who subsequently ratified an unauthorized loan which another director made and was held responsible for. An executor of a deceased director was also held liable. A director who objects and protests is not liable.

[1] These principles of law follow necessarily from the fact that the management and policy of the corporation are determined and controlled by the directors and not by the stockholders. The only cases wherein the stockholders may interfere are cases where the directors are guilty of fraud, *ultra vires* acts, or gross negligence in protecting the corporate interests.

"There may be claims against directors; there may be claims against officers; there may be claims against debtors; there may be a variety of things which a company may well be entitled to complain of, but which, as a matter of good sense, they do not think it right to make the subject of litigation; and it is the company, as a company, which has to determine whether it will make anything that is wrong to the company a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done." MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875). See also 15 Fed. Rep. 360, note. Even a majority of the stockholders cannot go into court and have appeals dismissed where the directors order them to be continued. Railway Co. *v.* Alling, 99 U. S. 463 (1878). "Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891). The discretion of the directors cannot be questioned by the stockholders. Edison *v.* Edison United Phonograph Co., 52 N. J. Eq. 620 (1894). See also § 684, *supra*.

[2] La Grange *v.* State Treasurer, 24 Mich. 468 (1872).

[3] Cutshaw *v.* Fargo, 8 Ind. App. 691 (1893). Stockholders cannot bring suit in behalf of the company to set aside a deed on the ground that the

represents and binds the shareholders in bringing and defending suits which involve the rights and obligations of the corporation, and binds them as fully as in the making of contracts.[1]

Thus, it is not for the stockholder to take out an appeal or certiorari which the corporation does not take out;[2] nor bring an action against other corporate agents for injury and loss to the corporation.[3] The great case of Dodge *v.* Woolsey,[4] however, was on the very point now under discussion, and it was decided under the facts of that case, where the corporation refused to defend itself against an illegal tax, that a stockholder of the corporation might do that which the corporation should have done.[5] It is within the power of the directors to compromise a pending lawsuit by or against the corporation, and a stockholder cannot control the directors' decision.[6]

directors neglect to bring the suit, where the matter in dispute is being litigated in another form. Bissell *v.* Taylor, 7 Wash. 324 (1893).

[1] Farnum *v.* Ballard, etc. Shop, 66 Mass. 507 (1853); Oglesby *v.* Attrill, 105 U. S. 605 (1881); Came *v.* Brigham, 39 Me. 35 (1854); Lane *v.* Weymouth School Dist., 51 Mass. 462 (1845); Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886), affirming 14 Fed. Rep. 753 (1883). It has been held that the minority bringing suit against a third person to enforce a right which the corporation ought to enforce must make the corporate officers co-defendants. Slattery *v.* St. Louis, etc. Co., 91 Mo. 217 (1886). But see § 738, *supra*. A stockholder cannot appeal from a decree against the company. *Ex parte* Cutting, 94 U. S. 14 (1876). Stockholders are not entitled to notice of the suit. Peirce *v.* Somersworth, 10 N. H. 369 (1839).

[2] Silk Mfg. Co. *v.* Campbell, 27 N. J. L. 539 (1859). Under the statute of Ohio a stockholder may sometimes appeal where the corporation does not. Henry *v.* Jeanes, 47 Ohio St. 116 (1890).

[3] Forbes *v.* Whitlock, 3 Edw. Ch. 446 (1841). See also Quincy *v.* Steel, 120 U. S. 241 (1887).

[4] 18 How. 331, 345 (1855), where the court said: "Now, in our view, the refusal upon the part of the directors, by their own showing, partakes more of disregard of duty than of an error of judgment. It was a non-performance of a confessed official obligation, amounting to what the law considers a breach of trust, though it may not involve intentional moral delinquency." See also Memphis, etc. Co. *v.* Williamson, 9 Heisk. (Tenn.) 314 (1872), where suit was brought on the bond which the plaintiff in Memphis *v.* Dean, 8 Wall. 64 (1868), gave in obtaining an injunction.

[5] See also Park *v.* Petroleum Co., 25 W. Va. 108 (1884); S. C., 26 W. Va. 486 (1885).

[6] It cannot be contended that the directors of a corporation do not possess authority, acting in good faith and in the exercise of their best judgment, to settle a pending action, or that the settlement is not binding on their stockholders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled." Donohoe *v.* Mariposa, etc. Co., 66 Cal. 317, 319 (1885). See also Shawhan *v.* Zinn, 79 Ky. 300 (1881). The board of directors may

Even though a contract is of doubtful validity, the corporation may compromise the claim.[1] A stockholder cannot sue to enjoin a person from slandering the title of property belonging to the corporation.[2] A stockholder in a railroad company may file a bill to enjoin an unreasonable reduction of the rates made by act of the legislature;[3] and a stockholder may enjoin his company from paying an illegal income tax.[4] A stockholder may enjoin a rival company from appropriating the right of way and property of his own company, where a majority of the directors of the latter are allowing these acts to be done.[5] A stockholder may bring suit in behalf of the corporation to compel the president to pay his subscription, where the president is in control of the company and refuses to pay such subscription.[6]

It has been held that a stockholder may bring suit on behalf of the corporation to remove a cloud from the corporate title to real estate,[7] and that a stockholder may sue for the corporation to compel delinquent stockholders to pay in their unpaid subscriptions.[8] In one case it has been held that where there is a controversy among the stockholders as to how many directors one of the stockholders — a municipality — is entitled to, a stockholder may file a bill to settle it, since the corporation is

compromise claims and lawsuits. New Albany *v.* Burke, 11 Wall. 96 (1870); First Nat. Bank *v.* National Exch. Bank, 92 U. S. 122 (1875), aff'g 39 Md. 600; Pneumatic Gas Co. *v.* Berry, 113 U. S. 322 (1885); Frankfort Bank *v.* Johnson, 24 Me. 490 (1844); Seeley *v.* San José, etc. Co., 59 Cal. 22 (1881). The sureties of a corporate treasurer are liable for the deficiency existing after the compromise by the corporation of a claim which the treasurer illegally created. Goodyear, etc. Co. *v.* Caduc, 144 Mass. 85 (1887).

[1] Farmers', etc. Co. *v.* Meese, 69 N. W. Rep. 113 (Neb., 1896). An adjustment of a claim by the board of directors is binding on the stockholders unless fraud and bad faith are shown. Chambers *v.* Chambers, etc. Co., 39 Atl. Rep. 822 (Pa., 1898).

[2] Langdon *v.* Hillside, etc. Co., 41 Fed. Rep. 609 (1890).

[3] Smyth *v.* Ames, 169 U. S. 466 (1898).

[4] Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895); S. C., 158 U. S. 601.

[5] Weidenfeld *v.* Sugar Run R. R., 48 Fed. Rep. 615 (1892).

[6] No request to directors is necessary in such a case. Knoop *v.* Bohmrich, 49 N. J. Eq. 82 (1891). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. Fisk *v.* Patton, 7 Utah, 399 (1891). The president may institute a suit to compel a majority of the board of directors to account for fraud, even though they are opposed to the suit. Recamier Mfg. Co. *v.* Seymour, 5 N. Y. Supp. 648 (1889).

[7] Baldwin *v.* Canfield, 26 Minn. 43, 56 (1879).

[8] Wallworth *v.* Holt, 4 Myl. & C. 619 (1840).

not bound to decide or test the matter.[1] "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding."[2] By reason of this principle of law and the further fact that a multiplicity of suits should be avoided, the courts will, in some instances, allow a stockholder to intervene in a suit brought by or against the corporation and thus enable him to assist and protect the corporate interest in such suit. This subject, however, is considered elsewhere.[3]

The rule which ordinarily prevents a stockholder from instituting or defending a suit against third persons herein is clearly to be distinguished from all other classes of actions treated of in the fourth part of this work. The actions now being considered are those which exist for or against the corporation in a multitude of cases, and which are of daily occurrence to all great corporations. They are actions not involving frauds or *ultra vires* acts of the directors, but involve at the most only a neglect of the directors to begin or defend suits.

There is a class of cases which are midway between these two classes. This third class involves a neglect of the directors to defend a suit against the corporation, and the further fact that the defense is not made on account of the fraud and collusion of the directors with the complainants in the suit. This generally happens in foreclosures of mortgages on the property of the corporation, a subject which is considered elsewhere.[4]

§ 751. *Suits by and against corporations must be in corporate name.*— It is stated by Blackstone that one of the distinguishing features of a corporation is that it may sue and be sued in its corporate name. This is an elementary principle of law. Consequently, the stockholders are not to be made parties in suits against the corporation.[5] Moreover, a suit by or against the corporation must be by or against it in its corporate name, and not in the names of its officers.[6] The president of the com-

[1] Wheeling *v.* Baltimore, 1 Hughes, 90 (1862); S. C., 29 Fed. Cas. 914.

[2] National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895). See also § 209, *supra*.

[3] See § 848, *infra*.

[4] See § 848, *infra*.

[5] Kelley *v.* Mississippi Cent. R. R., 1 Fed. Rep. 564 (1880).

[6] An action against an individual, "president of the," etc., is not a suit against the corporation. The suit must be against the corporation in its corporate name. Ogdensburgh

pany may employ an attorney to bring suit or to appear for the company.[1]

§ 752. *Service—Appearance—Answer.*— If the suit is against the corporation, service is made upon it, not by service upon a stockholder,[2] but upon the chief officer of the corporation within the jurisdiction.[3] "At common law service was made on such

Bank *v.* Van Rensselaer, 6 Hill, 240 (1843). An action against the stockholders does not bind or affect the corporation unless it is made a party by name and service. Lillard *v.* Porter, 2 Head (Tenn.), 177 (1858). When there is no prayer for process against a corporation by its corporate name, but only against its officers, and the body of the bill does not describe the corporation as a party, the corporation is not before the court, though it is in the title. Verplanck *v.* Mercantile Ins. Co., 2 Paige, 438 (1831). An important exception to this rule arises, of course, where the corporation refuses to sue and a stockholder sues for it. See Part IV of this work generally. Process running to A as president of, etc., runs to A individually, and the company is not thereby made a party, and an amendment without new service cannot cure. Plemmons *v.* Southern Imp. Co., 108 N. C. 614 (1891). An attachment or garnishment against "William Milnes, president Shenandoah," etc., Railroad, is not good as against the company. It is against Milnes as an individual. Fidelity, etc. Co. *v.* Shenandoah Valley R. R., 33 W. Va. 761 (1890). A corporation may appeal from an order for the examination of one of its officers. Sherman *v.* Beacon Const. Co., 58 Hun, 143 (1890). In a suit to enjoin a corporation from lowering the level of a lake, the president may be joined as a party defendant. Cedar Lake Hotel Co. *v.* Cedar Creek, etc. Co., 79 Wis. 297 (1891). Where suit is brought against a corporation, and its officers are made parties defendant for purposes of discovery, the latter are not merely nominal parties. Doyle *v.* San Diego, etc. Co., 43 Fed. Rep. 349 (1890). Where an answer under oath is waived, and no discovery is sought in an action against a corporation, the officers are not proper parties defendant. Colonial, etc. Co. *v.* Hutchinson Mortgage Co., 44 Fed. Rep. 219 (1890). See also § 738, *supra*. Process should not run to a person as president of a company. It should run to the company itself. State *v.* Montegudo, 48 La. Ann. 1417 (1896).

[1] See § 716, *supra*. In a suit against a corporation and its president, both parties are liable for the fees of their attorneys. Humes *v.* Decatur Land, etc. Co., 98 Ala. 461 (1893).

[2] Bache *v.* Nashville, etc. Soc., 10 Lea (Tenn.), 436 (1882); Lillard *v.* Porter, 2 Head (Tenn.), 177 (1858); De Wolf *v.* Mallett, 3 Dana (Ky.), 214 (1835). Service in Colorado by statute may be on a stockholder if there is no resident agent. Service cannot be avoided by a transfer of his stock by a stockholder for that purpose only. Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499 (1890). See also § 758, notes, *infra*.

[3] Service of notice of attachment in a garnishment case upon two of the officers and directors of a corporation has been held sufficient notice to the corporation. Boyd *v.* Chesapeake, etc. Canal Co., 17 Md. 195 (1860). Notice of a motion for a rule to establish the election of directors is sufficient if served on the directors whose election is questioned, and it need not be served on the other directors or on the president. *Ex parte*

head officer of a corporation as secured knowledge of the process to the corporation."[1] The subject of service upon a foreign corporation is considered elsewhere.[2]

Generally the statutes of the state specify the corporate officers upon whom service may be made. The corporation may appear generally, or may appear specially for the purpose of objecting to the service.[3] Formerly a corporation made complaint or answer in a suit by attaching the corporate seal to the bill of complaint or answer. But this rule left the pleading unverified, and consequently, by statute now, it is generally

Holmes, 5 Cow. 426 (1826). Upon affidavit that the corporation had no presiding officer or treasurer, and that the secretary had left the country, the court ordered service to be on the trustee. Tom *v.* First Society, etc., 19 Wend. 25 (1837). Where the president and treasurer of a corporation misinform a process server and induce him to serve process upon another party which was intended to be served upon the president, the service is good as against the corporation. Wilson *v.* California Wine Co., 95 Mich. 117 (1893). "At common law the process against a corporation could only be served on its head or principal officer within the jurisdiction of the sovereignty where the artificial body existed." Young *v.* Dexter, 18 Fed. Rep. 201, 208 (1883). Service upon the vice-president is good under a statute authorizing service on the president or other head. Comet, etc. Co. *v.* Frost, 15 Colo. 310 (1890). Service upon one who has ceased to be president, director, or other officer renders the judgment void. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. Sturgis *v.* Crescent, etc. Co., 10 N. Y. Supp. 470 (1890). Service on one as secretary, when he never had been secretary, is not good. Collier *v.* Morgan's, etc. R. R., 41 La. Ann. 37 (1889). Where the corporation had suspended business, and the chairman of the directors was dead, the court directed service to be made on the deputy chairman and secretary who had last served as such for the corporation. Gaskell *v.* Chambers, 26 Beav. 252 (1858). Service on the chief resident agent has been held sufficient. Newby *v.* Von Oppen, L. R. 7 Q. B. 293 (1872). A notice of a lien served on the secretary is sufficient. Heltzell *v.* Chicago, etc. R. R., 77 Mo. 315 (1883). Service on the president is sufficient. Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96 (1854). But not on a mere agent. McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827). A suit against a supposed corporation is not good against its members, there being merely a copartnership. Service on the general manager does not make him a party defendant. Leatherman *v.* Times Co., 88 Ky. 291 (1889). See § 758, *infra*.

[1] Kansas City, etc. R. R. *v.* Daughtry, 138 U. S. 298, 305 (1891).

[2] See §§ 757, 758, *infra*.

[3] See § 758, *infra*. A corporation, like a natural person, may appear voluntarily by attorney, and such appearance gives jurisdiction to the same extent as if there was actual service of process. Att'y-Gen. *v.* Guardian, etc. Ins. Co., 77 N. Y. 272 (1879).

prescribed that some officer of the corporation shall verify the pleading for the corporation.[1] Originally a corporation could not file an answer without the corporate seal except by consent.[2]

§ 753. *Allegation and proof of incorporation.*— If the corporation is plaintiff it is customary to allege that it has been and is incorporated.[3] If the defendant pleads the general issue

[1] In an answer by a corporation: "The answer should be made by the principal officer of the defendant corporation, who should be able to admit or deny the facts charged and interrogated about, or to state want of knowledge clearly and truly as a reason for not doing either." Hale *v.* Continental L. Ins. Co., 16 Fed. Rep. 718 (1883). An injunction against a corporation is not dissolved by an answer verified by the present secretary, who became such after the acts occurred, and who verified that his acts therein referred to were true, and that the acts of others he believed to be true. Some officer cognizant of the facts must verify. Fulton Bank *v.* New York, etc. Canal Co., 1 Paige, 311 (1829). At common law a corporation answers by attaching its seal. The answer is not evidence, since it is not sworn to. If a sworn answer is desired, some of the officers or members must be made co-defendants. Baltimore, etc. R. R. *v.* Wheeling, 13 Gratt. (Va.) 40 (1855). In legal proceedings answers which, if made by an individual, should be under oath, are made by corporations under their corporate seals. 1 Daniell, Ch. Pl. (6th Am. ed.) 146; Ransom *v.* Stonington Sav. Bank, 13 N. J. Eq. 212 (1860); Bronson *v.* La Crosse R. R., 2 Wall. 283, 302 (1863); Baltimore & Ohio R. R. *v.* Gallahue, 12 Gratt. (Va.) 655 (1855), answer of garnishee. See also Brumley *v.* Westchester, etc. Soc., 1 Johns. Ch. 366 (1815); Vermilyea *v.* Fulton Bank, 1 Paige, 37 (1828); Bouldin *v.* Baltimore, 15 Md. 18 (1859); Union Bank *v.* Geary, 5 Pet. 99 (1831); Haight *v.* Morris Aqueduct, 4 Wash. C. C. 601 (1826); S. C., 11 Fed. Cas. 156. A statute requiring a corporation to obtain the consent of a judge to interpose a defense to a suit on a promissory note before it can interpose a defense is not applicable where the corporation is an indorser to a note. Shorer *v.* Times, etc. Co., 119 N. Y. 483 (1890).

[2] Gildersleeve *v.* Wolfe Island, etc. Canal Co., 3 Ch. Chamb. (Can.) 358 (1871). It is necessary to attach the corporate seal to its answer to a bill in equity. Frank, etc. Co. *v.* U. S. etc. Co., 38 Atl. Rep. 990 (Md., 1897).

[3] Failure to allege incorporation is cured by judgment where the defendant failed to object. St. Cecelia's Academy *v.* Hardin, 78 Ga. 39 (1887). The following decisions have been made: Incorporation need not be alleged unless the fact of its existence enters into or constitutes a part of the cause of action. Holden *v.* Great Western E. Co., 72 N. W. Rep. 805 (Minn., 1897). A corporation plaintiff need not allege that it is a corporation; it suffices to state in the commencement of the declaration the name of the corporation. Union Cement Co. *v.* Noble, 15 Fed. Rep. 502 (1882); Smythe *v.* Scott, 124 Ind. 183 (1890); Shearer *v.* Peale, etc. Co., 9 Ind. App. 282 (1894); Exchange Nat. Bank *v.* Capps, 32 Neb. 242 (1891). *Cf.* 1 Barb. Ch. Pr. 36, n. (foot p. 44, 2d ed.). In a suit against a corporation on a promissory note the incor-

he admits the incorporation of the plaintiff.[1] The fact of incorporation is proved by putting in evidence the certificate of

poration need not be alleged, since the signature estops a denial of incorporation. Griffin *v.* Asheville Light Co., 111 N. C. 434 (1892). An examination before trial may be had to ascertain whether defendants are proper defendants or whether they are a corporation. Sweeney *v.* Sturgis, 24 Hun, 162 (1881). An allegation of incorporation made once suffices for two causes of action in one suit. West *v.* Eureka Imp. Co., 40 Minn. 394 (1889). The complaint need not allege whether the defendant is a foreign or domestic corporation. Rothchild *v.* Grand Trunk R'y, 19 N. Y. Civ. Pro. 53 (1890). The allegation "a corporation under the laws of Iowa" is sufficient. Saunders *v.* Sioux City Nursery, 6 Utah, 431 (1890). Incorporation must be alleged. Miller *v.* Pine Min. Co., 2 Idaho, 1206 (1892); State *v.* Chicago, etc. R'y, 4 S. D. 261 (1893). In California an averment of corporate existence is necessary in every count of a complaint against the corporation. People *v.* Central Pac. R. R., 83 Cal. 393 (1890). In a libel in admiralty such averment should be made. Sun Mut. Ins. Co. *v.* Mississippi, etc. Co., 14 Fed. Rep. 699 (1882). In Perine *v.* Grand Lodge, etc., 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. If the incorpo-

[1] Bailey *v.* Valley Nat. Bank, 127 Ill. 332 (1889). But see Oregonian R'y *v.* Oregon, etc. Co., 23 Fed. Rep. 232 (1885), holding that the defense of no corporate capacity to sue in a particular case is raised by plea in abatement, and the defense of no corporate capacity at all by a plea either in abatement or bar. *Cf.* Pullman *v.* Upton, 96 U. S. 328 (1878); and see Bank of Auburn *v.* Weed, 19 Johns. 300 (1822), holding that the plea of *nul tiel corporation* is not good, and that the general issue should be pleaded. Denial of corporate existence of plaintiff can be only by plea in abatement. Denial of merits waives this defense. Conard *v.* Atlantic Ins. Co., 1 Pet. 386 (1828). *Contra*, U. S. Bank *v.* Stearns, 15 Wend. 314 (1836). An answer of *nul tiel corporation* precedes an answer to the merits. *De facto* existence must then be proved. An answer alleging want of parties raises the question of whether the corporation is more than a partnership. Heaston *v.* Cincinnati, etc. R. R., 16 Ind. 275 (1861). A general denial in a suit in equity puts in issue the corporate character of the plaintiff. Bank of Jamaica *v.* Jefferson, 92 Tenn. 537 (1893). The plea of general issue does not deny the corporate existence. Rembert *v.* South Carolina R'y, 31 S. C. 309 (1889). A denial upon information and belief that the plaintiff is a corporation puts in issue the incorporation. Michigan Ins. Bank *v.* Eldred, 143 U. S. 293 (1892). The plea that the plaintiff "is not a corporation duly authorized by law to maintain this suit" is a good plea of *nul tiel corporation*. The burden is on the plaintiff to prove corporate existence. Johnson *v.* Hanover Nat. Bank, 88 Ala. 271 (1889). By the New York code, the corporate existence of a foreign corporation plaintiff is not put in issue where the answer does not expressly deny the same, and where the making of the corporate contract in question is admitted. Commercial Bank *v.* Pfeiffer, 108 N. Y. 242 (1888).

incorporation, the corporate minutes proving an organization by a corporate meeting, and proving user of the corporate name in business.[1]

ration is denied it must be proved. Davis *v.* Nebraska Nat. Bank, 70 N. W. Rep. 963 (Neb., 1897). In Massachusetts proof of incorporation need not be given unless the defendant within a certain time files a demand for proof. Cabana *v.* Holyoke Conclave, 160 Mass. 1 (1893). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial in order to ascertain where they were incorporated. Clark *v.* Wilcklow, 75 Hun, 290 (1894). In Colorade the appearance by a corporation as a defendant admits its incorporation. Ganthier Decorating Co. *v.* Ham, 3 Colo. App. 559 (1893). "The bringing of an action in a name purporting to be a corporate name is a sufficient averment of the existence of the plaintiff as a corporation." Canandarqua Academy *v.* McKechnie, 19 Hun, 62 (1879). There has been considerable controversy as to whether, at common law, a corporation plaintiff need allege that it is incorporated. See Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1727); Central Mfg. Co. *v.* Hartshorne, 3 Conn. 199 (1819); Ewing *v.* Robeson, 15 Ind. 26 (1860); Zion Church *v.* St. Peter's Church, 5 Watts & S. (Pa.) 215 (1843); Vance *v.* Farmers', etc. Bank, 1 Blackf. 80 (1820); Emery *v.* Evansville, etc. R. R., 13 Ind. 143 (1859); O'Donald *v.* Evansville, etc. R. R., 14 Ind. 259 (1860); Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326 (1827); Jackson *v.* Bank of Marietta, 9 Leigh (Va.), 240 (1838); Farmers', etc. Bank *v.* Troy City Bank, 1 Doug. (Mich.) 437 (1844); Lighte *v.* Everett F. Ins. Co., 5 Bosw. 716 (1860); Lewis *v.* Bank of Kentucky, 12 Ohio, 132 (1843); Mississippi, etc. R. R. *v.* Gaster, 20 Ark. 455 (1859); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Jackson *v.* Plumbe, 8 Johns. 378 (1811); Dutchess Cotton Mfy. *v.* Davis, 14 Johns. 238 (1817); Bank of Michigan *v.* Williams, 5 Wend. 482 (1830); Bank of Waterville *v.* Beltser, 13 How. Pr. 270 (1856). *Cf.* Chapman *v.* Barney, 129 U. S. 677 (1889), to the effect that the allegation is necessary in the federal courts in cases where the jurisdiction depends on it; Adams Exp. Co. *v.* Harris, 120 Ind. 73 (1889); La Fayette Ins. Co. *v.* Rogers, 30 Barb. 491 (1859). The corporation cannot demur on the ground that incorporation is not alleged. Adams *v.* Lamson, etc. Co., 59 Hun, 127 (1891); Rothschild *v.* Grand Trunk R'y, 14 N. Y. Supp. 807 (1891). *Contra*, Schillinger, etc. Co. *v.* Arnott, 14 N. Y. Supp. 326 (1891).

[1] Proof of incorporation may be by an exemplified copy of the charter and evidence of user. A special charter may be proved by the statute book. U. S. Bank *v.* Stearns, 15 Wend. 314 (1836). Incorporation may be proved by putting in evidence the records, books, and minutes of the company showing an organization in pursuance of the charter. Glenn *v.* Orr, 96 N. C. 413 (1887). A certificate of incorporation, with evidence of organization and user, and of a judgment in another case recovered by the corporation against defendant, is sufficient proof that plaintiff "had in good faith attempted to legally organize as a corporation, and had long acted as such, and was at least a corporation *de facto*, which is all that is necessary to enable it to maintain an action against any one, other than the state, who has contracted with the corporation or who has done it a wrong." Baltimore, etc. R. R. *v.* Fifth Bapt. Church, 137 U. S. 568 (1891). Fifty years' exist-

§ 754. *Confession of judgment.*— A corporation may confess judgment, but it is doubtful whether it can be done except by order of the board of directors.[1]

ence as a corporation is a sufficient proof of incorporation. Jeffries Neck Pasture *v.* Ipswich, 153 Mass. 42 (1891). It is sufficient to prove the *de facto* existence of the corporation defendant in a suit on contract. Benesch *v.* John Hancock, etc. Co., 11 N. Y. Supp. 348 (1890). An act recognizing a corporation as such is sufficient proof of incorporation. Boykin *v.* State, 96 Ala. 16 (1892). If proof is given by plaintiff that a copartnership existed, and the defense is that it was a corporation, the defendant must prove that fact. Proof of a *de facto* corporation is sufficient to meet the plea of *nul tiel corporation*. Cozzens *v.* Chicago, etc. Co., 46 N. E. Rep. 788 (Ill., 1897). The *de facto* incorporation of a national bank may be shown by oral evidence that it is carrying on a general banking business as a national bank under a certain name. Yakima Nat. Bank *v.* Knipe, 6 Wash. 348 (1893). A certificate of incorporation in another state under the court seal of the state is admissible in evidence without being exemplified under the federal statutes. U. S. Vinegar Co. *v.* Foehrenbach, 74 Hun, 435 (1893). Proof of the filing of the certificate of incorporation in the county clerk's office is sufficient proof of incorporation without proof of the filing in the office of the secretary of state. Georgeson *v.* Caffrey, 71 Hun, 472 (1893). Where the stockholders are sued as individuals for the debts of the company, it is for them to prove that the corporation existed. The testimony of two persons that they complied with the laws and got a charter is insufficient, it appearing that the law required at least three incorporators. The charter itself is the best evidence. "A mere feigned compliance with the laws of the state of which it is claimed a corporation is a citizen" is not sufficient, nor is the mere adoption of the corporate name sufficient. Owen *v.* Shepard, 59 Fed. Rep. 746 (1894). Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark *v.* Jones, 87 Ala. 474 (1888). The production of the corporate books showing an election of officers is sufficient to raise a presumption of the existence of the corporation. Wood *v.* Jefferson County Bank, 9 Cow. 194 (1828). "The production of the act of incorporation and proof of user under it by the corporate body afford presumptive proof in the first instance of the fact of incorporation."

[1] A president and treasurer have no power to confess judgment for the corporation. Adams *v.* Cross, etc. Co., 5 R'y & Corp. L. J. 18 (Ill., 1888). *Contra*, Chamberlin *v.* Mammoth Min. Co., 20 Mo. 96 (1854). "Upon a confession of judgment by a corporation, the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, . . . and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question." White *v.* Crow, 17 Fed. Rep. 98 (1883). The treasurer cannot confess judgment. Stevens *v.* Carp River Iron Co., 57 Mich. 427 (1885). A corporation may confess judgment. Shute *v.* Keyser, 29 Pac. Rep. 386 (Ariz., 1892). As to the power of the president and other officers to confess judgment, see ch. XLIII, *supra*.

In New York, by statute, a corporation cannot confess judgment in contemplation of insolvency.[1]

§ 755. *Injunction and contempt.*— An injunction against a corporation should run to the corporation in its corporate name. All officers and agents upon whom it is served, or to whose knowledge it comes, are guilty of contempt of court if they disregard it.[2] The corporation and also all of its officers and agents

People *v.* Beigler, Hill & D. Supp. 133 (1843). See also, on the method of proof, Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532 (1875); Spring Valley Water Works *v.* San Francisco, 22 Cal. 434 (1863); Eastern, etc. Co. *v.* Vaughan, 14 N. Y. 546 (1856); Hughes *v.* Antietam Mfg. Co., 34 Md. 316 (1870); Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862); Reynolds *v.* Myers, 51 Vt. 444 (1879); West Winsted Sav. Bank *v.* Ford, 27 Conn. 282 (1858); Society for Prop. Gosp. *v.* Pawlet, 4 Pet. 480 (1830); Alderman, etc. *v.* Finley, 10 Ark. 423 (1850); Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); Pullman *v.* Upton, 96 U. S. 328 (1877); Penobscot, etc. R. R. *v.* Dunn, 39 Me. 587 (1855); Heaston *v.* Cincinnati, etc. R. R. 16 Ind. 275 (1861); Orono *v.* Wedgewood, 44 Me. 49 (1857); Litchfield Bank *v.* Church, 29 Conn. 137, 148 (1860); U. S. *v.* Insurance Companies, 22 Wall. 99 (1874); De Witt *v.* Hastings, 40 N. Y. Super. Ct. 463 (1876); aff'd, 69 N. Y. 518; Commonwealth *v.* Bakeman, 105 Mass. 53 (1870); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849); Utica Ins. Co. *v.* Tilman, 1 Wend. 555 (1828); Jackson *v.* Leggett, 7 Wend. 377 (1831). A foreign corporation proves incorporation by its papers and proceedings, and by putting in evidence the statute authorizing incorporation. Savage *v.* Russell, 84 Ala. 103 (1888). The existence of a plank-road corporation is not proved by the fact that the governor had appointed inspectors of it and they had certified that the road was completed. Bill *v.* Fourth, etc. Road, 14 Johns. 416 (1817).

[1] *Re* Waterbury, 8 Paige, 380 (1840); Kingsley *v.* First Nat. Bank, 31 Hun, 329 (1884); National Shoe, etc. Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467 (1882).

[2] An injunction against a corporation in New York may be served on a division superintendent of the division interested. Moreover, knowledge of the injunction is as good as service. Disobedience is contempt. Rochester, etc. R. R. *v.* New York, etc. R. R., 48 Hun, 190 (1888). The directors are bound to obey an injunction against the company if it comes to their notice. Hatch *v.* Chicago, etc. R. R., 6 Blatchf. 105 (1868); S. C., 11 Fed. Cas. 799; People *v.* Sturtevant, 9 N. Y. 263 (1853). See also High, Injunctions; also § 745, *supra*. The company may be indicted for not obeying the order of the court. Regina *v.* Birmingham, etc. R'y, 9 Car. & P. 469 (1840). An injunction against a foreign corporation may apply to its acts out of the state as well as in it. Prince Mfg. Co. *v.* Prince's, etc. Co., 51 Hun, 443 (1889). In a proceeding by a New York receiver of a dissolved New York corporation against a former director for interfering with the assets against the injunction of the New York court, *held*, that the director could not evade the injunction by going out of the state. Williams *v.* Hintermeister, 26 Fed. Rep. 889 (1886). Though a bank may be in contempt, it does not follow that each servant or agent of the bank also is in contempt. Southern Development Co. *v.* Houston, etc. R'y, 27 Fed. Rep. 344

who wilfully violate the injunction may be fined for contempt of court.[1]

§ 756. *Contempt and sequestration.*— Although a corporation is an existence entirely distinct from its officers or members, yet the latter may be held answerable, and in contempt of court, for neglect or refusal to perform the orders, decrees, or judgments of courts.[2] Moreover, the corporation itself is bound to

(1886). Where the defendant is a foreign corporation, and has no property in the state which could be reached by sequestration, a court of chancery will not decree an injunction which cannot be enforced. Bellows Falls Bank *v.* Rutland, etc. R. R., 28 Vt. 470 (1856); King *v.* Barnes, 113 N. Y. 476 (1889). *Cf.* § 758, *infra*. An injunction may bind a corporation, though not a party to the suit. Eagle Mfg. Co. *v.* Miller, 41 Fed. Rep. 351 (1890). If the employee violates the injunction, not knowing of it, and is arrested, he may sue his corporation for damages for withholding notice of the injunction. Guirney *v.* St. Paul, etc. R'y, 43 Minn. 496 (1890). In Golden Gate, etc. Co. *v.* Yuba County Super. Ct., 65 Cal. 187 (1884), it was held that a corporation may be punished for contempt of court.

[1] *Re* Tift, 11 Fed. Rep. 463 (1881). An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of the latter. Iowa, etc. Wire Co. *v.* Southern, etc. Wire Co., 30 Fed. Rep. 123 (1887). An injunction against a corporation running a ferry cannot be evaded by the corporation transferring its boats to its president individually. The corporation was fined, and the president imprisoned for contempt. "Injunction orders must be fairly and honestly obeyed, and not defeated by subterfuges and tricks on the part of those bound to obey them; they may be violated by aiding, countenancing, and abetting others in violation thereof as well as by doing it directly; and courts will not look with indulgence upon schemes, however skilfully devised, designed to thwart its orders." Mayor, etc. *v.* New York Ferry, etc. Co., 64 N. Y. 622 (1876). A foreign corporation violating an injunction may be fined for contempt of court. Service is made in the same way as in ordinary cases. Its agent violating the injunction may also be fined. U. S. *v.* Memphis, etc. R. R., 6 Fed. Rep. 237 (1881).

[2] A contempt of court by a corporation may be punished by punishing the corporate officers who do the act or control the action of the corporation. Sercomb *v.* Catlin, 128 Ill. 556 (1889). The case of Lacharme *v.* Quartz Rock, etc. Co., 1 H. & C. 134 (1862), whereby an order was enforced by reaching the corporate officers, is based on the English statute giving the court such a power. In the ancient case of Salmon *v.* Hamborough Co., 1 Cas. in Ch. 204 (1671), where the corporation defendant did not obey an order of the court, and had no property, the House of Lords issued an order directed to the corporate officers ordering them to obey the former order or be committed for contempt. *Cf.* 4 Wait, Pr. 206; Curson *v.* African Co., 1 Vern. 121 (1632). Papers against a corporation are not to be directed against its officers personally, even as officers. Verplanck *v.* Mercantile Ins. Co., 2 Paige, 438 (1831). Where the corporation is enjoined from doing a certain thing, then the officers are personally liable for contempt if they do the thing en-

obey the court, and for failure to do so the court will sequestrate the corporate property. Sequestration is a chancery remedy whereby the property of a party is seized by the officers of the court of chancery to punish contempts and to compel obedience to the order or decree of the court.[1] It is used not only to compel the corporation to do an act commanded by a court of chancery, but also to subject the corporate property to the payment of a money decree which a court of chancery has made against the corporation.[2] Sequestration is the taking of property from the owner for a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.[3]

A sequestration reaches all the goods and chattels and the rents and profits of land belonging to the corporation;[4] but there is some doubt as to whether choses in action and the title to real estate can be subjected to this remedy by a court of chancery. It is clear that originally the corporate realty could not be so reached.[5]

joined. See § 755, *supra*. In Davis *v.* Mayor, etc., 1 Duer, 451, 484 (1853), the court said that it was admitted that a mandamus directed to the corporation in its corporate name bound all the officers and members (citing municipal corporation cases). Chancellor, Bland, in McKim *v.* Odom, 3 Bland (Md.), 422 (1829), with good reason objects to the technical and senseless rule that corporate officers cannot be compelled to do an act which the corporation is commanded to do. A somewhat similar instance of the power of the court arises in a mandamus to make a transfer of stock. See § 390, *supra*.

[1] See 2 Daniell, Ch. Pr., p. 1052, etc.; 1 Barb. Ch. Pr., p. 71, etc., 444; Ang. & A. Corp., § 667, etc. As regards corporations, this remedy was used to compel the corporation to appear and answer a bill in equity, and also to subject the property of the corporation to the payment of a money decree of a court of chancery. Sequestrations in chancery correspond greatly to executions at law. Sequestration "is most certainly of the nature of an execution." It is demandable of right. It issues though the corporation has no property. Reid *v.* Northwestern R. R., 32 Pa. St. 257 (1858). The case of Jones *v.* Boston Mill Corp., 21 Mass. 507 (1827), holds that sequestration is a proper remedy to enforce a decree.

[2] If the sequestration is to compel the corporation to do something other than pay money, the corporate property is merely seized and held by the court until the corporation complies. If, however, the sequestration is to compel the payment of a money decree, the corporate property seized will be sold and the proceeds applied to that debt. See authorities cited *supra*.

[3] Proctor *v.* Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896).

[4] See authorities in note 1, *supra*.

[5] 2 Daniell, Ch. Pr., p. 1054; Coats *v.* Elliott, 23 Tex. 606 (1859). Sequestration is the proper remedy to sub-

§ 757. *Foreign corporations may sue and be sued — Stockholders' suits against foreign corporations — Garnishment — Statute of limitations — Usury.*— A foreign corporation is considered a resident of the state wherein it was created; and it is regarded as a citizen of that state in all questions of jurisdiction.[1]

ject the net profits of a turnpike company to the payment of a judgment. Neither sequestration nor a common-law execution can effect a sale of the road, however, since the franchise is a trust from the state. Ammant *v.* New Alexandria, etc. Road, 13 Serg. & R. (Pa.), 210 (1825). But where, under the statutes, a receiver is appointed in sequestration proceedings, the decisions are inclined to hold otherwise. Atlas Bank *v.* Nahant Bank, 40 Mass. 480 (1839). But see Foster *v.* Townshend, 68 N. Y. 203 (1877); N. Y. Code Civ. Proc., § 1772. In proceedings under N. Y. Code Civ. Proc., § 1784, etc., all the corporate personalty and realty vest in the receiver. See, in construction of the New York statute, Bangs *v.* McIntosh, 23 Barb. 591 (1857); Devendorf *v.* Beardsley, 23 Barb. 656 (1857); Judson *v.* Rossie Galena Co., 9 Paige, 598 (1842). See also Devoe *v.* Ithaca, etc. R. R., 5 Paige, 521 (1835), as to the practice. As regards choses in action the old authorities differed. 1 Barb. Ch. Pr., p. 71, says that the choses in action cannot be reached by sequestration. 2 Daniell, Ch. Pr., p. 1052, says that possibly choses in action in the possession of third persons cannot be reached. The later authorities, however, are inclined to extend this remedy to choses in action. Grew *v.* Breed, 53 Mass. 363 (1847); Hosack *v.* Rogers, 11 Paige, 603 (1845); White *v.* Geraerdt, 1 Edw. Ch. 340 (1832). It has been doubted whether sequestration proceedings could reach the books and papers of the corporation, Lowten *v.* Colchester, 2 Meriv. 395 (1817); but it would seem that such papers should be subject to sequestration so far as they contain information or give title to property which has been sequestered.

[1] See § 988, *infra;* Louisville, etc. R.R. *v.* Letson, 2 How. 497 (1844); Stafford *v.* American Mills Co., 13 R. I. 310 (1881); Cowardin *v.* Universal L. Ins. Co., 32 Gratt. (Va.) 445 (1879), holding that it is subject to attachment as a non-resident; Marshall *v.* Baltimore, etc. R. R., 16 How. 314 (1853); Covington, etc. Co. *v.* Shepherd, 20 How. 227 (1857); Myers *v.* Dorr, 13 Blatchf. 22 (1870); S. C., 17 Fed. Cas. 1105; Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866); Daly *v.* National L. Ins. Co., 64 Ind. 1 (1878); Hadley *v.* Freedman's, etc. Co., 2 Tenn. Ch. 122 (1874); Harding *v.* Chicago, etc. R. R., 80 Mo. 659 (1883); McGregor *v.* Erie R'y, 35 N. J. L. 115 (1871); Stout *v.* Sioux City, etc. R. R., 8 Fed. Rep. 794 (1881), holding that a foreign corporation which had filed its charter with the secretary of state and otherwise complied with the local statute was a domestic corporation under the law of Nebraska. A foreign corporation may be sued in Massachusetts by a resident. Young *v.* Providence, etc. Co., 150 Mass. 550 (1890). A non-resident may sue a foreign corporation in Massachusetts. Youmans *v.* Minn. etc. Trust Co., 67 Fed. Rep. 282 (1895). A provision in a charter that the company should be sued only in the state where it is incorporated does not prevent suit against it in another state. Shields *v.* Union, etc. Ins. Co., 119 N. C. 380 (1896). Foreign corporations may be sued in Tennessee. Telephone Co. *v.* Turner, 88 Tenn. 265 (1889). A

It is discretionary, however, with a court as to whether it will grant equitable relief against a foreign corporation. Especially is this the case in regard to suits brought by stockholders. The courts will often refuse to grant relief, inasmuch as there may be no means of enforcing the decree.[1] A suit to compel a foreign corporation to issue new certificates of stock for certificates lost will lie.[2] A stockholder in a foreign corporation may sue in the courts of New York to enjoin fraudulent acts

non-resident may sue a foreign corporation in South Carolina when the cause of action arose within the state. Central R. R. etc. Co. *v.* Georgia, etc. Co., 32 S. C. 319 (1890). A foreign corporation may plead the statute of limitations. St. Paul *v.* Chicago, etc. R'y, 45 Minn. 387 (1891). As to restrictions by the state on the right of a foreign corporation to remove cases to the federal courts, see § 697, *supra.*

[1] The courts of Massachusetts will not take jurisdiction of a suit by the stockholders of a Missouri corporation to enjoin the corporation from issuing bonds secured by mortgage on property in Missouri. Kimball *v.* St. Louis, etc. R'y, 157 Mass. 7 (1892), reviewing the cases, the court saying that while it had jurisdiction and its judgment would be binding even in Missouri, yet "it would be a misuse of our powers to attempt to control the action of those courts in a case like this by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law." A resident stockholder may enjoin a foreign railroad corporation from constructing branch lines. Ives *v.* Smith, 8 N. Y. Supp. 46 (1889). A non-resident stockholder cannot enjoin a foreign corporation from making an *ultra vires* transfer of its property to still another foreign corporation. Small *v.* Minneapolis, etc. Co., 10 N. Y. Supp. 456 (1890). Where one foreign corporation is under obligation to issue stock to another foreign corporation, a resident stockholder of the latter may bring suit in New York courts to compel the issue of such stock. Babcock *v.* Schuylkill, etc. R'y, 9 N. Y. Supp. 845 (1890). The courts of Maryland will not issue a mandamus to compel a foreign corporation to annul a forfeiture of stock. This is a matter to be litigated in the courts of the state creating the corporation. North State, etc. Co. *v.* Field, 64 Md. 151 (1885). Ordinarily the court will not remedy the frauds of directors of a foreign corporation. Moore *v.* Silver Valley Min. Co., 104 N. C. 534 (1890). The American stockholders in an English company organized to own and work mines in America may, by suit in an American court, cause to be set aside a reorganization made in England in violation of the by-laws of the company. Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7 (1893). An American corporation cannot be sued in England by service upon a resident agent in that country, although three-quarters of the stockholders reside in England, it appearing that all of the directors reside in America. Badcock *v.* Cumberland, etc. Co., [1893] 1 Ch. 362. As to the jurisdiction of the federal courts, see § 734, *supra.*

[2] Guilford *v.* Western U. Tel. Co., 59 Minn. 332 (1894).

and hold the directors and third persons personally liable.[1] But a stockholder's suit to enjoin the company from leasing its property for an inadequate sum must be brought in the state where the company is incorporated.[2] A Washington stockholder in an Oregon corporation cannot bring suit in the federal court in Washington to hold non-resident directors liable for paying illegal salaries and neglecting to collect the corporate debts, and to have a receiver appointed.[3]

The courts have frequently refused to entertain jurisdiction over a foreign corporation in cases where the decree of the court cannot be enforced.[4] Garnishee process does not lie

[1] Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897).

[2] Madden *v.* Penn, etc. Co., 37 Atl. Rep. 817 (Pa., 1897). An article on "Jurisdiction over foreign corporations" is found in 12 Harvard Law Review, 1 (1898).

[3] Leary *v.* Columbia River, etc. Co., 82 Fed. Rep. 775 (1897).

[4] Williston *v.* Michigan, etc. R. R., 95 Mass. 400 (1866); Howell *v.* Chicago, etc. R'y, 51 Barb. 378 (1868), a stockholder's action to enjoin an *ultra vires* act; Gregory *v.* New York, etc. R. R., 40 N. J. Eq. 38 (1885), where a resident stockholder in a foreign corporation sought to set aside its lease to a resident corporation; Cunningham *v.* Pell, 5 Paige, 607 (1836), holding that no personal judgment could be rendered against an absent director who was not personally served. In Ervin *v.* Oregon. etc. Nav. Co., 28 Hun, 269 (1882), the court sustained the jurisdiction where service on the directors was personal, even though the corporate property was not in the state. A West Virginia stockholder in a Pennsylvania construction company may sue a West Virginia railroad company which owes bonds to the construction company, and compel an accounting and distribution of such bond assets, when the Pennsylvania company is insolvent and has been dissolved. No request to the directors is necessary. Crumlish *v.* Shenandoah Valley R. R., 28 W. Va. 623 (1886). It has been held that a resident stockholder of a foreign corporation may enjoin it from making an *ultra vires* extension of its line by building branches, etc. Ives *v.* Smith, 3 N. Y. Supp. 645 (1888). But it will not be ordered to pay a dividend. Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. (N. S.) 332 (1872). Nor has the court jurisdiction where, of two bodies of men, each claim to be the rightful stockholders. Wilkins *v.* Thorne, 60 Md. 253 (1883). Nor will the court enjoin a foreign corporation from delivering stock and bonds to a construction company, though the plaintiff claims that he has the contract for construction. Kansas, etc. R. R. *v.* Topeka, etc. R. R., 135 Mass. 34 (1883). A court will not order a domestic corporation to do an act in another state, such as opening ditches, etc. Port Royal R. R. *v.* Hammond, 58 Ga. 523 (1877). *Cf.* Fisk *v.* Chicago, etc. R. R., 53 Barb. 513 (1868); Prouty *v.* Michigan, etc. R. R., 1 Hun, 655 (1874); Prouty *v.* Lake Shore, etc. R. R., 85 N. Y. 273 (1881); Boardman *v.* Lake Shore, etc. R'y, 84 N. Y. 157 (1881). See also Ervin *v.* Oregon, etc. Nav. Co., 28 Hun, 269 (1882), 35 Hun, 544 (1885). A foreign corporation cannot sue another foreign corporation in New York to compel a

against a foreign corporation to reach a sum of money due from such corporation to a non-resident.[1] A foreign corporation cannot set up the statute of limitations where a non-resident could not set it up.[2] A foreign corporation may set up the statute of limitations in Tennessee, if it has had an office in the state during the entire period.[3] The defense of usury is considered elsewhere.[4]

By the comity of states the courts of a state will entertain a suit brought by a foreign corporation.[5]

conveyance of land located in another state. Cumberland, etc. Co. *v.* Hoffman, etc. Co., 30 Barb. 159, 171 (1859). See Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1888).

[1] An attachment or garnishment in Michigan of a debt due from an Illinois corporation to a Washington corporation, and payable in Washington, is not good, even though the Illinois corporation is doing business in Michigan. Reimers *v.* Seatco Mfg. Co., 70 Fed. Rep. 573 (1895). The question of garnishment by service on the debtor corporation in a state other than its domicile is fully discussed in National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468 (1895). See also Alabama, etc. R. R. *v.* Chumley, 92 Ala. 317 (1890); Straus *v.* Chicago Glycerine Co., 46 Hun, 216 (1887). A foreign corporation cannot be garnished by service upon an agent within the state. Associated Press *v.* United Press, 29 S. E. Rep. 869 (Ga., 1898).

[2] A foreign corporation cannot plead the statute of limitations, inasmuch as it has been "out of the state." Larson *v.* Aultman, etc. Co., 86 Wis. 281 (1893), reviewing the authorities. A foreign corporation cannot plead the New York statute of limitations. It must plead the statute of limitations of its own state. Robeson *v.* Central R. R., 76 Hun, 444 (1894). In Texas a foreign corporation may plead the statute of limitations. Thompson *v.* Texas, etc. Cattle Co., 24 S. W. Rep. 856 (Tex., 1893).

[3] Turcott *v.* Yazoo, etc. R. R., 45 S. W. Rep. 1067 (Tenn., 1898).

[4] See § 766, *infra*.

[5] Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343 (1875); Lewis *v.* Bank of Kentucky, 12 Ohio, 132 (1843); Smith *v.* Weed S. Machine Co., 26 Ohio St. 562 (1875), holding also that it need not allege in its pleading the terms of its charter showing its capacity to sue; Hanna *v.* International Petroleum Co., 23 Ohio St. 622 (1873); Lathrop *v.* Commercial Bank of Scioto, 8 Dana (Ky.), 114 (1839); Louisville, etc. R. R. *v.* Letson, 2 How. 497 (1844); Bank of Augusta *v.* Earle, 13 Pet. 519 (1839); Bank of Michigan *v.* Williams, 5 Wend. 478 (1830); Beaston *v.* Farmers' Bank, 12 Pet. 102, 135 (1838); Marine, etc. Bank *v.* Jauncey, 1 Barb. 486, (1847), holding that its authority to sue need not be set forth in its pleading; Tombigbee R. R. *v.* Kneeland, 4 How. 16 (1846); New York Dry Dock *v.* Hicks, 5 McLean, 111 (1850); S. C., 18 Fed. Cas. 151; Lucas *v.* Bank of Georgia, 3 Ala. (O. S.) 147 (1829); Guaga Iron Co. *v.* Dawson, 4 Blackf. 202 (1836); New Jersey, etc. Bank *v.* Thorp, 6 Cow. 46 (1826); Mutual Benefit L. Ins. Co. *v.* Davis, 12 N. Y. 569 (1855); Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153 (1881); Hibernia Nat. Bank *v.* La-

§ 758. *Service in suits against a foreign corporation.*— At common law a foreign corporation could not be sued outside of the state creating it, inasmuch as service on its officers was held insufficient. This view of the law is now abandoned. Jurisdiction over a foreign corporation may be acquired, in suits on contracts made or business done within the jurisdiction, by service upon an officer of the corporation, or upon its agent engaged in the state.[1] There has been a vast amount of

combe, 84 N. Y. 367 (1881), holding that it has the same right to remedies and liens as citizens; Williams *v.* Creswell, 51 Miss. 817 (1876), where a District of Columbia corporation was complainant; American Mut. L. Ins. Co. *v.* Owen, 81 Mass. 491 (1860); Leasure *v.* Union, etc. Ins. Co., 91 Pa. St. 491 (1879); Portsmouth Livery Co. *v.* Watson, 10 Mass. 91 (1813); Bank of Edwardsville *v.* Simpson, 1 Mo. 184 (1822); National Bank *v.* De Bernales, 1 Car. & P. 569 (1825); Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1727); Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196 (1884); British American Land Co. *v.* Ames, 47 Mass. 391 (1843), holding that a corporation of a foreign country may sue; Importing, etc. Co. *v.* Locke, 50 Ala. 332 (1874); Savage Mfg. Co. *v.* Armstrong, 17 Me. 34 (1840); American Colonization Soc. *v.* Gartrell, 23 Ga. 448 (1857). In this case the charter declared the corporation to be created for a specified purpose, "and for no other purpose," and its right to sue in another state was questioned. Bank of Marietta *v.* Pindall, 2 Rand. (Va.) 465, 473 (1824); Hahnemannian L. Ins. Co. *v.* Beebe, 48 Ill. 88 (1868), where the right to sue in another state for libel was questioned; U. S. *v.* Insurance Cos., 22 Wall. 99 (1874), holding that corporations created merely for domestic and business purposes in the seceding states during the rebellion may sue in the federal courts; Insurance Co. *v.* The "C. D., Jr.," 1 Woods, 72 (1870); S. C., 13 Fed. Cas. 65, holding that it may sue either in state or federal courts; Fidelity Ins. etc. Co. *v.* Niven, 5 Houst. (Del.) 416 (1878), holding that if empowered to act as an administrator it may sue as such in another state. But the statutes of a state may prohibit suit in its courts against a foreign corporation, except in such cases as the statute may designate. A statute to this effect exists in New York. Code Civ. Proc., § 1780; Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315 (1889). But the New York statute is avoided by an assignment of the cause of action to a resident. McBride *v.* Farmers' Bank, 26 N. Y. 450 (1863).

[1] St. Clair *v.* Cox, 106 U. S. 350 (1882); Hayden *v.* Androscoggin Mills, 1 Fed. Rep. 93 (1879), where service was on the president. See also § 752, *supra;* Peckham *v.* North Parish, 33 Mass. 274, 286 (1834); Martens *v.* International, etc. Soc., 53 N. Y. 339 (1873); City F. Ins. Co. *v.* Carrugi, 41 Ga. 660 (1871); Henning *v.* Planters' Ins. Co., 28 Fed. Rep. 440 (1886), holding that the judgment is conclusive only when it shows that the corporation was doing business in the jurisdiction; Barnett *v.* Chicago, etc. R. R., 4 Hun, 114 (1875); Angerhoefer *v.* Bradstreet Co., 22 Fed. Rep. 305 (1884). A suit by a non-resident against a foreign corporation for causes arising out of the state by service on the treasurer gives no jurisdiction. Newell *v.* Great Western R'y, 19 Mich. 336 (1869). But in Massachu-

litigation, however, as to when the service of process upon an officer or agent of a foreign corporation is sufficient to confer jurisdiction over the corporation.

setts a bill lies to subject the assets of a foreign corporation to the payment of its debts. Silloway *v.* Columbia Ins. Co., 74 Mass. 199 (1857). And attachment lies against it. Ocean Ins. Co. *v.* Portsmouth Marine R'y, 44 Mass. 420 (1841). And if it has a place of business in the state it may be sued under the statute. National Bank of Commerce *v.* Huntington, 129 Mass. 444 (1880). At common law, service on the officer in charge of the resident business of a foreign corporation gives jurisdiction for a cause of action arising in the jurisdiction. Newby *v.* Von Oppen, etc. Co., L. R. 7 Q. B. 293 (1872). But service of injunction papers on a resident selling agent is insufficient. Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416 (1855). A corporation incorporated by the United States may be reached by service on the president anywhere in the country. Eby *v.* Northern Pac. R. R., 13 Phila. 144 (1879). An Iowa corporation could not be sued in the District of Columbia (Lathrop *v.* Union Pac. R'y, 1 MacArth. 234 — 1873), until a statute authorized service. Dallas *v.* Atlantic, etc. R. R., 2 MacArth. 146 (1875). Where foreign corporations are forbidden to do business in the state under a penalty of a fine, unless a certificate is filed, this is the only penalty. Contracts made by a foreign corporation without filing a certificate are enforceable. Toledo, etc. Co. *v.* Thomas, 33 W. Va. 566 (1890). An attachment of property in the state does not make the cause one arising in the state. Whitehead *v.* Buffalo, etc. R'y, 18 How. Pr. 230 (1859). A foreign corporation doing business in the state may be sued. Thomas *v.* Placerville, etc. Co., 65 Cal. 600 (1884). Service of notice of attachment on a director suffices. Boyd *v.* Chesapeake, etc. Canal Co., 17 Md. 195 (1860). Service on the treasurer is insufficient to compel the transfer of patents. Desper *v.* Continental, etc. Co., 137 Mass. 252 (1884). Service on a stockholder of a foreign corporation is not good. Rand *v.* Upper Locks and Canals, 3 Day (Conn.), 441 (1809). See also § 752, *supra;* O'Brien *v.* Shaw's Flat, etc. Co., 10 Cal. 343 (1858). A default is effectual only when the papers show a proper service. Willamette, etc. Co. *v.* Williams, 1 Oreg. 112 (1854); Bawknight *v.* Liverpool, etc. Ins. Co., 55 Ga. 194 (1875), holding that in Georgia a foreign corporation cannot be sued *in personam* except upon a contract made there. The remedy upon a foreign contract or foreign judgment is *in rem* by attachment and garnishment. Camden Rolling-mill Co. *v.* Swede Iron Co., 32 N. J. L. 15 (1866), holding that a foreign corporation which has no place of business in New Jersey cannot be sued in the courts of that state on a contract made in another state, but otherwise on a contract made in the state. See National Cond. Milk Co. *v.* Brandenburgh, 40 N. J. L. 111 (1878); Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173 (1827), holding that an attachment will lie against it. To same effect, St. Louis, etc. Ins. Co. *v.* Cohen, 9 Mo. 416 (1845); Andrews *v.* Michigan Cent. R. R., 99 Mass. 534 (1868); Barr *v.* King, 96 Pa. St. 485 (1880), holding that it may be garnished on execution; Smith *v.* Mutual L. Ins. Co., 96 Mass. 336 (1867), holding that a citizen of another state cannot sue in the courts of Massachusetts a corporation which is foreign

In most of the states there are statutes which provide for service in suits against foreign corporations by service on an officer or agent,[1] the particular officer or agent being specified.

to that state on a cause of action which did not arise within the jurisdiction.

The leading case of McQueen *v.* Middletown Mfg. Co., 16 Johns. 5 (1819), states the common-law rule as to suits against a foreign corporation. Process against a foreign corporation cannot be served upon its officers who may be found within the jurisdiction of the court unless such service is authorized by the statutes of the state where suit is brought. Pomeroy *v.* New York, etc. R. R., 4 Blatchf. 120 (1857); S. C., 19 Fed. Cas. 965; Eaton *v.* St. Louis, etc. Co., 2 McCrary, 362 (1881); Latimer *v.* Union Pac. R'y, 43 Mo. 105 (1868); Weight *v.* Liverpool, etc. Ins. Co., 30 La. Ann. 1186 (1878), holding that process cannot be served on a local agent; Moch *v.* Virginia F. & M. Ins. Co., 10 Fed. Rep. 696 (1882), as to judgment by service on agent doing business in the state. Also Block *v.* Atchison, etc. R. R., 21 Fed. Rep. 529 (1884); Emerson, etc. Co. *v.* McCormick, etc. Co., 51 Mich. 5 (1883), holding that foreign corporations may sue each other in Michigan if both are doing business within the state and the cause of action accrued there. See also Pennoyer *v.* Neff, 95 U. S. 714 (1877); American Exp. Co. *v.* Conant, 45 Mich. 642 (1881); Moulin *v.* Trenton, etc. Ins. Co., 24 N. J. L. 222 (1853); Pope *v.* Terre Haute, etc. Co., 87 N. Y. 137 (1881); Good Hope Co. *v.* Railway, etc. Co., 22 Fed. Rep. 635 (1884); Camden Rolling-mill Co. *v.* Swede Iron Co., 32 N. J. L. 15 (1866). If, under a statute, the foreign corporation appoints an agent in the state to accept service, a personal judgment may be rendered against the corporation. Wilson *v.* Martin-Wilson, etc. Co., 149 Mass. 24 (1889). See on this subject generally, an article in 43 Central L. J. 497.

[1] Service of a summons in a cause of action arising out of the state may be made on the head of a department in New York, the company, a foreign corporation, having an office in New York. Tuchband *v.* Chicago, etc. R. R., 115 N. Y. 437 (1889). Under the New York statute service on a foreign corporation cannot be made by serving its attorney. Taylor *v.* Granite State Prov. Assoc., 136 N. Y. 343 (1893). In Nebraska service may be made upon a managing agent of a foreign corporation doing business in the state. Klopp *v.* Creston City, etc. Co., 34 Neb. 808 (1892). In Michigan, if service is made on a person as a principal officer of a foreign corporation, and that person shows by affidavit that he was not such, the service is set aside. First Nat. Bank *v.* Burch, 76 Mich. 608 (1889). Service on the resident agent of a foreign corporation is sufficient. Vorheis *v.* People's, etc. Soc., 86 Mich. 31 (1891). See Hiller *v.* Burlington, etc. R. R., 70 N. Y. 223 (1877); Childs *v.* Harris Mfg. Co., 104 N. Y. 477 (1887); Pope *v.* Terre Haute, etc. Co., 87 N. Y. 137 (1881). Service cannot be upon an officer who has resigned, and the resignation accepted. Ervin *v.* Oregon, etc. Nav. Co., 22 Hun, 598 (1880). As to Pennsylvania, see Hussey Mfg. Co. *v.* Deering, 20 Fed. Rep. 795 (1884). See Barnett *v.* Chicago, etc. R. R., 4 Hun, 114 (1875), to the effect that sometimes the judgment is binding, though the corporation has no property in the jurisdiction. The legislature may change the mode of service. Railroad Co. *v.* Hecht, 95 U. S. 168 (1877). The statute must be strictly followed. St. Clair *v.* Cox, 106 U. S. 350 (1882). Attachment does not lie against a

A requirement that a foreign corporation shall file its charter with the secretary of state does not create a domestic corporation of such company so far as the jurisdiction of the United States courts is concerned, even though the statute says that a

foreign corporation after a receiver of it has been appointed in the state where it exists. Thomas *v.* Merchants' Bank, 9 Paige, 216 (1841). For service under the Pennsylvania statute, see Benwood Iron Works *v.* Hutchinson, 101 Pa. St. 359 (1882); Hussey Mfg. Co. *v.* Deering, 20 Fed. Rep. 795 (1884). Service on a resident agent whose agency is for other states only is not good. Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246 (1883). Service under the Utah statute, Walker *v.* Continental Ins. Co., 2 Utah, 231 (1879); the Missouri statute, McNichol *v.* U. S. etc. Agency, 74 Mo. 457 (1881). Service must be on the *de facto* officers. Berrian *v.* Methodist Soc., 4 Abb. Pr. 424 (1857). Service on a clerk under the statute. Libbey *v.* Hodgdon, 9 N. H. 394 (1838). Service under the New Jersey statute. National Cond. Milk Co. *v.* Brandenburgh, 40 N. J. L. 111 (1878). On a contract made in the state, service on an agent suffices in New York, though the foreign corporation does no business and has no property in the state. Barnett *v.* Chicago, etc. R. R., 4 Hun, 114 (1875).

Frequently the statute allows service on a "managing agent." Difficulty arises in defining this term. It has been held that a person is a "managing agent" if he is a general manager, Carr *v.* Commercial Bank, 19 Wis. 272 (1865); a local insurance agent, Bain *v.* Globe Ins. Co., 9 How. Pr. 448 (1854); a local agent, American Exp. Co. *v.* Johnson, 17 Ohio St. 641 (1867); a general freight agent, Palmer *v.* Pennsylvania Co., 35 Hun, 369 (1885); the agent who made the contract, Estes *v.* Belford, 22 Fed. Rep. 275 (1884). But a stock transfer agent is not a managing agent. Reddington *v.* Mariposa, etc. Co., 19 Hun, 405 (1879); nor is an assistant secretary, Sterett *v.* Denver, etc. R'y, 17 Hun, 316 (1879); nor is a horse-car superintendent, Emerson *v.* Auburn, etc. R. R., 13 Hun, 150 (1878); nor is a ticket agent, Doty *v.* Michigan Cent. R. R., 8 Abb. Pr. 427 (1859); nor is a baggage-master, Flynn *v.* Hudson River R. R., 6 How. Pr. 308 (1851); nor is a boat captain, Upper Miss. Transp. Co. *v.* Whittaker, 16 Wis. 220 (1862). The term "special agent" includes a conductor, New Albany, etc. R. R. *v.* Grooms, 9 Ind. 243 (1857); New Albany, etc. R. R. *v.* Tilton, 12 Ind. 3 (1859); Ohio, etc. R. R. *v.* Quier, 16 Ind. 440 (1861); the person in charge who attends to the business, Angerhoefer *v.* Bradstreet Co., 22 Fed. Rep. 305 (1884); but not the traveling agent, Parke *v.* Commonwealth Ins. Co., 44 Pa. St. 422 (1863); nor the collecting attorney, Moore *v.* Freeman's Nat. Bank, 92 N. C. 590 (1885). For many other cases on these and similar statutes and on the general principles governing service of process on corporations, see 8 Southern Law Rev. 199; and 1 Barb. Ch. Pr. 52. In Oregon the statute is construed to hold that a domestic corporation must be sued in the county of the principal office, or where the cause arose. Holgate *v.* Oregon Pac. R. R., 16 Oreg. 123 (1888). *Contra*, Glaize *v.* South Carolina R. R., 1 Strobh. L. (S. C.) 70 (1846). A vice-president and general superintendent is an "officer" upon whom service may be made under a statute. Norfolk, etc. R. R. *v.* Cottrell, 83 Va. 512 (1887).

domestic corporation is thereby created.[1] Merely being licensed to do business in the state does not make a foreign corporation a resident of the state.[2] Where a domestic railroad is leased to a foreign corporation, under a statute which thereby expressly makes the latter a domestic corporation, it becomes such for

Service on the foreign corporation is sufficient where the company has an office and general agent doing a substantial business in the state. But see § 759, *infra;* Tuchband *v.* Chicago, etc. R. R., 115 N. Y. 437 (1889). *Cf.* Barnes *v.* Mobile, etc. R. R., 12 Hun, 126 (1877).

Where service on an agent is allowed if certain officers cannot be found in the county, the return of service on an agent must show that the officers were not within the jurisdiction. Miller *v.* Norfolk, etc. R. R., 41 Fed. Rep. 431 (1889). Service upon a director of a foreign corporation sustained under the New York statute. McElroy *v.* Continental R'y, 6 N. Y. Supp. 306 (1889). A Maine corporation may sue a New Jersey corporation in Massachusetts, where the latter company has filed an agreement with the state of Massachusetts agreeing that it might be sued there. Consolidated, etc. Co. *v.* Lamson, etc. Co., 41 Fed. Rep. 833 (1890). Foreign corporations doing business in the state may be sued on a cause of action that arose out of the state, and service may be made on an agent or depot-master if the statutes authorize service to be made in this way. Humphreys *v.* Newport News, etc. Co., 33 W. Va. 135 (1889). Service may be on the superintendent of insurance at Albany although the action is in the city court of New York. People *v.* City Court Justices, 11 N. Y. Supp. 773 (1890). Under the Michigan statutes service may be made on foreign corporations by service on a resident agent who is in charge of the property. Shafer Iron Co. *v.* Iron County Circuit Judge, 88 Mich. 464 (1891). Under the statutes of Michigan service on a foreign corporation may be made on a traveling salesman in a cause of action which arose within the state. Ryerson *v.* Steere, 72 N. W. Rep. 131 (Mich., 1897). An advertising agent is not an "agent" upon whom service may be made under the New Jersey statute. Mulhearn *v.* Press Pub. Co., 53 N. J. L. 150 (1890). A local agent of a domestic insurance company is not an agent employed in the general management of the business. State Ins. Co. *v.* Waterhouse, 78 Iowa, 674 (1889). Service may be upon a general superintendent when the statute authorizes it on a managing agent. Barrett *v.* American, etc. Co., 56 Hun, 430 (1890). An employee who attends to the publication of a periodical, and the printing, binding, and mailing, is not a "managing agent." Ruland *v.* Canfield Pub. Co., 10 N. Y. Supp. 913 (1890). An agent is not an "officer." Banks *v.* Gay Mfg. Co., 108 N. C. 282 (1891). Where by statute the state superintendent of insurance is made agent to accept service of process on foreign insurance companies doing business in the state, service on him by mail is insufficient. Farmer *v.* National Life Assoc., 50 Fed. Rep. 829 (1892). The attachment papers in an attachment against a foreign corporation must show the jurisdiction of the court. Oliver *v.* Walter, etc. Co., 10 N. Y. Supp. 771 (1890).

[1] St. Louis, etc. R'y *v.* James, 161 U. S. 545 (1896).

[2] Martin *v.* Baltimore, etc. R. R., 151 U. S. 673 (1894).

purposes of jurisdiction.[1] The various states have different statutes on this subject and they are set forth elsewhere.[2]

Sometimes the statutes require a foreign corporation to appoint a resident agent to accept service before it does business in the state.[3]

§ 759. *Jurisdiction of the federal courts — "Dummy" corporations — Residence of corporations — Jurisdiction where service is on an officer temporarily in the state — Federal corporations.*— Although a bill in equity sets forth that a corporation is merely a pretended corporation, as a part of a fraudulent scheme, and is really nothing but a partnership, nevertheless, if such corporation has an existing charter, it exists as a corporation, sufficiently at least to oust the federal court of jurisdiction of the case.[4] But where property is trans-

[1] Western, etc. R. R. *v.* Roberson, 61 Fed. Rep. 592 (1894). The fact that by statute a foreign corporation by filing certain papers is declared to be a domestic corporation does not prevent it from removing a case to the federal court as being a foreign corporation. Markwood *v.* Southern R'y, 65 Fed. Rep. 817 (1895). Although a statute authorizes a foreign corporation to build a road in the state, this does not make the corporation a domestic corporation so far as the jurisdiction of the federal courts is concerned. Chapman *v.* Alabama, etc. R. R., 59 Fed. Rep. 370 (1894).

[2] See Part VII, *infra.*

[3] Goodwin *v.* Colorado, etc. Co., 110 U. S. 1 (1884); Gibbs *v.* Queen Ins. Co., 63 N. Y. 114 (1875). See also §§ 697–700, *supra;* also note 3, p. 1658. A judgment obtained by such service cannot be impeached in other jurisdictions. Lafayette Ins. Co. *v.* French, 18 How. 404 (1855); Moch *v.* Virginia F. & M. Ins. Co., 10 Fed. Rep. 696 (1882). Transacting business without filing is equivalent to filing. Ehrman *v.* Teutonia Ins. Co., 1 McCrary, 123 (1880). The appointment of such an agent does not affect the right of the corporation, as a citizen of another state, to sue and be sued in the federal courts. Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149 (1869); Gray *v.* Quicksilver Min. Co., 21 Fed. Rep. 288 (1884). For decisions under the Massachusetts statute requiring foreign insurance companies to appoint an agent to accept service, see Thayer *v.* Tyler, 76 Mass. 164 (1857); National Mut. F. Ins. Co. *v.* Pursell, 92 Mass. 231 (1865); Leonard *v.* Washburn, 100 Mass. 251 (1868); Gillespie *v.* Commercial, etc. Ins. Co., 78 Mass. 201 (1858); Morton *v.* Mutual L. Ins. Co., 105 Mass. 141 (1870). An appointment, under statute, of a resident agent to accept service continues until a new appointment is made. Gibson *v.* Manufacturers' Ins. Co., 144 Mass. 81 (1887).

[4] Empire, etc. Transp. Co. *v.* Empire, etc. Min. Co., 150 U. S. 159 (1893). In Irvine Co. *v.* Bond, 74 Fed. Rep. 849 (1896), an owner of land in California incorporated a company under the laws of West Virginia and transferred to it, in payment for stock, certain portions of his land. He owned all the stock, and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned.

ferred to a non-resident corporation for the sole purpose of enabling the parties to litigate a claim in the United States courts, the United States courts will refuse to take jurisdiction.[1] The jurisdiction of the federal court depends upon the state wherein the corporation is incorporated, and not upon the state or states wherein the stockholders reside.[2] Where a railroad runs through several federal districts in a state, it is a citizen and inhabitant of the district where it does the general business and has its headquarters and general offices.[3] The objection that neither of the parties resides in the district where suit is brought is waived by appearing generally.[4] In the circuit court of the United States it was formerly the law that a corporation incorporated beyond the circuit in which the suit was brought might

[1] Lehigh, etc. Co. *v.* Kelly, 160 U. S. 327 (1895).

[2] St. Louis, etc. R'y *v.* James, 161 U. S. 545 (1896). In Interstate Com. Commission *v.* Texas & Pac. R'y, 57 Fed. Rep. 948 (1893), the court held that the principal office and domicile of the defendant was in New York city, where the company held its stockholders and directors' meetings and kept its stock books and records, even though the general or administrative offices of the heads of departments were in Texas. The company itself existed under a charter granted by congress. "The members of a corporate body must be conclusively presumed to be citizens of the state in which the corporation is domiciled." Shaw *v.* Quincy Min. Co., 145 U. S. 444 (1892). A corporation is a resident only of the state that incorporates it, so far as the jurisdiction of the federal courts is concerned. Myers *v.* Murray, etc. Co., 43 Fed. Rep. 695 (1890). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. Miller *v.* Wheeler, etc. Co., 46 Fed. Rep. 882 (1891); Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577 (1891); Railway Co. *v.* Whitton, 13 Wall. 270, 283 (1871), holding that a corporation is deemed to be a citizen of the state creating it for the purpose of conferring jurisdiction upon the courts of the United States, and the legislation of other states will not affect this presumption; Insurance Co. *v.* Francis, 11 Wall. 210 (1870), holding that an allegation that a New York corporation is located and doing business in Mississippi was not an allegation that it was a citizen of the latter state; Steamship Co. *v.* Tugman, 106 U. S. 118 (1882), holding that the residence of the corporation does not at all depend on the residence of its stockholders.

[3] Galveston, etc. R'y *v.* Gonzales, 151 U. S. 496 (1894).

[4] Interior Constr. & Imp. Co. *v.* Gibney, 160 U. S. 217 (1895). A New York corporation may, by bill filed in the Virginia district of the United States court, have a receiver appointed of property there of a New Jersey corporation, if the defendant does not object to the jurisdiction. Stockholders and creditors of the defendant company cannot, by intervening, raise the question of jurisdiction. Central T. Co. *v.* McGeorge, 151 U. S. 129 (1894).

be made a defendant by such service as suffices in the state wherein the suit was brought, if it did business there.[1] But by the act of congress of 1887 a suit in the federal courts can be instituted only in the district where either the plaintiff or defendant resides, where the jurisdiction of the court is due to the parties being citizens of different states.[2] Nevertheless where a removable suit is properly commenced in a state court

[1] New England Mut. Ins. Co. *v.* Woodworth, 111 U. S. 138, 146 (1883); Eaton *v.* St. Louis, etc. Co., 7 Fed. Rep. 139 (1881); M'Coy *v.* Cincinnati, etc. R. R., 13 Fed. Rep. 3 (1882); St. Louis, etc. Co. *v.* Consolidated, etc. Co., 32 Fed. Rep. 802 (1887); Hunter *v.* International R'y Imp. Co., 26 Fed. Rep. 299 (1886); Block *v.* Atchison, etc. R. R., 21 Fed. Rep. 529 (1884); Carpenter *v.* Westinghouse Air-brake Co., 32 Fed. Rep. 434 (1887). But see Good Hope Co. *v.* Railway, etc. Co., 22 Fed. Rep. 635 (1884), holding that service on the president, who was there to adjust a difficulty, was insufficient. *Cf.* Estes *v.* Belford, 22 Fed. Rep. 275 (1884), where a patent-right had been used in the jurisdiction. Service on an agent of a domestic corporation does not give jurisdiction over a foreign corporation, though the latter operates through the former. U. S. *v.* American Bell Tel. Co., 29 Fed. Rep. 17 (1886). Unless the state statute provide otherwise, no jurisdiction is acquired by attachment of property and service of papers on resident officers of a foreign corporation. Boston Electric Co. *v.* Electric Gas L. Co., 23 Fed. Rep. 838 (1885), reviewing the authorities. Where the foreign corporation has appointed a resident agent to accept service, the federal court has jurisdiction by service on such agent. *Ex parte* Schollenberger, 96 U. S. 369 (1877); Knott *v.* Southern L. Ins. Co., 2 Woods, 479 (1874); S. C., 14 Fed. Cas. 785; Merchants' Mfg. Co. *v.* Grand Trunk R'y, 63 How. Pr. 459 (1882, U. S. C. Ct.), where a foreign corporation sued an alien corporation; Lung Chung *v.* Northern Pac. R'y, 19 Fed. Rep. 254 (1884), where service was insufficient; Gray *v.* Quicksilver Min. Co., 21 Fed. Rep. 288 (1884). The fact that a state is a stockholder in a corporation does not deprive the United States courts of jurisdiction where the corporation is a party. Bank of U. S. *v.* Planters' Bank, 9 Wheat. 904 (1824). In the federal courts service on a ticket solicitor of a railroad defendant for a cause of action arising in another circuit is insufficient. Maxwell *v.* Atchison, etc. R. R., 34 Fed. Rep. 286 (1888). As to the affidavit to be made by the corporation in order to remove a case to the United States court, see Mix *v.* Andes Ins. Co., 74 N. Y. 53 (1878). An order to show cause may be served on the cashier of an insolvent bank, although the bank is in a receiver's hands. Platt *v.* Archer, 9 Blatchf. 559 (1872); S. C., 19 Fed. Cas. 822. A Connecticut corporation cannot be sued by an alien in the California circuit court of the United States. Denton *v.* International Co., 36 Fed. Rep. 1 (1888); Filli *v.* Delaware, etc. R. R., 37 Fed. Rep. 65 (1888). But see Riddle *v.* New York, etc. R. R., 39 Fed. Rep. 290 (1889). See also Connor *v.* Vicksburg, etc. R. R., 36 Fed. Rep. 273 (1888); Preston *v.* Fire Extinguisher Mfg. Co., 36 Fed. Rep. 721 (1888).

[2] Stat. at L. 1887, sess. II, ch. 373. See also cases in preceding note.

it may be removed to the federal court, though neither of the parties resides in that district.[1]

A judgment against a foreign corporation based on service upon the president while temporarily in the state is not enforceable in other states, the corporation not being engaged in business or having any agent in the state where the judgment was obtained.[2]

The federal courts refuse to follow the New York decisions and statute allowing suit to be brought against a foreign corporation by service upon the president while temporarily within the state, the corporation not being engaged in business in the state. On removal of the case to the federal court the service will be set aside. A special appearance for that purpose may be put in.[3]

[1] Kansas City, etc. R. R. *v.* Interstate Lumber Co., 37 Fed. Rep. 3 (1888). See also Zambrino *v.* Galveston, etc. R'y, 38 Fed. Rep. 449 (1889); Riddle *v.* New York, etc. R. R., 39 Fed. Rep. 290 (1889). Where a state sues a corporation in a state court, the defendant cannot remove the case into the federal court on the ground of diverse citizenship, inasmuch as the state is not a citizen. Postal Tel. Cable Co. *v.* Alabama, 155 U. S. 482 (1894).

[2] Goldey *v.* Morning News, 156 U. S. 518 (1895). Service on the president of a foreign corporation in a cause of action not arising in the state gives no jurisdiction. State *v.* Ramsey County Dist. Ct., 26 Minn. 233 (1879). Service on the secretary who is casually in the state is not good. Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301 (1841). A foreign corporation cannot be bound by obtaining service upon an officer who is casually in the state, where the statute is silent on the subject. Aldrich *v.* Anchor Coal Co., 24 Oreg. 32 (1893). Service of process upon the president of a foreign corporation who is temporarily within the state is not good service in Pennsylvania. Phillips *v.* Burlington Library Co., 141 Pa. St. 462 (1891). Service on a domestic corporation cannot be made by personal service on the president outside of the jurisdiction. Dillard *v.* Central Va. Iron Co., 82 Va. 734 (1887). Judgment in another state against a foreign corporation doing business there, service being on an officer who is accidentally in the state, is conclusive and valid. Moulin *v.* Trenton, etc. Ins. Co., 24 N. J. L. 222 (1853). Service on a corporation which does no business in the state cannot be made by service on an agent who is temporarily in the state. Crook *v.* Girard, etc. Co., 39 Atl. Rep. 94 (Md., 1898). The manager may be served, although only temporarily in the state on special business, such suit being connected with such business. Houston *v.* Filer, etc. Co., 85 Fed. Rep. 757 (1898).

[3] Glews *v.* Woodstock Iron Co., 44 Fed. Rep. 31 (1890). Service on an officer of a foreign corporation who temporarily comes within the state is not good and will be set aside. Goldey *v.* Morning News, 42 Fed. Rep. 112 (1890). A foreign corporation sued in state courts by service on a director casually in the state

Moreover, the federal court in New York may have jurisdiction of a suit at law brought by a non-resident against a foreign corporation, even though under the statutes of New York the state courts would have no jurisdiction of such case.[1] An alien corporation may be sued wherever service may legally be obtained upon it.[2]

A large number of decisions are given in the notes below on the various phases of the jurisdiction of the federal courts in suits brought against foreign corporations.[3]

may remove to United States court and have the suit dismissed. Bentlif *v.* London, etc. Corp., 44 Fed. Rep. 667 (1890). On removal to the federal court, a suit commenced by service on the president, who casually was in the jurisdiction on private business, will be dismissed, the company never having transacted business or maintained an office in the state. Reifsnider *v.* American, etc. Co., 45 Fed. Rep. 433 (1891). "Where a foreign corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state so that service can be made upon it." Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98 (1890). Where a corporation appears, demurs, removes the case into the federal court, and answers, it cannot attack the jurisdiction of the court, even though service was on the president, who was enticed into the state. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98 (1890). Where a foreign corporation sued in a state court wishes to remove the case to the federal court, and there have the service set aside on the ground of want of jurisdiction, it must enter a special appearance in the state court for the purpose of objecting to the jurisdiction, and then, after filing the objection, but before a hearing thereon, remove the whole case into the federal court. Tallman *v.* Baltimore, etc. R. R., 45 Fed. Rep. 156 (1891). See also note 2, p. 1662.

[1] Barrow S. S. Co. *v.* Kane, 170 U. S. 100 (1898).

[2] If it has financial agents in New city, and an office there for the transaction of its monetary and financial business in the United States, service in New York upon the head of the firm which acts as the agents of the corporation is a sufficient service upon the corporation itself. *Re* Hohorst, 150 U. S. 653 (1893).

[3] A corporation organized in one state cannot be sued in the federal court in another state by a citizen of a third state. Shaw *v.* Quincy Min. Co., 145 U. S. 444 (1892), holding also that the defendant may appear specially. Service upon the highest officer within the county is sufficient where the statutes so prescribe. Kansas City, etc. R. R. *v.* Daughtry, 138 U. S. 298 (1891). Service upon an attorney of a corporation, appointed under a state statute to accept service, is good service for the federal courts. *Re* Louisville Underwriters, 134 U. S. 488 (1890). Under a state statute authorizing service of process upon a local agent of a foreign corporation, jurisdiction may be obtained by the federal courts. Société Foncière *v.* Milliken, 135 U. S. 304 (1890). The status of a corporation in regard to the jurisdiction of the federal courts is stated in U. S. *v.* Southern Pac. R. R., 49 Fed. Rep. 297 (1892). A

A corporation incorporated by the United States may, by

foreign corporation doing business in Ohio and having a managing agent there may be garnished there under the statutes of Ohio. Rainey *v.* Maas, 51 Fed. Rep. 580 (1892). A railroad corporation is a resident of each federal district through which it runs. East Tennessee, etc. R. R. *v.* Atlanta, etc. R. R., 49 Fed. Rep. 608 (1892). Where an alien corporation appoints a resident agent to accept service, it becomes an "inhabitant," and may be sued in the federal court. Gilbert *v.* New Zealand Ins. Co., 49 Fed. Rep. 884 (1892). The word "inhabitant" applies to corporations, in respect to statutory jurisdiction of courts. Gilbert *v.* New Zealand Ins. Co., 49 Fed. Rep. 884 (1892). A corporation is not an "inhabitant" of any state except the one wherein it is incorporated. Campbell *v.* Duluth, etc. R'y, 50 Fed. Rep. 241 (1892). It has been held that a limited partnership organized under the laws of Pennsylvania is not a citizen of that state so as to enable it to remove a case to the federal court, irrespective of the citizenship of its members. Carnegie, etc. Co. *v.* Hulbert, 53 Fed. Rep. 10 (1892). A foreign corporation may be sued in the federal court in the state where the plaintiff resides, although it had filed its certificate of incorporation with the secretary of state under the statute, and had stipulated not to remove any case into the federal court. Such a stipulation is unconstitutional and void. Southern Pac. Co. *v.* Denton, 146 U. S. 202 (1892). The place of residence of a corporation is the state wherein it is incorporated. So held under the act for the removal of causes. Miller *v.* Wheeler, etc. Co., 46 Fed. Rep. 882 (1891); Overman Wheel Co. *v.* Pope Mfg. Co., 46 Fed. Rep. 577 (1891). A foreign corporation filing a certificate as required by statute is not a non-resident as regards the right to remove cases to the federal courts. Scott *v.* Texas, etc. Co., 41 Fed. Rep. 225 (1889). A corporation is a resident only of the state wherein it is incorporated, as regards the jurisdiction of the United States courts. Although another party defendant is an actual resident in the district where suit is brought, yet the foreign corporation cannot be sued there on that account. Bensinger, etc. Co. *v.* National Cash Reg. Co., 42 Fed. Rep. 81 (1890). If two corporations sued on a tort are liable severally, one may remove the case, although the other cannot, to the federal court. Spangler *v.* Atchison, etc. R. R., 42 Fed. Rep. 305 (1890). An alien corporation may remove a case to the federal courts. Purcell *v.* British, etc. Co., 42 Fed. Rep. 465 (1890).

A consolidated railroad running into two states is a separate corporation in each state, and, being sued in one state, cannot remove the case to the federal court on the ground that it is a citizen of the other state. Paul *v.* Baltimore, etc. R'y, 44 Fed. Rep. 513 (1890). A foreign corporation defendant may remove a case to the federal court although it has filed a statutory certificate authorizing service on a designated agent. Amsden *v.* Norwich, etc. Ins. Soc., 44 Fed. Rep. 515 (1890). A statute prohibiting a foreign corporation from suing in the state courts unless it has filed a copy of its articles, etc., in the state, if it is doing business in the state, does not prevent such a corporation from bringing suit in the federal courts, although it has not filed its articles, etc. Bank of British N. A. *v.* Barling, 44 Fed. Rep. 641 (1890). A judgment creditor of an insolvent corporation may file a bill in equity in the federal court to subject the property to the payment of the debt, although a suit is pending in the

reason of that fact, bring suits in or remove them to the fed-

state court to reduce the amount of complainant's claim to a less figure. The issues are different. Coffin *v.* Chattanooga, etc. Co., 44 Fed. Rep. 533 (1891). A suit cannot be brought in the federal court against a corporation except in the district where the company is incorporated. National Typog. Co. *v.* New York Typog. Co., 44 Fed. Rep. 711 (1890). When a defendant foreign corporation seeks to remove a case to the federal courts it must aver it is a non-resident. An averment of its citizenship is insufficient. Hirschl *v.* J. I. Case, etc. Co., 42 Fed. Rep. 803 (1890). A foreign corporation may be sued in the federal courts although it has an office and does business in the state. Henning *v.* Western U. Tel. Co., 43 Fed. Rep. 97 (1890). Although a Missouri corporation is made an Arkansas corporation also by statute, yet it may remove cases to the federal court as though it were a Missouri corporation alone. Stephens *v.* St. Louis, etc. R. R., 47 Fed. Rep. 530 (1891). The fact that the C., B. & Q. R. R. Co., an Illinois corporation, first took a lease of and then purchased the road of the B. & M. R. R. Co. in Iowa, does not make the former company an Iowa corporation. It continues an Illinois corporation. Conn *v.* Chicago, etc. R. R., 48 Fed. Rep. 177 (1891). A railroad corporation of one state purchasing a railroad in another state does not thereby become a resident of the latter state so as to prevent its removing cases to the federal court. Morgan *v.* East Tennessee, etc. R. R., 48 Fed. Rep. 705 (1883). If no objection is raised in the proper manner the jurisdiction of the federal court cannot be questioned. The proceedings are not void. McBride *v.* Grand, etc. Co., 40 Fed. Rep. 162 (1889). An alien corporation doing business in Oregon may be sued there in the federal courts. It is an "inhabitant" to that extent. Miller *v.* Eastern, etc. Min. Co., 45 Fed. Rep. 345 (1891). A statute requiring foreign corporations to file a stipulation which is forfeited in case the corporation removes any case to the federal courts is void. And even if valid the corporation cannot be forbidden to litigate past rights or recover property already acquired. Texas, etc. Co. *v.* Worsham, 76 Tex. 556 (1890). Although a New York corporation does practically all of its business in Missouri, yet it is a citizen of New York. Baughman *v.* National, etc. Co., 46 Fed. Rep. 4 (1891).

A company organized under the statutes of Pennsylvania and having mixed characteristics of a partnership and corporation is a corporation so far as removal to the federal court is concerned. Bushnell *v.* Park, 46 Fed. Rep. 209 (1891); Blackburn *v.* Selma, etc. R. R., 2 Flipp. 525 (1879); S. C., 3 Fed. Cas. 526, holding that entering appearance waives the right to object to the jurisdiction of a federal court. To same effect, De Sobry *v.* Nicholson, 3 Wall. 420 (1865); Hayden *v.* Androscoggin Mills, 1 Fed. Rep. 93 (1879), holding that it may be sued in federal courts, though its property has been attached, if doing business in the state and process can be served; Boston Electric Co. *v.* Electric Gas. L. Co., 23 Fed. Rep. 838 (1885). In this case a Maine corporation had its principal office in Massachusetts, where also a majority of its officers and directors resided. *Held*, that the federal courts of Massachusetts had no jurisdiction over it, though suit was begun by attachment and service upon the corporate officers. Hatch *v.* Chicago, etc. R. R., 6 Blatchf. 105 (1868); S. C., 11 Fed. Cas. 799, holding that having an

eral courts, unless the statute provides otherwise.[1] A Pennsylvania "partnership association" organized under the statutes of Pennsylvania is a corporation so far as the jurisdiction of

office and doing business in another state does not affect its citizenship; Williams *v.* Missouri, etc. R'y, 3 Dill. 267 (1875); S. C., 29 Fed. Cas. 1377; Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149 (1869).

[1] Pacific R. R. Removal Cases, 115 U. S. 2 (1885); Union Pac. R. R. *v.* McComb, 1 Fed. Rep. 799 (1880); Eby *v.* Northern Pac. R. R., 36 Leg. Int. 164 (1879); Hughes *v.* Northern Pac. R'y, 18 Fed. Rep. 106 (1883); Allen *v.* Texas, etc. R'y, 25 Fed. Rep. 518 (1885), where even a consolidation with domestic corporations had been made and state statutes prohibited the removal. A case to the contrary is Myers *v.* Union Pac. R'y, 16 Fed. Rep. 292 (1882). As to national banks, see Cruikshank *v.* Fourth Nat. Bank, 16 Fed. Rep. 888 (1883); Farmers' Nat. Bank *v.* McElhinney, 42 Fed. Rep. 801 (1890); Farmers', etc. Nat. Bank *v.* Dearing, 91 U. S. 29 (1875), followed in Rhoner *v.* First Nat. Bank, 14 Hun, 126 (1878), holding that an attachment cannot be issued against national banks until after final judgment; and overruling Southwick *v.* First Nat. Bank, 7 Hun, 96 (1876), and Bowen *v.* First Nat. Bank, 34 How. Pr. 408 (1867). It has been held that they are so far foreign corporations that they may be required to give security for costs. See National Park Bank *v.* Gunst, 1 Abb. N. Cas. 292 (1876). But they may obtain an attachment on property to the same extent that a domestic corporation may. Market Nat. Bank *v.* Pacific Nat. Bank, 64 How. Pr. 1 (1882). A company incorporated in a territory cannot thereby remove a case to the United States courts. Adams Exp. Co. *v.* Denver, etc. R'y, 16 Fed. Rep. 712 (1883). A right to change of venue to the residence of the defendant may enable a corporation defendant to change it to the place where it does its business, though incorporated elsewhere. Guinn *v.* Iowa Cent. R'y, 14 Fed. Rep. 323 (1882). A District of Columbia insurance company cannot remove cases to a federal court for that cause alone. Scheffer *v.* National Life Ins. Co., 25 Minn. 534 (1879). National banks are citizens of the state wherein they are located. National Park Bank *v.* Nichols, 4 Biss. 315 (1869); S. C., 17 Fed. Cas. 1228; Manufacturers' Nat. Bank *v.* Baack, 8 Blatchf. 137 (1871); S. C., 16 Fed. Cas. 671; Davis *v.* Cook, 9 Nev. 134 (1874). *Cf.* Kennedy *v.* Gibson, 8 Wall. 498 (1869); U. S. Rev. Stat., § 640; Wilson County *v.* National Bank, 103 U. S. 770 (1880); Osborn *v.* Bank of U. S., 9 Wheat. 738 (1824); Cooke *v.* State Nat. Bank, 52 N. Y. 96 (1873); St. Louis Nat. Bank *v.* Allen, 5 Fed. Rep. 551 (1881); First Nat. Bank *v.* Bohne, 8 Fed. Rep. 145 (1881); Third Nat. Bank *v.* Harrison, 8 Fed. Rep. 721 (1881); Union Nat. Bank *v.* Miller, 15 Fed. Rep. 703 (1883), holding that the act of July 12, 1882, placed national and other banks, as to their right to sue in the federal courts, on the same footing. *Cf.* Acts of Congress, 1888, ch. 866. As to unincorporated joint-stock companies, see Chapman *v.* Barney, 129 U. S. 677 (1889). A railway corporation created by act of congress "is, in every state and territory of the Union in which it may lawfully exercise its powers, a domestic institution," and may be sued in the federal courts in any district where it is doing business and has an agent upon whom service can be made. Where a lease is made without statutory authority, the lessor may be served with process as though no lease had been made.

the United States is concerned.[1] If a foreign corporation desires to deny that it has been properly served, it may put in a special appearance and raise the objection of no jurisdiction.[2]

Where the statutes of a state prescribe the mode in which service may be made, all corporations subsequently doing business in the state are bound by service so made. Van Dresser *v.* Oregon, etc. Nav. Co., 48 Fed. Rep. 202 (1891). "The circuit court of the United States has no jurisdiction, either original or by removal from a state court, of a suit as one arising under the constitution, laws, or treaties of the United States, unless that appears by the plaintiff's statement of his own claim. . . . While the court does not say in terms that, to authorize the removal of a cause from a state to a federal court, it must appear from the plaintiff's complaint that he relies upon some provision of the constitution, laws, or treaties of the United States, it does decide that he must so far rely, or that his claim must so far be predicated, upon some provision of the constitution, law, or treaty of the United States, as would authorize him to bring an original action in the circuit court." State *v.* Atchison, etc. R'y, 77 Fed. Rep. 339, 341, 343 (1896).

[1] Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. Rep. 585 (1898).

[2] Provident, etc. Soc. *v.* Ford, 114 U. S. 635 (1885); Friezen *v.* Allemania F. Ins. Co., 30 Fed. Rep. 349 (1886), holding that a general appearance waives the objection to jurisdiction. See also Brooks *v.* New York, etc. R. R., 30 Hun, 47 (1883), holding that a general answer has the same effect; also Cook *v.* Champlain Transp. Co., 1 Denio, 91 (1845); North Missouri R. R. *v.* Akers, 4 Kan. 453 (1868), holding that after entering appearance it cannot question the jurisdiction of the court in an action upon contract. See also § 752, *supra;* McCormick *v.* Pennsylvania Cent. R. R., 49 N. Y. 303 (1872); Lung Chung *v.* Northern Pac. R'y, 19 Fed. Rep. 254 (1884); Moch *v.* Virginia F. & M. Ins. Co., 10 Fed. Rep. 696 (1882). Where a foreign corporation, served in the state where it is incorporated, answers by pleas to the jurisdiction and also files pleas to the merits, reserving its rights under the former pleas, it waives any objection to the jurisdiction. St. Louis, etc. R'y *v.* Whitley, 77 Tex. 126 (1890). See also note 3, p. 1637.

PART V.

BONDS, MORTGAGES, FORECLOSURES, RECEIVERS, AND REORGANIZATIONS.

CHAPTER XLVI.

BONDS, NOTES, ETC., OF A CORPORATION — GUARANTIES AND ACCOMMODATION PAPER.

§ 760. A corporation may borrow money — Loans in excess of the charter or contract limit — Overissues of bonds.

761. Bills, notes, and acceptances may be made and issued by corporations.

762. Bonds may be issued by corporations—Bonds may be valid although the mortgage securing them is invalid — Bonds to preferred creditors — Re-issues.

763. Pledge of bonds by a corporation and enforcement thereof.

764. Forged bonds — Priorities among bonds — Incomplete bonds — References to the mortgage — Purposes of the issue.

765. Attachments levied on bonds — Form of bonds — Gold clause — Seal — Cancellation and subrogation.

766. Bonds issued below par for cash, property, or construction work — Dividend of bonds — Bonds, notes, or mortgages given without consideration — Statutory and constitutional prohibitions relative to issues of bonds — Fraudulent issues of bonds — *Bona fide* purchasers of bonds issued at less than their par value are protected — Fraudulent issues of bonds to the directors, or through directors who are "dummies," or to construction companies in which the directors are interested — Who may complain of an issue of bonds at less than par — Stockholders — The state — The corporation itself — Bondholders — Corporate creditors — Usury as affecting bonds issued at less than par — Distribution of bonds on sale of corporate assets — Bonds and stock to be issued to a contractor who fails to perform.

§ 767. Negotiable character of bonds and coupons of a corporation payable to order, bearer, or holder — Lost bonds.

768. The negotiability of the bonds extends also to the mortgage.

769. Miscellaneous features of bonds — Issue in payment of the property of another corporation — Consolidations—Bondholders' suits — Bonds exchangeable into stock.

770. Suits at law on bonds — Demand of payment — Form of action — Statute of limitations.

771. Coupons and interest on bonds — Negotiability of coupons — Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.

§ 772. Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment — Statute of limitations.
773. Income bonds.
774. Accommodation paper by a corporation — *Bona fide* holders.
775. Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.
§ 776. Debentures.
777. Debenture stock secured by an American mortgage.
778. Mode of drafting, signing, sealing, and acknowledging corporate obligations to pay money — Liability of the corporation and the corporate officers on irregularly executed instruments — Charter provisions as to authorizing the instruments.

§ 760. *A corporation may borrow money — Loans in excess of the charter or contract limit — Overissues of bonds.* — The power of a corporation to borrow money is implied, and exists without being expressly granted by charter or statute.[1] A bank

[1] Memphis, etc. R. R. *v.* Dow, 19 Fed. Rep. 388 (1884); Philadelphia, etc. R. R. *v.* Stichter, 21 Am. L. Reg. 713 (Pa., 1882); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Beers *v.* Phœnix Glass Co., 14 Barb. 358 (1852); Mead *v.* Keeler, 24 Barb. 20 (1857); Partridge *v.* Badger, 25 Barb. 146 (1857); Clark *v.* Titcomb, 42 Barb. 122 (1864); Curtis *v.* Leavitt, 15 N. Y. 9 (1857); Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Smith *v.* Law, 21 N. Y. 296 (1860); Nelson *v.* Eaton, 26 N. Y. 410 (1863); Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 177 (1879); Coats *v.* Donnell, 94 N. Y. 168 (1883); Oxford Iron Co. *v.* Spradley, 46 Ala. 98 (1871); Alabama, etc. Ins. Co. *v.* Central, etc. Assoc., 54 Ala. 73 (1875); Taylor *v.* Agricultural, etc. Assoc., 68 Ala. 229 (1880); Hays *v.* Galion Gas, etc. Co., 29 Ohio St. 330, 340 (1876); Hope Ins. Co. *v.* Perkins, 38 N. Y. 404 (1868). A corporation may borrow money and give notes therefor. Grommes *v.* Sullivan, 81 Fed. Rep. 45 (1897); Magee *v.* Mokelumne Hill, etc. Co., 5 Cal. 258 (1855), where a statute prohibiting corporations from issuing bills, notes, etc., "upon loans or for circulation as money," was held to be intended to prevent their loaning their credit, and not to restrict their right to borrow for business purposes; followed in Smith *v.* Eureka Flour Mills Co., 6 Cal. 1 (1856); Santa Cruz R. R. *v.* Spreckles, 65 Cal. 193 (1884), holding that the loan may be obtained from a director; Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248 (1873); Commercial Bank, etc. *v.* Newport Mfg. Co., 1 B. Mon. 13 (1840); Lucas *v.* Pitney, 27 N. J. L. 221 (1858); Hackettstown *v.* Swackhamer, 37 N. J. L. 191 (1874); Thompson *v.* Lambert, 44 Iowa, 239 (1876); Larwell *v.* Hanover Sav. Fund Soc., 40 Ohio St. 274 (1883); Bradley *v.* Ballard, 55 Ill. 413 (1870); Fay *v.* Noble, 66 Mass. 1 (1853); Craven County Com'rs *v.* Atlantic, etc. R. R., 77 N. C. 289 (1877); Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256 (1825); Moss *v.* Harpath Academy, 7 Heisk. (Tenn.) 283 (1872); Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515 (1845); Rockwell *v.* Elkhorn Bank, 13 Wis. 653 (1861); Furniss *v.* Gilchrist, 1 Sandf. 53 (1847); Holbrook *v.* Basset, 5 Bosw. 147 (1859); Life & F. Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31 (1831); Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165 (1883), holding that, if a bank borrows money, the fact that its officers misappropriate the money cannot defeat the right to recover it from the bank; Australian,

may borrow money, but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.[1] However, although the officers of a bank have no power to borrow money for the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though express authority had been given.[2]

Even if the corporation has no implied power to borrow, it will be compelled to repay the money actually received by it.[3]

It is legal for the company to borrow money of its directors. The fiduciary relation of the directors towards the stockholders does not prevent such a loan.[4] A street railroad company may borrow money and give a promissory note for the same, and a *bona fide* holder is protected even though it was given to a director in payment for services in procuring the franchise.[5]

etc. Co. *v.* Mounsey, 4 K. & J. 733 (1858); *Re* National, etc. Co., 1 Dr. & Sm. 55 (1860); Ulster R'y *v.* Banbridge, etc. R'y, Ir. Rep. 2 Eq. 190 (1868); Bank of Australasia *v.* Breillat, 6 Moore, P. C. 152 (1847); Laing *v.* Reed, L. R. 5 Ch. 4 (1869); *Re* Cork, etc. R'y, L. R. 4 Ch. 748 (1869); Maclae *v.* Sutherland, 3 El. & Bl. 1, 39 (1854); Gibbs's Case, L. R. 10 Eq. 312 (1870) — an insurance company. See also Hawtayne *v.* Bourne, 7 M. & W. 595 (1841); Lowndes *v.* Garnett, etc. Co., 33 L. J. (Ch.) 418 (1864); *Ex parte* Pitman, L. R. 12 Ch. D. 707 (1879); Hill's Case, L. R. 9 Eq. 605, 618 (1870); Burmester *v.* Norris, 6 Ex. 796 (1851), holding that a mining company cannot borrow. Under a power to borrow on bonds or debentures, the company may borrow without issuing bonds or debentures. Commercial Bank *v.* Great Western R'y, 3 Moore's P. C. Rep. (N. S.) 295 (1865). A canoe club may borrow money to erect a building. Bradbury *v.* Boston Canoe Club, 153 Mass. 77 (1891). A building association has power to borrow money and give security for it. North, etc. Assoc. *v.* First Nat. Bank, 79 Wis. 31 (1891).

[1] Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893).

[2] Armstrong *v.* Chemical Nat. Bank, 83 Fed. Rep. 556 (1897).

[3] Manville *v.* Belden Min. Co., 17 Fed. Rep. 425 (1883); Memphis, etc. R. R. *v.* Dow, 19 Fed. Rep. 388 (1884); Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 248 (1873); Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa, 607 (1879); Larwell *v.* Hanover, etc. Soc., 40 Ohio St. 274 (1883); *Re* Magdalena Steam Nav. Co., Johns. (Eng. Ch.) 690 (1860); Bradley *v.* Ballard, 55 Ill. 413, 417 (1870); Darst *v.* Gale, 83 Ill. 136, 141 (1876); Hays *v.* Galion Gas, etc. Co., 29 Ohio St. 330, 340 (1876); Hoare's Case, 29 Beav. 225 (1861); Troup's Case, 29 Beav. 353 (1860). Compare White *v.* Carmarthen, etc. R'y, 1 Hem. & M. 786 (1863). *Contra*, Burmester *v.* Norris, 6 Exch. 796 (1851). A person who loans money to a corporation cannot petition to have it wound up under the English act. *Ex parte* Williamson, L. R. 5 Ch. 309 (1869).

[4] See § 692, *supra*.

[5] Kneeland *v.* Braintree Street R'y, 167 Mass. 161 (1896).

Where a corporation has power to borrow money, neither it nor its stockholders can evade payment of a loan by the defense that the money was used for an unauthorized business, and that the party loaning the money knew that fact.[1]

The common law places no limit upon the amount which the corporation may borrow. The amount borrowed may be greater than the capital stock.[2]

Although a statute forbids a corporation from borrowing more than a specified amount, yet if the corporation actually does borrow in excess of that amount it cannot escape payment to the lender.[3] Thus, a national bank is liable on a debt con-

[1] Bradley *v.* Ballard, 55 Ill. 413 (1870). A preference for money borrowed to purchase stock *ultra vires* is illegal, the lender knowing that the money was to be so used. Adams, etc. Co. *v.* Deyette, 5 S. D. 418 (1894). Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same. Wright *v.* Hughes, 119 Ind. 324 (1889). But see § 761, *infra*.

[2] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844).

[3] Ossipee, etc. Mfg. Co. *v.* Canney, 54 N. H. 295 (1874); De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878); Humphrey *v.* Patrons' Mercantile Assoc., 50 Iowa, 607 (1879); Garrett *v.* Burlington Plow Co., 70 Iowa, 697 (1886); Auerbach *v.* Le Sueur Mill Co., 28 Minn. 291 (1881). A mortgage securing a debt in excess of the amount allowed by statute is nevertheless binding on the corporation and its subsequent creditors. Sioux City, etc. Warehouse Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897). In England the rule is *contra*. Fountains *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868), where debentures issued in excess of authority were held void; Wenlock *v.* River Dee Co., L. R. 10 App. Cas. 354 (1885); *Re* Pooley Hall Colliery Co., 21 L. T. (N. S.) 690 (1869), where similar debentures were said to be "not voidable, but absolutely void." The holder was allowed to come in as a general creditor. And see two cases turning upon the construction of "rules" or by-laws. Davis's Case, L. R. 12 Eq. 516 (1871), and Wilson's Case, L. R. 12 Eq. 521 (1871). But see Gordon *v.* Sea, etc. Ins. Co., 1 H. & N. 599 (1857). Municipal bonds issued in excess of a limit fixed by constitutional provision are void. *Bona fide* holders are not protected. Millerstown *v.* Frederick, 114 Pa. St. 435 (1886). The defense of debt in excess of the amount allowed must be pleaded. German Sav. Inst. *v.* Jacoby, 97 Mo. 617 (1889). Where the charter prescribes that the debts shall not exceed one-half of the capital stock, capital stock means the paid-in capital stock and not the capital stock as stated in the charter. Lehigh, etc. R'y Co.'s Appeal, 129 Pa. St. 405 (1889). Although the power of a railroad to borrow be limited, yet preferred stock may be issued, secured by a mortgage, where the power to mortgage has been given, and such preferred stock may be deprived of the power to vote. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). Where by statute corporate debts must not exceed two-thirds of the capital stock unless secured by "real-estate securities," a mortgage on real estate is such "real-estate se-

tracted by it, even though its entire indebtedness exceeds the amount allowed by act of congress.[1] Although a gas company has no power to issue bonds in excess of its capital stock, yet this does not restrict its right to issue notes. A *bona fide* purchaser is protected, even though there was an excess of power.[2] The attorney-general may enjoin a corporation from incurring debts in excess of a limit fixed by the charter.[3] A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it.[4]

Bonds secured by mortgage and issued by a corporation are valid and enforceable although they exceed in amount the limit prescribed by charter or statute.[5] Where one street rail-

curities." First Nat. Bank *v.* Sioux City, etc. Warehouse Co., 69 Fed. Rep. 441 (1895). A note for a loan in excess of a statutory limit is valid to at least the extent of the limit. Moon, etc. Co. *v.* Waxahachie, etc. Co., 35 S. W. Rep. 337 (Tex., 1896). A bank cannot collect from a corporation money loaned in excess of the amount limited by the articles of such corporation. First Nat. Bank *v.* Kiefer Milling Co., 95 Ky. 97 (1893). Where the charter prohibits the directors making a contract for over $250 unless a stockholders' meeting authorizes the same, a contract for $2,000 without such authorization is void. Georgetown, etc. Co. *v.* Central, etc. Co., 34 S. W. Rep. 435 (Ky., 1896). Where the charter limits the indebtedness to $1,000, a person loaning it $1,500 can recover only $1,000. Kraniger *v.* People's Bldg. Soc., 60 Minn. 94 (1895). A defense that the debts exceed the charter limit is not good as against claims existing before the charter limit was reached, and is not good except as to the excess over the charter limit. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). A by-law prohibiting directors from contracting debts beyond a certain amount does not invalidate a loan by the directors to a corporation in excess of that amount, where the stockholders knew of the loan and did not object thereto, and allowed the money to be used on the plant of the company. The corporation being a private one no one else is interested. The corporation cannot repudiate the debt. Bensick *v.* Thomas, 66 Fed. Rep. 104 (1895). See 87 Fed. Rep. 815.

[1] Weber *v.* Spokane Nat. Bank, 64 Fed. Rep. 208 (1894), rev'g 50 Fed. Rep. 735.

[2] Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505 (1893).

[3] Lehigh, etc. R'y Co.'s Appeal, 129 Pa. St. 405 (1889). Concerning the constitutional and statutory provision limiting corporate debts in Pennsylvania, see Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889).

[4] Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892).

[5] Bonds are valid although the amount exceeds twice the capital stock of the company, the limit fixed by statute. Fidelity, etc. Co. *v.* West Pennsylvania, etc. R. R., 138 Pa. St. 494 (1891). *Cf.* Pittsburg, etc. R. R.'s Appeal, 4 Atl. Rep. 385 (Pa., 1886). A mortgage is enforceable although it is given to secure a debt contracted in excess of the amount limited by the charter of the corporation. Allis *v.* Jones, 45 Fed.

road buys out another and assumes the bonds of the latter, it cannot question such bonds on the ground that they exceed the capital stock, in violation of the statute.[1] It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an

Rep. 148 (1891), holding also that a subsequent creditor whose claim also is open to this objection cannot have the mortgage set aside. Bonds in excess of the charter limit may be valid. Des Moines Gas Co. *v.* West, 50 Iowa, 16 (1878); Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). A corporate mortgage is valid though it secures a sum in excess of the amount allowed by statute. Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). Although the statutes authorize a mortgage for an amount not exceeding two-thirds of the capital paid in, yet if a mortgage is given for an amount in excess of the limit, but not in excess of two-thirds of the authorized capital, *bona fide* holders of the bonds may enforce the mortgage. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883). A contractor who takes part in the issue of bonds in excess of the capital stock, an act prohibited by statute, is estopped from questioning the validity of the mortgage securing the bonds. Reed's Appeal, 122 Pa. St. 565 (1888). Although bonds issued by the company to raise money are unauthorized and illegal by statute, yet the holders may collect from the company the amount received by the company on the bonds. *Re* Cork, etc. R'y, L. R. 4 Ch. 748 (1869). But see Davis's Case, L. R. 12 Eq. 516 (1871). A mortgage is not void although the bonds are in excess of the statutory limit. New Britain Nat. Bank *v.* A. B. Cleveland Co., 91 Hun, 447 (1895). A mortgage under the New York act cannot exceed the capital stock or two-thirds of the value of the property at the time of the execution of the mortgage, even though a part of the bonds are not to be issued until subsequently. Flynn *v.* Coney, etc. R. R., 26 N. Y. App. Div. 416 (1898). Bonds in excess of the charter limit of two of the three states in which the company is incorporated are nevertheless valid in the third. Atwood *v.* Shenandoah, etc. R. R., 85 Va. 966 (1889). In Commonwealth *v.* Smith, 92 Mass. 448 (1865), it is held that mortgage bonds issued in excess of the charter limit are void. When the constitution of a state forbids "county, political, or other municipal corporations" within the state to "become indebted in any manner" beyond a named percentage "on the value of the taxable property within such county or corporation," negotiable bonds issued by such corporations in excess of such limit are invalid without regard to any recitals which they contain. Nesbit *v.* Riverside Independent District, 144 U. S. 610 (1892). Where the power to mortgage does not exist, except it be expressly given by statute, as in the case of railroads, a mortgage in excess of the statutory authorization is void. Commonwealth *v.* Smith, 92 Mass. 448 (1865). An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount. If the bonds are not issued, but the land in payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing. Cordova Coal Co. *v.* Long, 91 Ala. 538 (1891).

[1] Such bonds are not void. Smith *v.* Ferries, etc. R'y, 51 Pac. Rep. 710 (Cal., 1897).

increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years.[1]

Where there is an overissue of bonds by reason of the issue of a greater amount of bonds than the mortgage recites and secures, great difficulty is found in determining whether all of the bonds participate in the benefit of the mortgage security. The rule is that all *bona fide* holders participate in the security, even though this includes some or all of the overissue.[2]

In England it has been held that where a company had power to borrow, but the power had been already exhausted, and the directors nevertheless raised more money, they were personally liable to repay it.[3]

[1] Farmers' L. & T. Co. *v.* Toledo, A. A. etc. R'y, 67 Fed. Rep. 49 (1895). Bonds issued in excess of the charter limit are valid to the extent of the consideration received for them. Peatman *v.* Centerville, etc. Co., 69 N. W. Rep. 541 (Iowa, 1896).

[2] Where there are two sets of numbers for two sets of bonds, all secured by the same mortgage, a purchaser is not bound to know of an overissue where the method of numbering is not explained. Stephens *v.* Benton, 1 Duv. (Ky.) 112 (1863). Where by error $420,000 of bonds are issued, while the mortgage secures but $400,000, the extra $20,000 are secured also by the mortgage as against the company, and also as against income bondholders not secured by mortgage; but as against a subsequent recorded second mortgage, the $20,000 of bonds are unsecured, and the income bondholders take the rights of the second mortgage bondholders to come in ahead of this $20,000. Stephens *v.* Benton, 1 Duv. (Ky.) 112 (1863). Where a mortgage is given to secure bonds to the amount of $16,000 per mile of road thereafter built, to be determined on certain certificates to be given by the chief engineer and others, and more than $16,000 of bonds per mile are issued, all of the bonds share equally in the foreclosure assets, since it is impossible to tell which are overissued bonds except by the numbers, which are not sufficient proof of the date of issue. Stanton *v.* Alabama, etc. R. R., 2 Woods, 523 (1875); S. C., 22 Fed. Cas. 1070. See also State *v.* Cobb, 64 Ala. 127 (1879), sustaining the validity of the same bonds and enforcing the state's guaranty of them. But neither the court nor the trustees have power to make an overissue of bonds in order to fulfill a corporate contract. Vose *v.* Bronson, 6 Wall. 452 (1867).

[3] Weeks *v.* Propert, L. R. 8 C. P. 427 (1873); Chapleo *v.* Brunswick, etc. Building Soc., L. R. 6 Q. B. D. 696 (1881); Richardson *v.* Williamson, L. R. 6 Q. B. 276 (1871), explained by Mellish, L. J., in Beattie *v.* Ebury, L. R. 7 Ch. 801 (1872). Where a person advanced money to a company on the security of an invalid Lloyd's bond of the company, the directors who issued it were held not to be personally liable to repay the money advanced. Rashdall *v.* Ford, L. R. 2 Eq. 750 (1866). See on this case, West London Com. Bank *v.* Kitson, L. R. 13 Q. B. D. 363 (1884). Where the directors of a benefit building society had power to borrow if a rule enabling them to do so had been passed,

Sometimes the statutes make the directors personally liable for debts of the company contracted in excess of a certain amount.[1]

The defense of usury on the part of a corporation is considered elsewhere;[2] as is also the subject of the power of a cor-

and they borrowed money for the society in the absence of any rule enabling them so to do, it was held that they were personally liable to repay it. Richardson *v.* Williamson, L. R. 6 Q. B. 276 (1871), explained by Mellish, L. J., in Beattie *v.* Ebury, L. R. 7 Ch. 801 (1872). See also West London Commercial Bank *v.* Kitson, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884). Where a company had power to issue debenture stock to a limited extent, and the directors, after the power was exhausted, issued more debenture stock, they were held personally liable to the holders of the unauthorized stock. The damages were held to be the value which the stock would have had if it had been authorized. Firbank *v.* Humphreys, L. R. 18 Q. B. D. 54 (1886). Although the statute requires the articles to state the amount of indebtedness which may be incurred, the articles may fix the amount, with the right to the stockholders to increase it up to the statutory limit. Thornton *v.* Balcom, 85 Iowa, 198 (1892). Although the directors have agreed to pay for goods in debentures, and although the company is unable to fulfill by reason of all its authorized debentures having already been issued, nevertheless the directors are not personally liable to the vendor to make good the failure to deliver the debentures. Elkington *v.* Hürter, [1892] 2 Ch. 452. Where a person bought new preference stock of a railway company which both he and the directors *bona fide* believed they had power to issue, but which in truth they had not, it was held that he had no remedy against them, for there was nothing more than a common mistake of law. Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876).

[1] Where the statutes provide that directors are liable for an excess of indebtedness, this liability has been held to be a general one, enuring to the benefit of all creditors upon bill filed and not for the benefit of individual creditors. Hornor *v.* Henning, 93 U. S. 228 (1876). *Cf.* Rossiter *v.* Rossiter, 8 Wend. 494 (1832); Palmer *v.* Stephens, 1 Denio, 471 (1845). See also ch. XII, *supra*, and § 682, *supra*. The provision making the directors liable for corporate debts in excess of the capital stock does not relieve the corporation from liability for such excess nor invalidate the debt. Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892). Under the Illinois statute rendering directors liable for debts in excess of the capital stock, if they assent thereto, directors who do not know of such excess until after it has been contracted are not liable, even though they allowed one director to transact all the business. Lewis *v.* Montgomery, 145 Ill. 30 (1893). Where the statute renders the directors liable for money received in excess of a certain limit, they are liable, even though by reason of the fraud of the secretary they did not know that the excessive borrowing was being done. Cross *v.* Fisher, L. R. [1892] 1 Q. B. 467. If directors give their personal notes for corporate debts contracted in excess of the charter limit, they cannot sue the stockholders for contribution. Heald *v.* Owen, 79 Iowa, 23 (1890).

[2] See § 766, *infra*.

poration to loan money, discount notes, and take a mortgage;[1] and the subject of issuing bonds to become due after the charter of the corporation expires.[2]

§ 761. *Bills, notes, and acceptances may be made and issued by corporations.*— A private corporation may make and issue a promissory note.[3]

A note given under the seal of the corporation is not necessarily a sealed instrument, inasmuch as the seal is the old mode of signature to an instrument by a corporation. Such a note is not a sealed instrument in its effect on the negotiability of the instrument, nor on the remedy to enforce it, nor on the statute of limitations.[4] There are cases, however, to the contrary.[5]

[1] See § 690, *supra*.

[2] See § 641, *supra*.

[3] Moss *v.* Averell, 10 N. Y. 449, 457, (1853); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Clark *v.* Farmers', etc. Mfg. Co., 15 Wend. 256 (1836); Mead *v.* Keeler, 24 Barb. 20 (1857); Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 177 (1879); Mott *v.* Hicks, 1 Cow. 513 (1823); Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842); Moss *v.* Oakley, 2 Hill, 265 (1842); Smith *v.* Law, 21 N. Y. 296 (1860); Lucas *v.* Pitney, 27 N. J. L. 221 (1858); Richmond, etc. R. R. *v.* Snead, 19 Gratt. (Va.) 354 (1869), a due-bill; Rockwell *v.* Elkhorn Bank, 13 Wis. 653 (1861); Union Bank *v.* Jacobs, 6 Humph. (Tenn.) 515 (1845); Straus *v.* Eagle Ins. Co., 5 Ohio St. 59 (1855); Curtis *v.* Leavitt, 15 N. Y. 9 (1857); Oxford Iron Co. *v.* Spradley, 46 Ala. 98 (1871); Smith *v.* Eureka Flour Mills Co., 6 Cal. 1 (1856); *Ex parte* Estabrook, 2 Low. 547 (1877); S. C., 8 Fed. Cas. 794; Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Mumford *v.* American, etc. Co., 4 N. Y. 463 (1851); Masters *v.* Reed, 1 Grant Cas. (Pa.) 36 (1854), holding that they may also issue bonds; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250 (1839); Commercial Bank *v.* Newport Mfg. Co., 1 B. Mon. (Ky.) 13 (1840); Leavitt *v.* Blatchford, 17 N. Y. 521 (1858); Magee *v.* Mokelumne Hill, etc. Co., 5 Cal. 258 (1855); Hamilton *v.* Newcastle, etc. R. R., 9 Ind. 359 (1857); Randolph, Com. Paper, §§ 327–335; Millard *v.* St. Francis, etc. Academy, 8 Bradw. (Ill.) 341 (1880), where an educational institution borrowed money and gave a note therefor. A corporation may make a promissory note. Barker *v.* Mechanics', etc. Ins. Co., 3 Wend. 94 (1829). Corporations may issue notes and bills of exchange "where the nature and character of their business warrants it." *Re* General Estates Co., L. R. 3 Ch. 758 (1868). The indorsers of a corporate note cannot question the power of the corporation to make the note. Glidden *v.* Chamberlin, 46 N. E. Rep. 103 (Mass., 1897).

[4] The note of a corporation is negotiable, even though the corporate seal

[5] Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836), holding that such a note is not negotiable so as to authorize a suit by an indorsee in his own name. The note may be sued upon as a sealed instrument. St. James's Parish *v.* Newburyport, etc. R. R., 141 Mass. 500 (1886). An instrument in form a note, but signed by the corporate seal, must be sued on as a sealed instrument. Benoist *v.* Carondelet, 8 Mo. 250 (1843). See also, concerning this subject, §§ 767, 770, *infra*.

A corporation may draw or accept a bill of exchange for the purposes of its business.[1] But a note or bill of exchange issued or accepted by a corporation for purposes which the corporation is not authorized to engage in cannot be enforced by the

is attached thereto. Chase Nat. Bank *v.* Faurot, 149 N. Y. 532 (1896). An instrument in the form of a promissory note does not become an instrument under seal by having the corporate seal affixed. The corporate seal is the corporate mode of signing. *Re* General Estates Co., L. R. 3 Ch. 758 (1868). The seal of a corporation stamped on its promissory note does not destroy the negotiability of the note. The seal is the proper signature of the corporation. *Re* General Estates Co., L. R. 3 Ch. 758 (1868). It is not necessary that the corporate seal be attached. Mott *v.* Hicks, 1 Cow. 513 (1823); Hamilton *v.* Newcastle, etc. R. R., 9 Ind. 359 (1857). See also Buckley *v.* Briggs, 30 Mo. 452 (1860); also § 731, *supra*. The promissory note of a corporation, signed by its president and treasurer as such, is negotiable, even though the seal of the corporation is attached, there being no evidence that it was the intention that the instrument should be under seal, and no words in the note stating that it was to be under seal, and no evidence that the seal was the seal of the corporation, or that it was affixed by authority. Weeks *v.* Esler, 68 Hun, 518 (1893). In this case on appeal, 143 N. Y. 374 (1894), the court doubted whether a corporate seal upon a promissory note could affect its negotiability, and held that, where there was no evidence that the seal was affixed by authority, the negotiability was certainly not affected. The note of a corporation is a note and not a bond, although the corporate seal is affixed thereto. Landauer *v.* Sioux, etc. Co., 72 N. W. Rep. 467 (S. D., 1897).

[1] For instances of making bills, see Olcott *v.* Tioga R. R., 40 Barb. 179 (1862); S. C., aff'd, 27 N. Y. 546 (1863); Safford *v.* Wyckoff, 4 Hill, 442 (1842), holding that a negotiable bill irregularly issued will bind the corporation in favor of a *bona fide* indorsee. For instances of accepting bills, see Munn *v.* Commission Co., 15 Johns. 44 (1818); Partridge *v.* Badger, 25 Barb. 146 (1857); Prairie Lodge *v.* Smith, 58 Miss. 301 (1880), where the corporation accepted an order drawn by its contractor; City Bank of Columbus *v.* Beach, 1 Blatchf. 425 (1849); S. C., 5 Fed. Cas. 739. In England it is held that a bill of exchange cannot be accepted by a mining company unless proof is given that it is necessary. Dickinson *v.* Valpy, 10 B. & C. 128 (1829). Nor by a railroad. Bateman *v.* Mid-Wales R'y, L. R. 1 C. P. 499 (1866). Nor a salt company. Bult *v.* Morrell, 12 Ad. & E. 745 (1840); Broughton *v.* Manchester, etc. Works, 3 B. & Ald. 1 (1819). Nor a salvage company. Thompson *v.* Universal, etc. Co., 1 Exch. 694 (1848), (a promissory note case). Nor a cemetery. Steele *v.* Harmer, 14 M. & W. 831 (1845). But the right may exist if specified in the articles of incorporation. *Re* Peruvian R'ys, L. R. 2 Ch. 617 (1867). Directors who had accepted bills on behalf of a company, which had no power under its private acts of parliament to accept bills, were held liable to the holders, who had no notice in fact that the company was not empowered to accept bills. West London Com. Bank *v.* Kitson, L. R. 12 Q. B. D. 157 (1883), and L. R. 13 Q. B. D. 360 (1884).

payee or by an indorsee taking the same with notice.[1] A corporation, however, cannot set up the defense of *ultra vires* to a note where it has received the property for which the note was given.[2] The indorsers of a corporate note cannot question the power of the corporation to make the note.[3]

A *bona fide* purchaser of a corporate note is protected as he would be if the maker were an individual.[4]

[1] Bacon *v.* Mississippi Ins. Co., 31 Miss. 116 (1856); Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144 (1861); Pearce *v.* Madison, etc. R. R., 21 How. 441 (1858), where a note given by a railroad company for the purchase of a steamboat was held void; Ehrgott *v.* Bridge Manufactory, 16 Kan. 486 (1876), where the payee took the note in payment of a third person's debt. Parties taking a corporate bill of exchange in payment of business which they knew the corporation was not authorized to carry on cannot enforce it. Balfour *v.* Ernest, 5 C. B. (N. S.) 601 (1859). But see § 760, *supra*.

[2] Dewey *v.* Toledo, etc. R'y, 91 Mich. 351 (1892).

[3] Glidden *v.* Chamberlin, 46 N. E. Rep. 103 (Mass., 1897).

[4] Bissell *v.* Michigan, etc. R. R. Cos., 22 N. Y. 258, 289 (1860); Daniel, Neg. Inst., §§ 1502–1504; Stoney *v.* American, etc. Ins. Co., 11 Paige, 635 (1845). See Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842), holding that the burden of proof is on the holder; Genesee Sav. Bank *v.* Michigan Barge Co., 52 Mich. 438 (1884). Although an agent duly authorized by the corporation to make notes for it issues its notes for accommodation, yet a *bona fide* holder cannot hold the agent liable in tort. He should sue the corporation on the notes. Bird *v.* Daggett, 97 Mass. 494 (1867). See also Monument Nat. Bank *v.* Globe Works, 101 Mass. 57 (1869); Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299 (1876). In these cases the agent indorsed paper for the accommodation of third parties. Madison, etc. R. R. *v.* Norwich Sav. Soc., 24 Ind. 457 (1865), where an agent represented a railroad company as being the owner of certain bonds, when in fact it was an accommodation guarantor. It was held liable upon the guaranty.

In Merchants' Bank *v.* State Bank, 10 Wall. 604, 644 (1870), Mr. Justice Swayne said: "Where a party deals with a corporation in good faith — the transaction is not *ultra vires* — and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists. If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them." This remark was quoted with approval in Gano *v.* Chicago, etc. R'y, 60 Wis. 12 (1884); Claflin *v.* Farmers', etc. Bank, 25 N. Y. 293 (1862), where, however, the certification of his personal check by the president of a bank was considered to constitute such a suspicious circumstance as should put a purchaser upon his guard, and render the certification invalid even in the hands of a *bona fide* holder for value. See also § 293, *supra*. Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256 (1825), where a draft fraudulently drawn by a president was enforced

A corporation has no power to become an accommodation indorser of a note; but where all the stockholders assent thereto and creditors are not injured, the indorsement is sustained.[1] A corporation may of course draw checks on its bank account.[2]

The authority of the president or cashier or other officer to issue a note in the name of the corporation is discussed elsewhere.[3] Sometimes the charter or a statute forbids a corpora-

against the corporation; Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859), holding that bonds were not void because secured by a mortgage executed without authority; Rowland *v.* Apothecaries' Co., 47 Conn. 384 (1879), a note of a corporation given by its treasurer for money for his personal use being held valid against the corporation; Mechanics' Banking Assoc. *v.* New York, etc. Co., 35 N. Y. 505 (1866), accommodation indorsement by president; *Ex parte* Estabrook, 2 Low. 547 (1877); S. C., 8 Fed. Cas. 794, a note given by a manager without authority; Thompson *v.* Lambert, 44 Iowa, 239 (1876), misappropriation by officers of money obtained on mortgage; White *v.* How, 3 McLean, 291 (1843); S. C., 29 Fed. Cas. 1019, where the corporate agent improperly issued notes; Genesee Sav. Bank *v.* Michigan Barge Co., 52 Mich. 438 (1884), where the treasurer was authorized to issue notes and did so, but improperly, it was claimed. The rule was stated to be (p. 446) that "where a corporation has, under any circumstances, power to issue negotiable paper, the *bona fide* holder has the right to presume that it was issued under circumstances which gave the requisite authority; and the negotiable paper of a corporation which appears on its face to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a *bona fide* holder;" Western, etc. R. R. *v.* Franklin Bank, 60 Md. 36 (1882), where a clerk forged certificates of coupons surrendered for funding. Certificates of deposit issued by a bank cashier for the purpose of raising money for the bank's use, though not based on an actual deposit, have been held binding upon the bank when held by *bona fide* purchasers without notice. See ch. XLIII, *supra*. In The Floyd Acceptances, 7 Wall. 666 (1868), it was held that acceptances of drafts due in the future for army supplies not delivered were void as not being within the authority of the secretary of war. Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Ellsworth *v.* St. Louis, etc. R. R., 33 Hun, 7; aff'd, 98 N. Y. 553 (1885), where bonds were issued in violation of the charter; *Re* General Estates Co., L. R. 3 Ch. 758 (1868). See also *Re* Land Credit, etc. Co., L. R. 4 Ch. 460 (1869); Beers *v.* Phœnix Glass Co., 14 Barb. 358 (1852), secretary borrowing money without authority. The *bona fide* purchaser of a note indorsed by a corporation may enforce it against the company. Central Bank *v.* Empire, etc. Co., 26 Barb. 23 (1857); Bridgeport City Bank *v.* Empire, etc. Co., 30 Barb. 421 (1859). But a purchaser of a bill of exchange before it is accepted by the company is not such a *bona fide* purchaser. Farmers', etc. Bank *v.* Empire, etc. Co., 5 Bosw. 275 (1859). See also § 774, *infra*.

[1] See § 774, *infra*.

[2] Waterlow *v.* Sharp, L. R. 8 Eq. 501 (1869); *Re* Cefn Cilcen Min. Co., L. R. 7 Eq. 88 (1868).

[3] See §§ 716, etc., *supra*.

tion from issuing a note. In such a case the note would be void.[1] The holder, however, may collect from the corporation the money or value advanced for the note.[2] The power of a corporation to indorse notes in connection with its own business is of course undoubted. It is a part of the every-day business of most corporations.[3]

§ 762. *Bonds may be issued by corporations — Bonds may be valid although the mortgage securing them is invalid — Bonds to preferred creditors — Re-issues.*— A corporation has inherent power to issue bonds for the payment of money, and no express power is necessary to authorize the issue.[4] A provision

[1] Leavitt *v.* Palmer, 3 N. Y. 19 (1849); Root *v.* Wallace, 4 McLean, C. C. 8 (1845); S. C., 20 Fed. Cas. 1167; Davis *v.* River Raisin Bank, 4 McLean, C. C. 387 (1848); S. C., 7 Fed. Cas. 111; Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842); New York Firemen Ins. Co. *v.* Ely, 2 Cow. 678 (1824); Weed *v.* Snow, 3 McLean, 265 (1843); S. C., 29 Fed. Cas. 572; Root *v.* Goddard, 3 McLean, 102 (1842); S. C., 20 Fed. Cas. 1159; Hayden *v.* Davis, 3 McLean, 276 (1843); S. C., 11 Fed. Cas. 898, where an acceptance and bond given to secure it were held void; Broughton *v.* Manchester, etc. Co., 3 B. & Ald. 1 (1819), where the bill of exchange contravened the statute giving the Bank of England a monopoly; Bank of Chillicothe *v.* Dodge, 8 Barb. 233 (1850), holding, however, that a foreign corporation innocently holding a draft issued in violation of a statutory prohibition stands in the same situation as if it had paid money under a mistake of material facts, and may recover the money paid for it. See also Smead *v.* Indianapolis, etc. R. R., 11 Ind. 104 (1858). Certificates of deposit payable to bearer are not within the New York restraining statutes prohibiting the issue of notes for circulation as money. Mumford *v.* American, etc. Co., 4 N. Y. 463 (1851).

[2] Oneida Bank *v.* Ontario Bank, 21 N. Y. 490 (1860). *Cf.* Attorney-General *v.* Life, etc. Ins. Co., 9 Paige, 470 (1842). See also the English cases *supra.*

[3] Olcott *v.* Tioga, etc. R. R., 27 N. Y. 546 (1863); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Frye *v.* Tucker, 24 Ill. 180 (1860); Buckley *v.* Briggs, 30 Mo. 452 (1860); Smith *v.* Johnson, 3 H. & N. 222 (1858), the last case being that of a bill of exchange.

[4] Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859); Commonwealth *v.* Smith, 92 Mass. 448 (1865). Also many cases *infra.* They may be issued to carry out a reorganization scheme. Memphis, etc. R. R. *v.* Dow, 19 Fed. Rep. 388 (1884), and 120 U. S. 287 (1887). A railroad company has inherent power to issue bonds. Craven County Com'rs *v.* Atlantic, etc. R. R., 77 N. C. 289 (1877); Miller *v.* New York, etc. R. R., 8 Abb. Pr. 431 (1859); McMasters *v.* Reed, 1 Grant, Cas. (Pa.) 36 (1854). A furnace and chemical company may issue first-mortgage bonds, and may sell them, partial payments to be made from time to time. These payments may be enforced. Davis *v.* Montgomery, etc. Co., 8 S. Rep. 496 (Ala., 1890). A subscription for bonds, the amount being payable on call, may be paid at once and the bonds demanded. Watjen *v.* Green, 48 N. J. Eq. 322 (1891). A railroad corporation may

in a charter that property should not be mortgaged or pledged except with the consent of the stockholders is for their benefit, and cannot be set up by one creditor as against another creditor.[1]

The corporation may issue bonds unsecured by mortgage. Hence, where a mortgage is made to secure the bonds, and that mortgage is illegal and declared void by the courts, the bonds will be valid as unsecured obligations.[2] The validity of

issue bonds without express authority so to do. Miller *v.* New York, etc. R. R., 8 Abb. Pr. 431 (1859). "There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter or in some other legislative act. A bond is merely an obligation under seal." The court held, however, that in Massachusetts the statute specifying the purposes for which bonds may be issued and regulating their issue prevents a common-law issue of them. Commonwealth *v.* Smith, 92 Mass. 448 (1865). In McLanahan *v.* Mott Co., 73 Hun, 131 (1893), the court declared illegal a proposed issue of $100,000,000 of bonds payable in the year 4343, and to draw interest at six per cent annually, two per cent to be paid semi-annually, and the remaining two per cent at the maturity of the bonds, two thousand four hundred and fifty years hence. A sinking fund was to be established for gradual redemption. This was to be made up of $500,000 deposited with the trustee of the mortgage before each interest day, and also a sum equal to the semi-annual interest, two per cent, on all bonds previously redeemed. The bonds to be redeemed were to be designated by the trustees by lot one month before the bonds were redeemed. They were to be redeemed "at their maturity value;" and this language was construed by the directors to mean that each bond was to be redeemed by the payment of $5,000, such amount being arrived at by taking the principal of the bond, $100, and adding to it items of the annual interest at two per cent for two thousand four hundred and fifty years. For another lottery scheme in the issue of bonds, see the indictment in MacDonald *v.* U. S., 63 Fed. Rep. 426 (1894). Power to mortgage property gives power to borrow money and issue bonds. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). Where a corporation has power under the statute to execute bonds and mortgages, neither a preferred nor common stockholder can prevent it on the theory that the directors may possibly use the bonds for other purposes than those specified in the statute and mortgage. Thompson *v.* Erie R'y, 42 How. Pr. 68 (1871). Purchase-money bonds given by a cemetery corporation in New York are legal. Seymour *v.* Spring Forest Cem. Assoc., 19 N. Y. Supp. 94 (1892). Where a land-improvement company causes a street railway to be built, and the two companies, having substantially the same stockholders, join in the execution and issue of bonds secured by a mortgage on both their properties, the bonds and mortgage are legal. Northside R'y *v.* Worthington, 88 Tex. 562 (1894).

[1] Alabama, etc. Co. *v.* McKeever, 20 S. Rep. 84 (Ala., 1896). See also § 808, *infra*.

[2] The bond may be valid although the mortgage is invalid for want of

mortgage bonds given to certain creditors by way of preference is considered elsewhere.[1] A bond dividend is sometimes made. When made under proper circumstances it is legal.[2]

It is legal for a corporation to sell its bonds to its directors, provided the sale is a fair one. Directors hold a fiduciary relation towards the stockholders, and sales of corporate property to the directors are voidable at the instance of a stockholder.[3] But, unless a stockholder objects, the sale is valid. These principles apply to a director's purchase of bonds.[4] Although the amount of bonds that may be issued is limited by the charter or by statute, yet bonds in excess of that amount may be enforced against the corporation.[5] An agreement of a corporation to issue a certain amount of bonds does not limit the bonded debt to that amount.[6] The company may re-issue such of its

power to make it. Illinois T. & S. Bank *v.* Pacific R'y, 49 Pac. Rep. 197 (Cal., 1897); Union Trust Co. *v.* New York, etc. R. R., 1 R'y & Corp. L. J. 50 (Ohio Com. Pl., 1887). Where a stockholder of a vendor corporation sets aside the sale of a railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee. Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884). Bonds may be issued which are not a lien upon any property and are not secured by any mortgage or deed of trust. It is immaterial that they are called "equipment bonds." They may, however, by contract constitute an equitable lien. Tysen *v.* Wabash R'y, 15 Fed. Rep. 763 (1883). Where one road has been leased to another, the two roads may subsequently be consolidated and consolidated mortgage bonds issued, of which a part shall go to the former lessor company in extinguishment of its claim to rent under the old lease. If the transaction is a fair one towards the stockholders of the lessor, the court will not disturb it. Hazard *v.* Vermont, etc. R. R., 17 Fed. Rep. 753 (1883). The bonds of a railroad company are not rendered void in consequence of being secured by a mortgage which is void because the company had no authority to execute it. Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859). Equipment bonds unsecured by mortgage are subject to future mortgages made by a consolidated company into which the company issuing the bonds has been consolidated. Though the holders might have exchanged their bonds for consolidated mortgage bonds, a failure to exercise the right is fatal. Wabash, etc. R'y *v.* Ham, 114 U. S. 587 (1885). *Cf.* Compton *v.* Jesup, 167 U. S. 1 (1897). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. Johnson *v.* Mercantile Trust, etc. Co., 94 Ga. 324 (1894).

[1] See § 691, *supra*.

[2] See § 766, *infra*.

[3] See § 653, *supra*.

[4] See § 692, *supra*.

[5] See § 760, *supra*.

[6] Cordova Coal Co. *v.* Long, 91 Ala. 538 (1891), holding also that if the bonds are not issued, but the land in

own bonds as it has purchased.[1] A corporation cannot have specific performance of an agreement of a person to purchase its debentures. The remedy is an action for damages.[2] For breach of an agreement to subscribe to bonds of a corporation the damage is the loss actually sustained, the contract really being a contract to loan money.[3] An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent.[4]

§ 763. *Pledge of bonds by a corporation and enforcement thereof.*— A corporation has power to pledge its bonds as security for a corporate debt.[5]

The statutes of the state may, however, limit this right, as

payment therefor is deeded to the company, the party has a lien on the land, but must demand the bonds before suing.

[1] Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880); *Re* Mortgage Bonds, 15 S. C. 304 (1880); *Ex parte* Williams, 18 S. C. 299 (1881). Although a mortgage is given to secure bonds in order to retire previous bonds, yet if, after retiring such bonds, some of the new issue still remain, the company may issue them. Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). Such part of the first-mortgage bonds as are re-issued may be issued and deposited as additional security for second-mortgage bonds. Atwood *v.* Shenandoah, etc. R. R., 85 Va. 966 (1889). Outstanding bonds which are purchased by a corporation may be re-issued. Pruyne *v.* Adams Furniture, etc. Co., 92 Hun, 214 (1895). Bonds which have been purchased by the corporation and not re-issued cannot participate in the proceeds of a foreclosure sale. An assignment by the company of past-due coupons which it has purchased is not a re-issue of them where they are not actually delivered. New York Security, etc. Co. *v.* Equitable Mortgage Co., 77 Fed. Rep. 64 (1896).

[2] South, etc. Co. *v.* Wallington, 78 L. T. Rep. 426 (1898).

[3] South African Territories, Ltd., *v.* Wallington, 76 L. T. Rep. 520 (1897).

[4] Pegge *v.* Neath, etc. Co., 77 L. T. Rep. 550 (1897).

[5] Peck *v.* New Jersey, etc. R. R., 22 Hun, 129 (1880); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190 (1881); Peck *v.* New York, etc. R'y, 85 N. Y. 246 (1881). Bonds made to retire and pay other bonds and debts may be issued as collateral security for such other debts. Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880); County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). Where bonds are authorized for extension purposes, and the mortgage and bonds so provide, they cannot, after the company becomes insolvent, be used as a pledge for old debts where the pledgees are really the directors. Farmers' L. & T. Co. *v.* San Diego, etc. R'y, 45 Fed. Rep. 518 (1891). Bonds may be pledged by the company for past or new debts. Lehman *v.* Tallassee, etc. Co., 64 Ala. 567 (1879); Grand Rapids, etc. R. R. *v.* Sanders, 54 How. Pr. 214 (1877); *Re* Regent's, etc. Co., 24 W. R. 687 (1876). A corporation may deposit its bonds as collateral security for notes made for its benefit by its stockholders under a verbal agreement that the bonds shall be held for the protection and security of the makers against liability on the note, their respective in-

in Wisconsin, where bonds can be issued at not less than seventy-five cents on the dollar.[1] A constitutional provision against the issue of bonds except for money, labor, or property does

terests in the bonds being proportionate with their agreed liability on the note as between themselves. Reid *v.* Bank of Mobile, 70 Ala. 199 (1881); Rice's Appeal, 79 Pa. St. 168 (1875), holding that the accommodation indorser for the company may enforce the bonds to the extent of his liability. The company may pledge its unissued bonds to secure its debts. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). A *bona fide* pledgee of bonds from the company is protected in his pledge. Allen *v.* Dallas, etc. R. R., 3 Woods, 316 (1878); S. C., 1 Fed. Cas. 465. But not if the pledge was in bad faith in order to buy the property in cheaply. See § 766, *infra*. The issue of bonds as a pledge and security for an antecedent indebtedness of the company has been held to be contrary to the provisions of the constitution of California relative to fictitious bonds. Farmers' L. & T. Co. *v.* San Diego, etc. R'y, 45 Fed. Rep. 518 (1891). Where a subscriber to bonds fails to pay, and the corporation then pledges them, it can hold him liable only for the value of the bonds at the time of the pledge, and not the value at a later date. Cleveland Iron Co. *v.* Ennor, 14 N. E. Rep. 673 (Ill., 1888). Pledgees from the company itself may be *bona fide* holders and will then be protected as such. Allen *v.* Dallas, etc. R. R., 3 Woods, 316 (1878); S. C., 1 Fed. Cas. 465. It is legal for a railroad company to pledge its bonds. Power to sell gives power to pledge. Farmers' L. & T. Co. *v.* Toledo, etc. Co., 54 Fed. Rep. 759 (1893). Where the pledgor is the corporation itself, and by agreement the pledgee is authorized to purchase the bonds at a pledgee's sale upon default, and does so, and the mortgage is foreclosed, an outside creditor cannot question the full title of the pledgee to the bonds, the company itself not objecting. Farmers', etc. Co. *v.* Toledo, etc. Co., 54 Fed. Rep. 759 (1893). A corporation may pledge its unissued bonds. Nelson *v.* Hubbard, 96 Ala. 238 (1892). Bonds may be pledged. Hunt *v.* Memphis Gaslight Co., 95 Tenn. 136 (1895). In *Ex parte* Carolina Nat. Bank, 18 S. C. 289 (1882), the receiver borrowed money to operate the railroad and pledged the unissued bonds of the company. He borrowed $20,000 and pledged $134,000 of bonds. The pledgee sold them out for $13,000, and then applied to have the remaining $7,000 paid out of the income. The court so ordered, the bondholders having failed to object for six years. That a corporation may pledge its unissued stock, see § 465, *supra*.

[1] Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. National, etc. Works *v.* Oconto, etc. Co., 52 Fed. Rep. 29 (1892). Bonds issued in Wisconsin in pledge for a debt of the company, with a stipulation that they should be accounted for at least seventy-five cents on the dollar, are void by statute, and the pledgees cannot maintain a bill in equity to enforce their lien by reason of the bonds. Pfister *v.* Milwaukee Electric R'y, 83 Wis. 86 (1892). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can

not prevent the corporation from pledging its bonds.[1] A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president.[2] A *bona fide* pledgee of bonds is protected to the same extent that *bona fide* purchasers are protected.[3] The power of a corporate agent to sell bonds does not give him power to pledge them even to secure corporate debts, and holders not *bona fide* are not protected.[4] A pledgee of bonds and coupons may collect the same and apply the proceeds on the debt.[5] A holder of collateral may enforce his claim in the ordinary way by judgment and execution against the debtor without any deduction for his collateral.[6]

Where the company pledges its own bonds they may be sold upon notice to pay the debt the same as shares of stock, even though the bonds are promises to pay and the sale has been enjoined in another state.[7] Parties holding bonds as collateral

he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. Hickley *v.* Pfister, 83 Wis. 64 (1892). Although bonds are issued illegally, being given in pledge for less than seventy-five cents on the dollar, yet neither the company nor an officer, nor a stockholder, can maintain an action for the surrender or cancellation of such bonds, unless they tender the amount for which the bonds were pledged. The company and its officers are in equal wrong with the pledgee. Hickley *v.* Pfister, 83 Wis. 64 (1892).

[1] Illinois T. & S. Bank *v.* Pacific R'y, 49 Pac. Rep. 197 (Cal., 1897). Although a corporation pledges $150,000 unissued bonds to secure a corporate debt of $85,000, yet there is no fictitious issue of bonds. Dexter *v.* McClellan, 22 S. Rep. 461 (Ala., 1897). See also § 766, *infra*.

[2] Hook *v.* Ayers, 63 Fed. Rep. 347 (1894).

[3] The following syllabus is a clear statement of the law: The pledgee of negotiable bonds before maturity, and without notice to him of any defect of title, as collateral security for the loan of money, is entitled to hold such paper, to the extent of his loan, with the same immunities as an ordinary holder of commercial paper taken by purchase in good faith, for value, and before maturity; and it is not material whether the evidence of the principal debt be in negotiable form or not. Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., 65 Fed. Rep. 341 (1894). Pledgees of bonds from the corporation are not *bona fide* holders where their debts were past due at the time of the pledge. Moore *v.* Ensley, 20 S. Rep. 744 (Ala., 1896). This decision is in accordance with the New York decisions, but is not the general law of the land.

[4] Shaw *v.* Saranac Horse Nail Co., 144 N. Y. 220 (1894).

[5] Ritchie *v.* McMullen, 79 Fed. Rep. 522, 551 (1897).

[6] Chemical Nat. Bank *v.* Armstrong, 59 Fed. Rep. 372 (1893); Lewis *v.* United States, 92 U. S. 618 (1875).

[7] Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889). A

to corporate debts cannot be enjoined from selling them out during a voluntary dissolution.[1] The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell.[2] A creditor of a corporation who holds collateral security for his debt cannot be compelled to exhaust such security before resorting to the general assets of the corporation for payment.[3] Where a corporate creditor has collateral security he may participate in the corporate assets as though he had no security, and afterwards realize what he can from the security, except that any surplus over and above his claim must, of course, be paid over to the representative of the insolvent corporation.[4]

sale by a pledgee after insolvency proceedings are commenced gives the purchaser none except equitable rights. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889). *Cf.* Jerome *v.* McCarter, 94 U. S. 734, 739 (1876).

[1] *Re* Binghamton Gen. Elec. Co., 143 N. Y. 261 (1894). The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell. National, etc. Bank *v.* Benbrook, etc. Co., 27 S. W. Rep. 297 (Tex., 1894). A corporate creditor who takes negotiable corporate bonds as collateral security, and then sells the bonds to himself for a nominal consideration, cannot, under the Connecticut statutes, file a claim for the par value of the bonds and also for his claim, less the amount realized at the sale, the bonds not being secured by mortgage. *Re* Waddell-Entz Co., 67 Conn. 324 (1896).

[2] Guaranty Trust Co. *v.* Galveston City R. R., 87 Fed. Rep. 813 (1898).

[3] Doe *v.* Northwestern Coal, etc. Co., 78 Fed. Rep. 62 (1896).

[4] Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893). A creditor of an insolvent national bank is entitled to prove the whole amount of the claims against it held by him, without reference to the collateral held to secure such claims. Merrill *v.* First Nat. Bank, 75 Fed. Rep. 148 (1896). Although a creditor of a corporation holds collateral security, nevertheless, upon the insolvency of the corporation, he may participate in the assets as though he did not have the collateral security, and may realize and apply the collateral security in addition to his proportionate part of the assets, to the extent, however, only of the full amount of his debt. Chemical Nat. Bank *v.* Armstrong, 59 Fed. Rep. 372 (1893). A pledgee of bonds from the corporation is entitled to full dividends upon the foreclosure of the mortgage until the amount due on the pledge has been fully paid. Cochran *v.* Anglo-American, etc. Co., 69 Hun, 168 (1893). The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral, since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. New York Security, etc. Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537 (1896). Mortgage bondholders may file their claims as general creditors in addition to realizing what they can from

Where, however, the company pledges its bonds, the pledgee can prove up against general assets his debt only and not the par value of the bonds.[1] The pledgee of securities who turns them in to a reorganization and takes new securities, without the consent of the pledgor, is guilty of a conversion, but the pledgor can recover only the actual value of the securities so turned in. The pledgee is not bound to aid the pledgor in using the pledge in a reorganization, nor is the pledgee bound to delay the reorganization on account of any demand of the pledgor.[2] A mechanic's lien on the plant of a gas company may be waived by taking bonds of the company as collateral se-

their mortgage. A pledgee of mortgage bonds from the corporation itself, after realizing what he can from the bonds, may file a claim as a general creditor, not as a bondholder, but on his original claim. Pattberg *v.* Lewis, etc. Bros., 38 Atl. Rep. 205 (N. J., 1897). Where a corporation has given bonds as collateral security for certain debts, the assets of the corporation upon insolvency should be marshaled, the bonds being estimated at their true value, and the creditor allowed to pro rate with unsecured creditors upon at least the balance of his claim. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). In Nebraska, the court, after reviewing the conflicting rules in the different states, held that, where a creditor held collateral, he must deduct from his claim all that he realizes from the collateral before he can get a dividend, and must also deliver up his collateral to the receiver. State *v.* Nebraska Sav. Bank, 40 Neb. 342 (1894). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re* Waddell-Entz Co., 67 Conn. 324 (1896). Under the statutes of Connecticut a pledgee is limited to a dividend on the unpaid portion of his claim unless he waives his security altogether. *In re* Greeley & Co., 40 Atl. Rep. 233 (Conn., 1898).

[1] *Re* Blakely, etc. Co., L. R., 8 Eq. 244 (1869); Newport, etc. Co. *v.* Douglass, 12 Bush (Ky.), 673 (1877). The bonds of a corporation not secured by mortgage, when given as collateral security for the debt of the company, do not entitle the creditor to any greater dividend in the assets of the company, upon its insolvency and winding up, than he would have if he did not hold such collateral security. International Trust Co. *v.* Union Cattle Co., 3 Wyo. 803 (1892). Bonds issued as collateral security have the right to participate in the benefits of the foreclosure to the extent of their par value. Duncomb *v.* New York, etc. R. R., 84 N. Y. 190 (1881); Peck *v.* New York, etc. R'y, 85 N. Y. 246 (1881); *Re* Regent's, etc. Co., L. R. 3 Ch. D. 411 (1875); Jerome *v.* McCarter, 94 U. S. 734, 740 (1876); Third Nat. Bank *v.* Eastern R. R., 122 Mass. 240 (1877); Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885). See also § 476, *supra*.

[2] Griggs *v.* Day, 21 N. Y. App. Div. 442 (1897). To same effect, see 136 N. Y. 152, 162 (1892).

curity, where the bonds recite that they are a first mortgage.[1] The fact that the bonds pledged by the corporation sell for very little at a pledgee's sale does not invalidate the sale.[2] But any fraud whereby the bonds are purposely sacrificed will invalidate the sale.[3] Purchasers of bonds at a pledgor's sale, though the pledge was by the company itself, and the price at such sale very low, may enforce such bonds at their par value.[4] In foreclosure the pledgee of bonds from the corporation is the owner to the extent of his loan.[5] Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money;[6] and where a corporation delivers bonds to a creditor to sell and apply on his debt, the bonds are good though he fraudulently disposes of them.[7] Where bonds are deposited as collateral security to notes, and before the notes are due the bonds are stamped on their face as subordinate to a junior lien, the indorsers of the notes are released.[8] A pledge of bonds by one person to another is similar to a pledge of stock, a subject which is fully considered elsewhere.[9] A sale of bonds as collateral security, in violation of the agreement as to the notice to be given, does not release a surety on the note secured

[1] Bristol, etc. Co. *v.* Bristol Gas, etc. Co., 42 S. W. Rep. 19 (Tenn., 1897).

[2] Wheelwright *v.* St. Louis, etc. Transp. Co., 56 Fed. Rep. 164 (1893).

[3] James *v.* Railroad Co., 6 Wall. 752 (1867). See 76 N. W. Rep. 195

[4] Jerome *v.* McCarter, 94 U. S. 734 (1876). The purchaser of bonds at a pledgee's sale may enforce such bonds for their full par value. Wade *v.* Chicago, etc. R. R., 149 U. S. 327 (1893). Where the pledgee sells bonds held as collateral and buys them in, he may enforce them for their full par value instead of to the extent of only his claim. Atlantic Trust Co. *v.* Woodbridge, etc. Co., 86 Fed. Rep. 975 (1897).

[5] Hayden *v.* Lincoln City Elect. R'y, 43 Neb. 680 (1895).

[6] Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896).

[7] Persse *v.* Atlantic, etc. Tunnel Co., 5 Colo. App. 117 (1894).

[8] Nassau Bank *v.* Campbell, 74 Hun, 616 (1893).

[9] See ch. XXVI, *supra*. *Bona fide* pledgees have the same rights as a *bona fide* purchaser to the extent of their pledge. Allen *v.* Dallas, etc. R. R., 3 Woods, 316 (1878); S. C., 1 Fed. Cas. 465. Where a bank receives a pledge of bonds in good faith its title is good, although it advanced money on the bonds by certifying checks, contrary to the national banking act. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240 (1892). The indorser of a note secured by bonds is released if the bonds are subsequently, by the holder of the note, made subject to liens which originally were second to the mortgage securing the bonds. Nassau Bank *v.* Campbell, 63 Hun, 229 (1892). A pledgee of bonds from an individual pledgor may prove the entire amount of the collaterals, but can recover no

by the bonds, but discharges him only to the extent of the actual value of the bonds.[1]

§ 764. *Forged bonds — Priorities among bonds — Incomplete bonds — References to the mortgage — Purposes of the issue.*— If any material part of a bond is forged the bond is void.[2] An alteration of the number, however, is immaterial and does not affect the bond itself.[3] The bonds may be incomplete, in that the payee or place of payment may be omitted. In such cases the validity and enforceability of the bond depend on the extent of the omission and the facts connected with the case.[4]

surplus over and above the amount of his debt or advances with proper costs of suit. The pledgor takes the remainder. Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885).

[1] Vose *v.* Florida R. R., 50 N. Y. 369 (1872).

[2] Bonds containing a forged seal of the corporation and a forged certificate by the trustee are invalid and void, and not enforceable. A consolidated road is not liable therefor. Maas *v.* Missouri, etc. R'y, 83 N. Y. 223 (1880). See also §§ 363–367, *supra*. But it is no defense to an action on coupons that certain forged bonds are out. Wood *v.* Consolidated, etc. Co., 36 Fed. Rep. 538 (1888).

[3] In State *v.* Cobb, 64 Ala. 127, 158 (1879), the court said: "The change or mutilation of the number would be a mere change or mutilation of a mark, placed upon the bond, it may be, by the maker, or the indorser, or it may be by any holder, for the convenience and protection of the one or the other." The alteration of the number on a bond does not destroy its negotiability, and a *bona fide* purchaser of it from a thief is protected. The number is merely for convenience in identifying the bond, the same as the private mark of the owner upon it would be. Commonwealth *v.* Emigrant, etc. Bank, 98 Mass. 12 (1867), citing Smith *v.* Ill. etc. R. R. (N. Y. Super. Ct.). To same effect, Elizabeth *v.* Force, 29 N. J. Eq. 587 (1878); Birdsall *v.* Russell, 29 N. Y. 220 (1864). Even though the thief of negotiable railroad bonds changes the numbers on the bonds, yet the *bona fide* purchaser is protected. Such an alteration is an immaterial one. Wylie *v.* Missouri Pac. R'y, 41 Fed. Rep. 623 (1890).

[4] Railroad bonds may be negotiable though payable to a blank person. White *v.* Vermont, etc. R. R., 21 How. 575 (1858). Although the name of the payee is left blank in a debenture, yet if there is a corporate contract to deliver debentures to the holder of them, they are enforceable. *Re* Queensland, etc. Co., [1894] 3 Ch. 181. A bond incomplete in that the payee is left blank may be filled in by any holder and sued upon by him, where the proceeds from the sale thereof went to the company and the legislature has ratified the bond. Chapin *v.* Vermont, etc. R. R., 74 Mass. 575 (1857); Hubbard *v.* New York, etc. R. R., 36 Barb. 286 (1862). Where in a railroad bond the place of payment is left blank, with power to the president to fill it in, until so filled in the bond is not negotiable, and a thief can give no title to a purchaser. Ledwich *v.* McKim, 53 N. Y. 307 (1873). Where the place of payment is left blank, with authority to the president to fill it in, but he does not fill it in, and the bonds are stolen from the company, they are not negotiable. Jackson *v.* Vicksburg, etc. R. R.,

Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them.[1]

The vendor of bonds does not impliedly warrant that they were legally issued,[2] nor does he guarantee payment.[3] The numbers on the bonds do not give one bond any priority as against other bonds having a larger number.[4] Nor does the fact that they were issued at different times give any prior right to payment of those first issued.[5] All the bonds are conclusively presumed to have been issued at their date.[6] All outstanding bonds in *bona fide* hands are conclusively presumed to have

2 Woods, 141 (1876); S. C., 13 Fed. Cas. 257. Where the bonds state that the president is authorized to fix the place of payment, and the bonds are stolen from the company before he does so, they are not negotiable nor collectible. Parsons *v.* Jackson, 99 U. S. 434 (1878). In the case of a note by a firm the date may be filled in by any holder. Michigan Bank *v.* Eldred, 9 Wall. 544 (1869). Municipal bonds payable "to ——, his executors, administrators, and assigns," are negotiable. Dutchess County Ins. Co. *v.* Hachfield, 1 Hun, 675 (1874). Bonds stolen before completion are void. Maas *v.* Missouri, etc. R'y, 11 Hun, 8 (1877), where forgery completed the bonds.

[1] Maas *v.* Missouri, etc. R'y, 83 N. Y. 223 (1880). Municipal bonds stolen and negotiated before they were legally issued by the municipality are void, and even a *bona fide* purchaser cannot enforce them. Germania Savings Bank *v.* Suspension Bridge, 73 Hun, 590 (1893).

[2] Otis *v.* Cullum, 92 U. S. 447 (1875).

[3] Ketchum *v.* Duncan, 96 U. S. 659 (1877).

[4] "The bonds all bear the same date, and fall due on the same day. Bond number one has therefore no advantage over any other bond, and no presumptions are to be indulged in its favor." Stanton *v.* Alabama, etc. R. R., 2 Woods, 523 (1875); S. C., 22 Fed. Cas. 1070. The fact that bonds are numbered does not give priority in payment to one bondholder as against another. Commonwealth *v.* Susquehanna, etc. R. R., 122 Pa. St. 306, 321 (1888).

[5] Reed's Appeal, 122 Pa. St. 565 (1888). Each bond shares *pro rata* in the distribution. Hodge's Appeal, 84 Pa. St. 359 (1877). See also § 881, *infra*, on the subject of distribution.

[6] The purchasers of bonds bearing the same date as the mortgage may rely on the fact that they were made and issued simultaneously, and that there was no intervening time for the liens of material-men to attach. Nelson *v.* Iowa, etc. R. R., 8 Am. R'y Rep. 82 (Iowa, 1875). In Reynolds *v.* Manhattan T. Co., 83 Fed. Rep. 593 (1897), the court held that where the mortgage has been delivered to the trustee, but no bonds have yet been issued, a mechanic's lien may be obtained at any time prior to the issue of the bonds. Engraved bonds issued in lieu of temporary lithographed bonds are legal. Illinois T. & S. Bank *v.* Pacific R'y, 49 Pac. Rep. 197 (Cal., 1897). Engraved bonds substituted for temporary printed bonds are good. McKee *v.* Vernon County, 3 Dill. 210 (1874); S. C., 16 Fed. Cas. 188.

been issued on the date of the recording of the mortgage.[1] The bond and mortgage may, however, provide for the priority of one part of the bonds over another part. Such priorities are matters of contract and are legal.[2]

First-mortgage bonds have priority over second-mortgage bonds, although issued after the latter.[3]

Where the bonds refer to a mortgage securing them, the mortgage becomes thereby a part of the bond and is construed with it.[4] And statements and representations in the bonds are

[1] Pittsburgh, etc. R'y *v.* Lynde, 44 N. E. Rep. 596 (Ohio, 1896). A mortgage deed of trust is a lien from the date of its record, even though the bonds are not issued until after other liens have attached. Central Trust Co. *v.* Bartlett, 57 N. J. L. 206 (1894). A mortgage operates from the time of recording, even though the bonds are issued thereafter, and during the intermediate time other incumbrances are made. This applies to chattels as well as real estate covered by the mortgage. Camden, etc. Co. *v.* Burlington, etc. Co., 33 Atl. Rep. 479 (N. J., 1895). "It is the rule, as between bondholders and persons acquiring liens on the mortgaged property subsequent to the recording of the mortgage, that the rights of the *bona fide* holders of the bonds are to be determined as if they had been acquired at the date of the recording of the mortgage securing them." Belden *v.* Burke, 72 Hun, 51, 75 (1893).

[2] There may be a preference to certain bonds as against others of the same issue, all secured by the same mortgage. Chicago, etc. Land Co. *v.* Peck, 112 Ill. 408 (1885); McMurray *v.* Moran, 134 U. S. 150 (1890). Although part of the bondholders purchased by reason of fraudulent representations of brokers to whom the other bondholders had sold part of their holdings, this does not give any priority to the former over the latter. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). In Commonwealth *v.* Chesapeake, etc. Canal Co., 32 Md. 501 (1870), various complicated questions as to the priority of different classes of bonds were passed upon. In Massachusetts a statutory provision forbids the issue of bonds redeemable in their numerical order. See L. 1891, ch. 382. A final decree in a foreclosure suit not appealed from may, so far as it awards priority to some of the bonds as against others, be subsequently modified to conform to a decision of the supreme court of the United States in another case, and holding differently as to such priority. The second case was for the sole purpose of determining what bonds were legal. Moran *v.* Hagerman, 64 Fed. Rep. 499 (1894). Where by the charter the stockholders are liable for all debts and they buy some of the company's bonds, the remaining bonds will be paid first out of the proceeds of foreclosure. Shaw *v.* Saranac Horse Nail Co., 78 Hun, 7 (1894).

[3] Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880).

[4] Bondholders are bound to take notice of what is indorsed and "of what was contained in their deed of mortgage, and of the laws of the state referred to in the deed of mortgage." Stanton *v.* Alabama, etc. R. R., 2 Woods, 523 (1875); S. C., 22 Fed. Cas. 1070; Morton *v.* New Orleans, etc. R. R., 79 Ala. 590 (1885). A bondholder need not take notice of a pro-

controlled by explanations contained in the mortgage, but if the terms conflict the bond controls.[1]

The purchasers of railroad bonds cannot rescind on the ground that the railroad has used the proceeds for purposes other than those stated in its prospectus.[2]

Although the statute restricts the mortgage to certain purposes, yet if the bonds are used for other purposes, *bona fide* purchasers are protected.[3] When part of the bonds are issued

vision in the mortgage that he cannot sue at law on his bond unless one-fourth of the bondholders assent. Guilford *v.* Minneapolis, etc. R'y, 48 Minn. 560 (1891). Bondholders are bound by recitations in the deed of trust recognizing unrecorded prior liens. Skiddy *v.* Atlantic, etc. R. R., 3 Hughes, 320, 356 (1879); S. C., 22 Fed. Cas. 274. A statute referred to in the bond becomes thereby a part of the bond. Gilman *v.* New Orleans, etc. R. R., 72 Ala. 566 (1882); Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885); Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501 (1870). Purchasers are bound to know the contents of the mortgage which secures the bond. Caylus *v.* New York, etc. R. R., 10 Hun, 295 (1877); affirmed, 76 N. Y. 609. The holders of consolidated bonds are, it has been held, chargeable with notice of the prior bonds and mortgages and of the terms upon which their own bonds were issued. Hence, they cannot impeach the validity of the bonds which were retired. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). See 87 Fed. Rep. 392.

[1] If the wording of the bond is different from the wording of the mortgage, the bond controls. Railway Co. *v.* Sprague, 103 U. S. 756 (1880).

[2] Banque Franco-Egyptienne *v.* Brown, 34 Fed. Rep. 162, 196 (1888); Van Weel *v.* Winston, 115 U. S. 228 (1885). Although bonds and a mortgage are authorized to pay debts, but are partially used to carry on the business, *bona fide* purchasers of the bonds are protected. Carpenter *v.* Black Hawk, etc. Co., 65 N. Y. 43 (1875). After the purpose of the issue is fulfilled, the remaining bonds may be issued for other purposes. Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). A mortgage reciting that it is made for the purpose of borrowing money to carry on the operations of the company is valid, although the bonds are issued in payment for the plant. Davidson *v.* Westchester, etc. Co., 99 N. Y. 558 (1885). Although bonds are issued expressly according to their terms to take up outstanding bonds, yet a *bona fide* purchaser is not bound to ascertain whether the bonds were used for that purpose. Galveston R. R. *v.* Cowdrey, 11 Wall. 459 (1870). But where by statute new mortgage bonds are issued to take up old bonds, purchasers of such new bonds must see to it that the old bonds are taken up, even though the new bonds are stated to be first-mortgage bonds. Spence *v.* Mobile, etc. R'y, 79 Ala. 576 (1885). The understanding of a bondholder as to the use of the funds does not bind the corporation. Ives *v.* Smith, 3 N. Y. Supp. 645 (1888). An action to rescind the purchase of stock lies where the money paid therefor was to be applied to a certain purpose, but was not so applied, but the receiver will not be directed to give up the money. Moore *v.* Robertson, 25 Abb. N. C. 173 (1890). See also Belden *v.* Burke, in § 766, *infra*.

[3] Where bonds and a mortgage are

the corporation may agree not to issue the others except on certain conditions.[1] Bonds are sometimes issued convertible into stock, and sometimes stock is issued convertible into bonds. The questions connected with such issues are considered elsewhere.[2]

§ 765. *Attachments levied on bonds — Form of bonds — Gold clause — Seal — Cancellation and subrogation.* — The unissued bonds of a corporation cannot be attached for corporate debts.[3] Bonds may be taxed,[4] and an attachment may be levied on them at the place where they actually are, but not at the place where the corporation is and they are not.[5] There can be no attachment of bonds which are issued to a trustee to pay a certain debt.[6]

A suit at law will lie for the conversion of bonds,[7] or a suit

prohibited except to pay debts, but instead of that are partially used to carry on the business, *bona fide* purchasers of the latter are protected. Carpenter *v.* Black Hawk, etc. Min. Co., 65 N. Y. 43 (1875); Lord *v.* Yonkers, etc. Co., 99 N. Y. 547 (1885). Where a company has power to mortgage, but not to give bills of exchange, a mortgage securing bills of exchange is good as security for the money represented by the bills of exchange. Scott *v.* Colburn, 26 Beav. 276 (1858).

[1] In general, all the bonds share equally in the proceeds of a foreclosure sale; but where the corporation agreed with the first purchasers to issue only $10,000 per mile, although the mortgage provided for a much larger issue, a purchaser of bonds in excess of that amount, who purchases with knowledge of the above agreement, will share in the proceeds only after such first purchasers' bonds have been paid. McMurray *v.* Moran, 134 U. S. 150 (1890),— the court stating also that the mortgage might have provided for priority among the bonds if it had been so drawn.

[2] See § 283, *supra.*

[3] An attachment of unissued bonds is not good. Richardson *v.* Green, 133 U. S. 30, 47 (1890); Coddington *v.* Gilbert, 17 N. Y. 489 (1858); Barnes *v.* Mobile, etc. R. R., 12 Hun, 126 (1877); Sickles *v.* Richardson, 23 Hun, 559 (1881).

[4] See § 572*a*, *supra.*

[5] Negotiable bonds held outside of the jurisdiction of the court cannot be attached by serving the attachment on the corporation which issued the bonds. Von Hesse *v.* Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y. 694. Garnishee process does not lie against a non-resident company on bonds, since the debtor may have sold them. Junction R. R. *v.* Cleneay, 13 Ind. 161 (1859).

[6] Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn., 1896).

[7] For the allegations in an action for the conversion of a bond, see Saratoga, etc. Co. *v.* Hazard, 55 Hun, 251 (1889); aff'd, 121 N. Y. 677. Where bonds are loaned to use temporarily upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. Birdsall *v.* Davenport, 43 Hun, 552 (1887).

in equity for their value;[1] but an equitable suit does not lie to rescind a sale of worthless bonds. A suit at law for damages is the proper remedy.[2]

There is no particular form in which the bonds of a corporation must be drawn. In order to be negotiable they of course must contain the essential features of negotiable paper.[3]

[1] A suit by an equitable owner of bonds to recover the bonds, or their value, is properly brought in equity. Phelps *v.* Elliott, 29 Fed. Rep. 53 (1886).

[2] U. S. Bank *v.* Lyon County, 46 Fed. Rep. 514 (1891). Concerning fraud inducing the purchase of bonds, see §§ 140, 157, *supra*. A bill in equity is proper to rescind when third parties with notice are to be reached. Banque, etc. *v.* Brown, 34 Fed. Rep. 162 (1888).

[3] See § 411, *supra*, concerning these requisites; also, § 767, *infra*, concerning the various decisions on the negotiability of corporate bonds.

The following are forms:

[*Form of Coupon Bond.*]

UNITED STATES OF AMERICA,

STATE OF NEW YORK.

No. $1,000.

THE COMMERCIAL CABLE COMPANY, NEW YORK.

FIRST MORTGAGE FIVE-HUNDRED-YEAR FOUR PER CENT GOLD BOND.

On the first day of January, A. D. 2397, for value received, The Commercial Cable Company promises to pay the bearer the sum of

ONE THOUSAND DOLLARS

in gold coin of the United States of America of or equal to the present standard of weight and fineness, at the office of The Farmers' Loan and Trust Company in New York City, and to pay interest thereon at the rate of four per cent per annum, payable quarterly on the first days of January, April, July, and October, in the gold coin aforesaid, at the said office of the said The Farmers' Loan and Trust Company, upon the presentation and surrender of the coupons annexed and to be annexed hereto, as they severally become due.

This bond is one of an issue of bonds, coupon and registered, of like tenor, to an amount not exceeding in the aggregate twenty million dollars, all of which are equally secured by a mortgage deed of trust bearing date January 1, 1897, made by the said The Commercial Cable Company to said The Farmers' Loan and Trust Company as Trustee, of and upon the property and franchises of The Commercial Cable Company.

In case of default for six months after due demand in the payment of interest on any of said bonds, the principal of all thereof may be declared due in the manner and with the effect provided in said mortgage deed of trust.

All payments upon this bond of both principal and interest are to be made without deduction for any tax or taxes which said Cable Company may be required to pay or to retain therefrom, by any present or future laws of the United States of America, or any of the states thereof, said Cable Company hereby covenanting and agreeing to pay any and all such tax or taxes.

The holder of this bond may at any time at his option surrender the same, with the undue coupons attached, to the Registrar of said bonds, to be canceled, and receive in lieu thereof a registered bond in the form provided in the mortgage deed of trust.

This bond shall not be valid or obligatory until the certificate indorsed hereon shall be signed by the Trustee under said mortgage deed of trust.

IN WITNESS WHEREOF, The Commercial Cable Company has on this first day of January, 1897, caused its corporate seal to be affixed hereto, and this bond to be signed by its Vice-President and Treasurer, and has also caused a fac-simile signature of its Treasurer to be engraved on each of the coupons hereto annexed.

THE COMMERCIAL CABLE COMPANY,

By

Vice-President

Treasurer.

Attest:

Secretary.

[*Form of Coupon.*]

$10 $10

On the first day of 1

THE COMMERCIAL CABLE COMPANY

will pay the bearer at the office of The Farmers' Loan and Trust Company, Ten Dollars in gold coin, being three months' interest due on its first mortgage bond for one thousand dollars.

No.

Treasurer.

Where a bond provides that it may be registered and the coupons surrendered, and that thereafter the interest will be paid by check, a bondholder may, by an action for specific per-

And said bonds are to bear the following certificate indorsed upon them, to be signed by said Trustee:

[*Trustee's Certificate.*]

THE FARMERS' LOAN AND TRUST COMPANY, Trustee, hereby certifies that this bond is one of the issue referred to within.

THE FARMERS' LOAN AND TRUST COMPANY,
Trustee.

By
Vice-President.

[*Form of Registered Bond.*]

(In denominations of $100, $500, $1,000, $5,000, and $10,000.)

UNITED STATES OF AMERICA,

No.

THE COMMERCIAL CABLE COMPANY, NEW YORK.

FIRST MORTGAGE FOUR PER CENT GOLD BOND.

Principal due Jan. 1, A. D. 2397.

Interest payable quarterly on the first days of January, April, July, and October, at the rate of four per cent per annum.

FOR VALUE received The Commercial Cable Company promises to pay to or assigns Dollars in gold coin of the United States of America of or equal to the present standard of weight and fineness at the office of The Commercial Cable Company, in the City of New York, on the first day of January, A. D. two thousand three hundred and ninety-seven, and to pay interest thereon, in like gold coin, at the rate of four per centum per annum, from the first day of 18 , until such principal sum shall be paid, such interest being payable at said office on the first days of January, April, July, and October in each year.

This bond is one of an issue of bonds, coupon and registered, of like tenor, to an amount not exceeding in the aggregate twenty million dollars, all of which are equally secured by a mortgage deed of trust bearing date January 1, 1897, made by the said The Commercial Cable Company to said The Farmers' Loan and Trust Company, as Trustee, of and upon the property and franchises of The Commercial Cable Company (including the franchises, stock, and property of the Postal Telegraph-Cable Company, heretofore acquired by said The Commercial Cable Company).

In case of default for six months after due demand in the payment of interest on any of said bonds, the principal of all thereof may be declared due in the manner and with the effect provided in said mortgage deed of trust.

All payments upon this bond of both principal and interest are to be made without deduction for any tax or taxes which said Cable Company may be required to pay or to retain therefrom, by any present or future laws of the United States of America, or any of the states thereof, said Cable Company hereby covenanting and agreeing to pay any and all such tax or taxes.

This bond is transferable only at the office of said The Commercial Cable Company on the books of said The Commercial Cable Company by the registered owner in person or by attorney upon the surrender hereof, and may be transferred into similar bonds of smaller denominations or be merged with other bonds of this issue into a similar bond of larger denomination, except that the only denominations shall be $100, $500, $1,000, $5,000, and $10,000.

Instalments of interest on this bond shall be paid by cheques or warrants mailed to proprietors at their addresses registered in the books of said Cable Company, and such payments shall be in full in the order of their maturity and in accordance with the provisions of said mortgage deed of trust.

This bond may be exchanged for the Debenture Stock of said The Commercial Cable Company on the terms set forth in the mortgage deed of trust securing this bond.

This bond shall not be valid or obligatory until the certificate indorsed hereon shall have been signed by the Trustee under the said mortgage deed of trust.

IN WITNESS WHEREOF The Commercial Cable Company has on this day of caused its corporate seal to be affixed hereto, and this bond to be signed by its Vice-President and Treasurer.

THE COMMERCIAL CABLE COMPANY,
By
Vice-President.

Treasurer.

Attest:
Secretary.

The above class of bonds usually contain a registration clause as follows:

This bond shall pass by delivery, or by transfer upon the transfer books of the Company in the city of New York. After regis-

formance, compel the carrying out of this contract on the part of the party issuing the bonds.[1]

The bonds may be payable to the bearer.[2] If the payee of the bond is left blank, the holder may fill in his name;[3] but if it is payable only to a specified person, a written assignment is necessary.[4] If payable to a certain person, he may indorse them in blank and then they pass by delivery.[5] A bondholder is a payee and not an assignee.[6] The bonds should not be described as first-mortgage bonds if there are underlying mortgages on divisions of the property.[7] A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought.[8] Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did

tration of ownership certified hereon by the transfer agent of the Company, no transfer, except on the books of the Company, shall be valid, unless the last transfer is to bearer, which shall restore transferability by delivery; and it shall continue subject to successive registrations, and transfers to bearer as aforesaid, at the option of each holder.

[1] Benwell *v.* Mayor, 36 Atl. Rep. 668 (N. J., 1897).

[2] Kneeland *v.* Lawrence, 140 U. S. 209 (1891); Mercer County *v.* Hackett, 1 Wall. 83 (1863); Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878). Railway bonds may be payable to the trustees in the mortgage or bearer, or may be payable to bearer alone. Ide *v.* Passumpsic, etc. R. R., 32 Vt. 297 (1859). The bearer may sue on them in his own name. Ide *v.* Passumpsic, etc. R. R., 32 Vt. 297 (1859). Bonds are often drawn payable to the trustee or bearer.

[3] See § 764, *supra*.

[4] The assignee of a bond payable to a certain person or assigns cannot sue thereon where the assignment to him is not in writing. Bunting *v.* Camden, etc. R. R., 81 Pa. St. 254 (1876).

[5] Brainerd *v.* New York, etc. R. R., 10 Bosw. 332 (1863).

[6] Rutten *v.* Union Pac. R'y, 17 Fed. Rep. 480 (1883).

[7] It is fraudulent to deliver as first-mortgage bonds, bonds which are denominated "first-mortgage consolidated bonds" which are not secured by a first mortgage, but are second to underlying mortgages on divisions of the property. Williamson *v.* New Jersey Southern R. R., 29 N. J. Eq. 311, 318 (1878), affirming on this point 28 N. J. Eq. 277. Although the bonds bear upon their face the words "consolidated *first*-mortgage bonds," yet, if they refer to a mortgage, and the mortgage shows that there were underlying first-mortgage bonds which were to be exchanged or taken up if possible by the consolidated bonds, the directors and the trustee are not liable for fraud in issuing the consolidated bonds, a part of the bonds having been used for new construction. Caylus *v.* New York, etc. R. R., 10 Hun, 295 (1877); aff'd, 76 N. Y. 609.

[8] Stevenson *v.* Marble, 84 Fed. Rep. 23 (1897).

not pay except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds.[1] A person having a prior lien may waive it by taking from the corporation, as security, bonds which purport to be first-mortgage bonds.[2] The seal of the corporation is attached to the bond.[3] This seal may be considered as merely the signature of the company, thereby rendering the "bond" merely a promissory note and subject to the short statute of limitations,[4] or it may be considered a seal the same as an individual's seal, making the instrument a sealed instrument.[5]

The execution of the bonds should be regularly and formally authorized by the proper corporate authorities.[6]

A mortgage and bonds secured thereby may be authorized by the board of directors, and no action or authorization by the stockholders is necessary.[7]

Bonds and mortgages may be executed outside of the state incorporating the company.[8]

If no date of payment of the principal is specified it may be collected at any time.[9]

The various questions arising concerning the interest on and coupons of bonds are considered elsewhere.[10]

A bond by its terms may be made payable in gold coin of

[1] Bank *v.* Byers, 41 S. W. Rep. 325 (Mo., 1897). *Cf.* § 814, *infra.*

[2] Bristol, etc. Co. *v.* Bristol Gas, etc. Co., 42 S. W. Rep. 19 (Tenn., 1897).

[3] An official may, while out of the state, cause a new seal to be made and attach it to the bonds of the corporation out of the state. Lynde *v.* Winnebago County, 16 Wall. 6 (1872). See also § 722, *supra.*

[4] See §§ 770, 772, *infra.*

[5] See §§ 770, 772, *infra.*

[6] Where the stockholders build the road with their own money and take the mortgage bonds of the company as security without formal action of the corporation authorizing it, the bonds are not good in their hands and an execution sale of the property comes in ahead of the mortgage. McKee *v.* Grand Rapids, etc. R'y, 41 Mich. 274 (1879). See §§ 721–725, *supra.* As to notice of a meeting to authorize bonds, see § 599, *supra.* As to ratification of an unauthorized mortgage, see § 809, *infra.*

[7] Hodder *v.* Kentucky, etc. R'y, 7 Fed. Rep. 793 (1881). See also § 808, *infra.*

[8] Hervey *v.* Illinois Mid. R'y, 28 Fed. Rep. 169 (1884).

[9] Hopkins *v.* Worcester, etc. Canal, L. R. 6 Eq. 437 (1868).

[10] See §§ 771, 772, *infra.*

or equal to the present standard of weight and fineness.[1] But the court cannot change the payments of interest from currency to gold.[2] A railroad has no right to pay off bonds before they are due, nor to pay the money to the trustee and have the mortgage canceled.[3]

Where the owner of bonds delivers them up to the company in exchange for other bonds or securities, the courts are inclined to hold that he does not thereby waive the security of the mortgage that secured the bonds, but that the new bonds are subrogated to such security.[4] Where a part of mortgage

[1] For various decisions on the gold clause in obligations, see 7 Wait, Act. & Def. p. 586; 2 Dan. Neg. Inst., 4th ed., § 1247; Bronson *v.* Rodes, 7 Wall. 229 (1868). Where the contract calls for gold coin, the judgment for damages for failure to pay should be for coin for the amount specified in the contract. Butler *v.* Horwitz, 7 Wall. 258 (1868); Trebilcock *v.* Wilson, 12 Wall. 687 (1871). An agreement to pay in gold may be implied, but the implication must be found in the language of the contract. Maryland *v.* Railroad Co., 22 Wall. 105 (1874). Coupons may by their terms be made payable in gold coin. Pollard *v.* Pleasant Hill, 3 Dill. 195; S. C., 19 Fed. Cas. 944 (1873). Where a statute authorizes the governor to sign bonds bearing eight per cent interest, he may sign bonds bearing eight per cent payable in gold. Young *v.* Montgomery, etc. R. R., 2 Woods, 606; S. C., 30 Fed. Cas. 850 (1875). Where bonds are payable in gold and silver coin the government has no right to pay them in legal-tender currency. State *v.* Hays, 50 Mo. 34 (1872). As to a gold clause, see also Blanck *v.* Sadlier, 153 N. Y. 551 (1897); Dennis *v.* Moses, 52 Pac. Rep. 333 (Wash., 1898); Carpentier *v.* Atherton, 25 Cal. 564 (1864).

[2] Taylor *v.* Atlantic, etc. R'y, 55 How. Pr. 275 (1877).

[3] Missouri, etc. R'y *v.* Union Trust Co., 87 Hun, 377 (1895). See also § 816, *infra*.

[4] Although bonds are taken in payment of past-due coupons, yet those who take such bonds are subrogated to and may enforce the coupons. Gibert *v.* Washington, etc. R. R., 33 Gratt. (Va.) 586, 596 (1880). But in Fidelity, etc. Co. *v.* Shenandoah, etc. R. R., 86 Va. 1 (1889), the same court held that where coupons are exchanged for income bonds at sixty cents on the dollar, and the clear intent was to satisfy, discharge, and cancel the coupons, there is no subrogation. Second-mortgage bonds taken in exchange for coupons on first-mortgage bonds share in the proceeds as though they were such coupons. Farmers' L. & T. Co. *v.* Green Bay, etc. R. R., 6 Fed. Rep. 100 (1881). Interest released by first-mortgage security-holders may be expressly made payable to holders of other securities, and yet the latter are not subrogated to the mortgage to that extent. Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1876). Bondholders taking certificates of indebtedness do not thereby waive their mortgage security. Skiddy *v.* Atlantic, etc. R. R., 3 Hughes, 320, 357 (1879); S. C., 22 Fed. Cas. 274. See also Memphis, etc. R. R. *v.* Dow, 120 U. S. 287 (1887), where a trustee for the second-mortgage bondholders bought for them the property at a

bonds which are in default are, under a reorganization agreement, returned to the corporation and placed under a new mortgage, securing bonds which are issued to the persons who so turned in the first-mentioned bonds, the holders of the remaining old bonds cannot claim that the bonds so turned in have been canceled, thereby reducing the first mortgage issue by that amount.[1] Yet, where consolidated mortgage bonds are issued in exchange for bonds secured by prior lien, but all of the prior bonds are not so turned in, and a foreclosure takes place, such of the prior bonds as were not turned in must be paid in full.[2] Where a holder of bonds exchanges them for new bonds, the agreement being that the old bonds should be canceled when all of them have been changed, such owner cannot rescind even though all of the bondholders do not come in and consequently the cancellation does not take place.[3] In construing a provision in a bond for a sinking fund, the prospectus is not admissible in evidence. The term "sinking fund" does not necessarily imply accumulation.[4] A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of

foreclosure sale under the first mortgage. *Cf.* Railroad *v.* Soutter, 13 Wall. 517 (1871), where the sale was fraudulent. See also, in general, Gibbes *v.* Greenville, etc. R. R., 13 S. C. 228 (1879); Newbold *v.* Peoria, etc. R. R., 5 Ill. App. 367 (1879); Blair *v.* St. Louis, etc. R. R., 23 Fed. Rep. 524 (1885); Ames *v.* New Orleans, etc. R. R., 2 Woods, 206 (1876); S. C., 1 Fed. Cas. 760. But a person advancing interest is not entitled to be equitably subrogated. Newport, etc. Co. *v.* Douglass, 12 Bush (Ky.), 673 (1877). See also § 772, *infra;* Simmons *v.* Taylor, 38 Fed. Rep. 682 (1889); *Ex parte* White, 2 S. C. 469 (1871). Where the mortgage bondholders agree to waive their lien and take new second-mortgage bonds, and the trustee does discharge the mortgage, a failure of the company to issue the new second-mortgage bonds in accordance with the contract does not entitle the old bondholders to be restored to their position as first-mortgage bondholders. They may, however, have their bonds allowed as second-mortgage bonds upon foreclosure. Fidelity, etc. Co. *v.* Shenandoah, etc. R. R., 33 W. Va. 761 (1890).

[1] Mowry *v.* Farmers' L. & T. Co., 76 Fed. Rep. 38 (1896).

[2] Bound *v.* South Carolina R. R., 78 Fed. Rep. 49 (1897). Where the outstanding bondholders join in a request for a foreclosure of the mortgage bonds of the reorganized company, they are deemed to have waived their rights in the old bonds. First Nat. Bank *v.* Radford Trust Co., 80 Fed. Rep. 569 (1897).

[3] Central Trust Co. *v.* Marietta, etc. R'y, 73 Fed. Rep. 589 (1896).

[4] Morrison *v.* Chicago, etc. Co., 77 L. T. Rep. 677 (1897).

a *bona fide* mortgagee without notice of such debentures and such contract.[1]

The question of whether a provision that bonds may be issued by vote of the stockholders only, and whether a statutory notice may be waived, is considered elsewhere.[2]

§ 766. *Bonds issued below par for cash, property, or construction work — Dividend of bonds — Bonds, notes, or mortgages given without consideration — Statutory and constitutional prohibitions relative to issues of bonds — Fraudulent issues of bonds — Bona fide purchasers of bonds issued at less than their par value are protected — Fraudulent issues of bonds to the directors, or through directors who are "dummies," or to construction companies in which the directors are interested — Who may complain of an issue of bonds at less than par — Stockholders — The state — The corporation itself — Bondholders — Corporate creditors — Usury as affecting bonds issued at less than par — Distribution of bonds on sale of corporate assets — Bonds and stock to be issued to a contractor who fails to perform.*— It is clear that at common law a corporation may issue its bonds at less than their par value.[3]

[1] *Re* Castell, etc. Co., 78 L. T. Rep. 109 (1898).

[2] § 725, *supra*, and § 808, *infra*.

[3] Gamble *v.* Queens County Water Co., 123 N. Y. 91 (1890), where the court, after speaking with reference to the stock of the company, proceeded to say: "A different rule, however, prevails in regard to the bonds of a corporation. An extended discussion of the question is not needful. We think a corporation has the power to issue its bonds at less than par. So far as this point is concerned, it is not restricted to an issue only upon payment to the company of the par value of the bonds, either in money or property for its use." To same effect, Lyceum *v.* Ellis, 57 N. Y. Super. Ct. 532 (1890). The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on a dollar in payment of a debt due him. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). A corporation may issue bonds at eighty cents on the dollar. The Vigilancia, 68 Fed. Rep. 781 (1895). A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent. Bank of Toronto *v.* Cobourg, etc. R'y, 10 Ont. (Can.) 376 (1885). Debentures may be issued at a discount, even sixty per cent discount being upheld in Webb *v.* Shropshire R'y, [1893] 3 Ch. 307. See also Handley *v.* Stutz, 139 U. S. 417 (1891); Christensen *v.* Illinois, etc. Co., 52 Hun, 478 (1889). But an agreement of a corporation to issue bonds to a subscriber as a "bonus" was held to be void, and the subscription was enforced, in Morrow *v.* Nashville, etc. Co., 87 Tenn. 262 (1889). In Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880), bonds were issued at the rate of eighty cents on the dollar, and no

The person to whom stock has been issued in payment for property may donate a part of it as a bonus to go with bonds sold at par by the corporation to the person taking the bonus.[1] A person who buys mortgage bonds with stock as a bonus from a party to whom the stock and bonds were originally issued cannot be held liable on the stock at the instance of other stockholders, who did not object at the time of the issue, and who now come into the foreclosure suit and attempt to defeat the bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property.[2] The bonds of a failing corporation and the mortgage securing them are valid although when the bonds were issued a large amount of increased capital stock was given by the corporation as a bonus with the bonds. The giving of the bonus is no defense to a foreclosure of the mortgage, it being shown that the corporation was nearly insolvent at the time such increased capital stock was issued.[3] In New York it has been held that unissued shares of stock may be issued gratuitously to stockholders; also bonds of the company; and they are not liable for the par value or any part thereof to the corporation or corporate creditors, unless they agreed to pay therefor or the statute requires payment. Even though the stockholder has sold such stock and bonds, he is not liable to corporate creditors for

question was raised as to the validity of the issue. In England debentures may be issued at a discount in cash. Campbell's Case, L. R. 4 Ch. D. 470 (1876), where the issue was to a director; *Re* Regents', etc. Co., L. R. 3 Ch. D. 43 (1876), where pledgees of debentures shared equally with purchasers, on winding up, to the extent of the pledge; *Re* Anglo-Danubian, etc. Co., L. R. 20 Eq. 339 (1875); *Re* Inns, etc. Co., L. R. 6 Eq. 82 (1868). Where railroad bonds are issued and paid for in Confederate currency, they can be enforced only to the extent of the purchasing value of the currency thus paid, at the time of the purchase, with interest upon that value. Spence *v.* Mobile, etc. R'y, 79 Ala. 576 (1885). See also, on the subject of issuing stock and bonds at less than their par value, ch. III, *supra*. It is illegal to issue municipal bonds at a discount. See § 98, *supra*. In Sherlock *v.* Winnetka, 68 Ill. 530 (1873), the court held a sale of municipal bonds below par to be unlawful.

[1] Davis *v.* Montgomery, etc. Co., 8 S. Rep. 496 (Ala., 1890). See also § 42, *supra*.

[2] Northern, etc. Co. *v.* Columbia, etc. Co., 75 Fed. Rep. 936 (1896); Dickerman *v.* Northern T. Co., 80 Fed. Rep. 450 (1897).

[3] Dummer *v.* Smedley, 68 N. W. Rep. 260 (Mich., 1896), the court relying on the authority of Handley *v.* Stutz, 139 U. S. 417 (1891).

the amount received from the sale.[1] Even though bonds are issued as a bonus to stockholders, yet a *bona fide* holder of such bonds may enforce them.[2]

Generally a large amount of stock is issued together with a quantity of bonds in payment for property or construction work. Upon the insolvency of the company, the bonds having passed into the hands of *bona fide* holders, an attempt is made to hold the contractors liable for the par value of the stock on the theory that it has never been paid for. The great weight of authority, however, holds that the contractors are not liable on the stock whether they have disposed of it or not.[3]

[1] Christensen *v.* Eno, 106 N. Y. 97 (1887), the court refusing to follow Skrainka *v.* Allen, 7 Mo. App. 434 (1879); S. C., 76 Mo. 384. See also ch. III, § 42, *supra*.

[2] Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., 65 Fed. Rep. 341 (1894), holding also that where an agent received the bonds with notice, but tried to cheat his principal, the latter is not chargeable with notice.

[3] Where all the stock and a large quantity of bonds are issued by a railroad corporation to its contractor in payment for the construction of the road, the contractor is not liable to corporate creditors on the stock, even though the bonds were a sufficient consideration for building the road, unless the corporate creditors prove that the stock at the time of its issue had a real or market value. "If, when disposed of by the railroad company, it was without value, no wrong was done to creditors." Even the Missouri constitution and statutes do not change this rule. Fogg *v.* Blair, 139 U. S. 118 (1891); Van Cott *v.* Van Brunt, 82 N. Y. 535 (1880). The doctrine laid down in Van Cott *v.* Van Brunt was approved in Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). It is legal for a railroad company to issue bonds and stock in payment for the construction of its road. If all the parties assent no one can complain. "As the stock was issued as a part of the consideration for construction, it cannot be said that it was taken without value given." The par value is immaterial. "The fact that they were created for an expenditure less than the par value of the aggregate issues of capital stock and bonds does not affect the question at all." Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). At common law, even though a railroad corporation issues to its president nearly $1,400,000 of mortgage bonds and $700,000 of stock for construction work which costs only about $700,000, nevertheless the purchasers of such stock and bonds cannot cause suit to be brought by the corporation, after the foreclosure of its property, and hold him liable. The court held that inasmuch as the stock had no market value no harm was done. The court said: "Nor is it true that those who took the stock and bonds, and paid money for them, were cheated by Kase, in any real sense of the word. Is any man of ordinary judgment cheated when he pays seventy-five or eighty cents on the dollar for a seven or eight per cent railroad bond, receiving with the bond a gift of the stock in many cases almost equaling the face value of the bond? Such a purchaser knew, just as Kase knew,

The issue of the bonds of a corporation in payment for property or construction work is the favorite mode of issuing bonds at less than their par value. The real value of the property or construction work being uncertain, it is difficult to detect

that the value of the paper was speculative. If Kase lived, if he expended the money in construction, if he completed the road, if the event then proved it to be a meritorious enterprise (that is, if it received and developed traffic sufficient to pay operating expenses, fixed charges, and reasonable dividends), the speculative buyer would probably more than double his money. If any one of the contingencies did not happen, the buyer lost; but he was not cheated, except in the sense that all who bet on the happening of an uncertain event, and lose, are cheated." Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa., 1898). In this case stock and bonds had been issued by the corporation for land, but the stock had no market value, and an effort was made to hold the vendor of the land liable for the par value of the stock and the actual value of the bonds less the actual value of the land. The court refused, and said: "We do not concur with the master in his conclusion that Kase should refund to the company a large sum of money in excess of the profit, because of the stock received by him in the transaction. He finds as a fact that the stock was then, and is now, worthless. A court of equity does not perform the duties of a court of quarter sessions; does not order restitution of that which is valuable, and also impose a heavy fine on the guilty. The company has the land, Kase has a profit of $111,000 bonds, and no profit in the worthless stock. He should account for the bonds alone." Inasmuch, however, as the president secretly owned land in the name of another person and caused the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he was held liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land. Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa., 1898). Although $1,500,000 of stock, issued as fully paid, and $1,500,000 in bonds, are issued for the construction of a work which costs less than $1,500,000, yet an attorney who took part in the transaction cannot, as a creditor of the corporation, claim that the stock was not fully paid. Ten Eyck *v.* Pontiac, etc. R. R., 72 N. W. Rep. 362 (Mich., 1897). In Northwestern, etc. Ins. Co. *v.* Cotton, etc. Co., 46 Fed. Rep. 22 (1891), however, the court held that where property worth $157,000 is turned in to a corporation for $200,000, payable in $125,000 of stock and $75,000 of bonds, the creditors of the company might hold the parties liable on the stock as though it were unpaid stock, and the creditor is presumed not to have known of the transaction when he contracted the debt. Where a railroad worth $112,000 is sold to a new corporation for $1,120.000 of bonds and all its capital stock, the transaction is fraudulent. The bondholders may obtain judgment against the company on their bonds, and then compel the stockholders to pay the full par value of their stock. Preston *v.* Cincinnati, etc. R. R., 36 Fed. Rep. 54 (1888). In Lloyd *v.* Preston, 146 U. S. 630 (1892), aff'g 36 Fed. Rep. 54 (1888), where the owner of a railroad sold it to a newly-organized corporation for stock and bonds, the par value of which was fifty times the

the real price at which the bonds are issued; and when it is borne in mind that bonds may be issued below par, even when issued for cash, the safety of issuing bonds at a price greatly below par in payment for property or construction work becomes apparent. The courts sustain such issues of bonds, even though the value of the property or construction work is far less than the par value of the bonds.[1] Thus, a purchaser of bonds, who pur-

real value of the railroad, the bondholders and other creditors who had obtained judgment against the corporation, the execution being returned unsatisfied, may hold the party receiving the stock liable thereon, on the ground that the subscription price of such stock has never been paid. The court said: "The entire organization was grossly fraudulent from first to last, without a single honest incident or redeeming feature." The court also said: "It having been found, on convincing evidence, that the overvaluation of the property transferred to the railway company by Harper, in pretended payment of the subscriptions to the capital stock, was so gross and obvious as, in connection with the other facts in the case, to clearly establish a case of fraud, and to entitle *bona fide* creditors to enforce actual payment by the subscribers, it only remains to consider the effect of the defenses set up."

[1] In White Water, etc. Co. *v.* Vallette, 21 How. 414 (1858), the court held that bonds issued in payment for the completion of a canal were legal, although the sum for which they were issued was largely greater than the estimated cost of the work. In that case the bonds were issued at about fifty cents on the dollar. Railroad bonds issued to pay for the construction of the road are not rendered invalid by proof that the road could have been, or was, constructed for less than the amount of such bonds, if the contract for its construction was fairly made and carried out, and called for the amount of bonds actually issued, and no fraud is charged in the inception or execution of such contract. Such a question, however, may be raised before the master upon the distribution of the fund realized upon foreclosure. Farmers' L. & T. Co. *v.* Rockaway Valley R. R., 69 Fed. Rep. 9 (1895). Even though a party acquires all the stock of a corporation, amounting to $1,500,000, and then through dummy directors issues $3,500,000 additional stock and $4,000,000 of mortgage bonds to himself, and then proceeds to sell the stock and bonds to the public, yet a person who purchases some of the stock cannot file a bill in equity against the corporation to set aside the transaction and to ascertain what part of his stock is legal. His remedy is at law for damages, or he may repudiate and recover back his money. "It is elementary that the court is possessed of no power to make a new contract between parties entirely distinct and different from the contract that they have entered into." Church *v.* Citizens' Street R'y, 78 Fed. Rep. 526 (1897). A delivery of bonds as payment in advance for services to be rendered in selling other bonds cannot be rescinded, where by subsequent agreement a loan with the bonds as collateral was negotiated, the bonds to be subsequently sold. American L. & T. Co. *v.* Toledo, etc. R'y, 47 Fed. Rep. 343 (1890); aff'd, Burke *v.* American L. & T. Co., 155 U. S. 534 (1895).

chases with notice that an alleged covenant in the mortgage securing the bonds, to devote the proceeds of the bonds to the improvement of the property, has been broken, cannot complain of such breach of covenant, even though the entire proceeds

The plan of issuing large quantities of stock and bonds of a railroad company to a contractor, the bonds being all "water," is declared illegal in Central Trust Co. *v.* New York, etc. R. R., 18 Abb. N. Cas. 381, 395 (1887), holding also that the full amount of the bonds can be claimed only by *bona fide* holders without notice, and that the other bonds will be paid only in proportion to the actual value of the property given to the company for them. The celebrated case of Columbus, etc. R'y *v.* Burke is in point here. It appears that in July, 1881, Burke purchased the entire capital stock (except seven shares which seem to have been lost) of three coal-carrying railroad companies in Ohio and consolidated them. He owned also the stock of another coal and railroad company. Accordingly he caused the consolidated company to issue $8,000,000 of its mortgage bonds in purchase of and payment for the stock of the coal and railroad company, which was worth less than $1,500,000. He then sold the bonds and kept the proceeds. The bonds recited on their face that they were for double tracking, equipment, and improvement purposes. No default was ever made on the bonds. They passed into *bona fide* hands. The consolidated company also passed into other hands. In 1887, or thereabouts, the company commenced suit against Burke and others to compel an accounting and to reach the stock of the company which Burke had paid for out of the proceeds of the $8,000,000 of bonds. A preliminary injunction against his transferring the stock was obtained, and his motion to dissolve this injunction was denied. Columbus, etc. R'y *v.* Burke, 19 Week. L. Bull. 27 (Ohio, 1887). Subsequently the case was withdrawn from the courts and submitted to three arbitrators. These arbitrators decided in 1888 that the company had no remedy. Columbus, etc. R'y *v.* Burke, 20 Week. L. Bull. 287. Then a *bona fide* holder of some of the bonds brought a suit in equity in the New York courts to compel Burke to account to the corporation for the value of the bonds so taken by him. A demurrer to the bill was overruled. Belden *v.* Burke, N. Y. L. J., Nov. 3, 1890. Upon the trial of this case, however, the suit was dismissed, chiefly on the ground that the plaintiff bondholder was estopped by the fact that the chain of title of his bonds ran through the guilty parties themselves. Belden *v.* Burke, 20 N. Y. Supp. 320 (1892). This decision was reversed by the General Term, 72 Hun, 51 (1893). The case then went to the New York court of appeals. (See next note.) In a suit at law by the company to compel the associates of Burke — the parties to whom he sold the bonds — to pay over the proceeds of the bonds, the court directed a verdict for the defendants chiefly on the ground that all the stockholders had assented to the transaction. Columbus, etc. R'y *v.* Lanier, N. Y. L. J., Feb. 4, 1893. Where a corporation agrees to pay for a railway by bonds upon the same, and does not fulfill, the vendor may hold it liable for the full par value of the bonds, although they are worth less than par. Texas, etc. R'y *v.* Gentry, 69 Tex. 625 (1888).

of the bonds were, through the medium of sales of property, diverted to the personal benefit of stockholders.[1]

Parties owning real estate may convey it to a corporation formed for that purpose and take bonds in payment. The New York court of appeals says: "No just criticism is possible either upon the legality or morality of the transaction. Evidence was given to show that the land conveyed was not worth the sum secured, but that is a totally immaterial fact. Whatever the price, it wronged no one, and could wrong no one."[2]

Where a corporation has used its surplus earnings to improve its property, it may issue bonds to its stockholders as a dividend in lieu of a cash dividend, and sometimes may do so even where there are no earnings.[3]

[1] Belden *v.* Burke, 147 N. Y. 542 (1885). The court said (p. 551), as to the action of the stockholders: "They had raised a vast sum of money by placing a mortgage upon their own property, and had expended and disbursed the money as they thought would best promote their own interests. There is no one who, in this action, has any right to complain of this, unless the bondholders, from whom they borrowed the money, were intentionally deceived to their loss or injury, for which they have no adequate redress at law." The court also said that neither on the ground of a breach of covenant — the covenant being a covenant of the corporation only — nor on the ground of fraud could the action be maintained. The court referred to the fact that the plaintiff had not paid more for his bonds than they actually were worth, the interest having been promptly paid, and the bonds having appreciated in market value.

[2] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895).

[3] In Wood *v.* Lary, 124 N. Y. 83 (1891), the court sustained the court below in refusing to cancel a mortgage and bonds, the bonds having been issued as a bond dividend to preferred stockholders. S. C., 47 Hun, 550; State *v.* Baltimore, etc. Co., 6 Gill (Md.), 363 (1847); Frank *v.* Edison, etc. Co., N. Y. L. J., Jan. 12, and Jan. 16, 1892. In Merz *v.* Interior Conduit, etc. Co., 87 Hun, 430 (1895), the issue of bonds to pay scrip which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view. See S. C., 46 N. Y. Supp. 243 (1897). Where scrip dividends convertible into bonds run to the holder, the holder may sue upon them in his own name. Chaffee *v.* Rutland R. R., 55 Vt. 110, 139 (1882). A railroad corporation may issue certificates of indebtedness, which the company agrees to redeem in money or bonds. Where the president causes the board to order a gratuitous distribution of bonds among the stockholders, though they hold five-sixths of the stock, there being dissenting stockholders, the company may enjoin foreclosure. Virginia, etc. Co. *v.* Mercantile Trust Co., 12 N. Y. Supp. 529 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and

Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for

all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. *v.* Schneider, 110 Mo. 83 (1892). See also Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288 (1888); aff'd *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). If on demand the company does not deliver the bonds, the holder may sue for the money. Pusey *v.* New Jersey R. R., 14 Abb. Pr. (N. S.) 434 (1873). A corporation cannot have its mortgage and bonds declared void on the ground that they were issued to its stockholders, and were mostly "water," in violation of a constitutional provision. Memphis, etc. R. R. *v.* Dow, 120 U. S. 287 (1887); S. C., to same effect, 19 Fed. Rep. 388. As to stock dividends, see §§ 535, 536, *supra.*

The law goes still farther and holds that where all the stockholders assent, and corporate creditors existing at the time of the transaction are protected, a corporation may legally issue its bonds, notes, or mortgage for the personal benefit of an individual stockholder. The case of Swift *v.* Smith, 65 Md. 428 (1886), is in point. In that case a person had purchased all the stock of a corporation and paid for it by notes secured by a mortgage of the corporation on all of its property. The corporation became insolvent. A general creditor of the corporation attacked the mortgage, but the court held that it was legal and could be enforced by the person to whom the notes were given. The court said: "A man can certainly do what he pleases with his own property, if he does not thereby prejudice any of the rights of subsisting creditors. It does not appear that any existing creditors were injuriously affected thereby." The fact that a corporation by unanimous consent pays the premium on life insurance of one of its directors does not enable subsequent corporate creditors to claim the insurance. Little *v.* Garabrant, 90 Hun, 404 (1895); aff'd, 153 N. Y. 661. An improvement corporation may legally give a mortgage to secure the personal debt of its president, if none of the stockholders or their existing creditors object. Osborn *v.* Montelac Park, 89 Hun, 167 (1895). Even though an officer pledges corporate bonds for his own debt, yet if he owns the whole capital stock of the corporation, the company cannot for that reason defeat the mortgage given to secure the bonds. Buffalo Loan, etc. Co. *v.* Medina Gas, etc. Co., 12 N. Y. App. Div. 199 (1896). Where the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain. Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. Solomon Co. *v.* Barber, 49 Pac. Rep. 524 (Kan., 1897). A *bona fide* purchaser of negotiable railroad bonds may enforce them, even though the president issued them for his own use. Long Island L. & T. Co. *v.* Columbus, etc. R'y, 65 Fed. Rep. 455 (1895). In Farmers' L. & T. Co. *v.* Forest Park, etc. R. R., 65 Fed. Rep. 882 (1895), a mortgagee who had not been made a party defendant in the foreclosure of mechanics' liens attempted to fore-

an *ultra vires* purpose, yet he may enforce the same.[1] A bondholder cannot cause to be canceled bonds issued to stockholders on the ground of no consideration, where the bonds are not yet due, and there has been no default, and the plaintiff has no control over the management or the earnings or money of the corporation.[2] The issue of bonds for cash at less than their par value is sometimes allowed by statute or by the charter.[3]

close its mortgage and claim that the mechanics' lien foreclosure sale was subject to the mortgage. The mortgage was illegal when issued because it exceeded the amount of the capital stock, in violation of the statute. Resolutions to increase the capital stock had been passed, but the papers had not been filed, nor the statutory fees to the state paid, until after the foreclosure of the mechanics' liens. The company had received nothing from the bonds. The purchasers at the first foreclosure sale had expended large sums of money. Speculators who long afterwards bought the bonds with knowledge of the facts bought the bonds for a small sum in order to bring this suit. The suit failed. In Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. Where the treasurer uses the funds of the corporation to pay for stock in the corporation itself which he and other stockholders had purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re* Brockway Mfg. Co., 89 Me. 121 (1896). A mortgage given by a corporation to secure a debt due to a third person by one of its stockholders is illegal as against corporate creditors. Washington Mill Co. *v.* Sprague Lumber Co., 52 Pac. Rep. 1067 (Wash., 1898). See § 774, *infra*.

[1] Wright *v.* Hughes, 119 Ind. 324 (1889). It is no defense to foreclosure that the mortgagor misapplied the proceeds from the bonds. Farmers' L. & T. Co. *v.* New York, etc. R. R., 78 Hun, 213 (1894).

[2] Bibb *v.* Montgomery Iron Works, 101 Ala. 301 (1893). See also § 735, *supra*.

[3] See § 47, *supra*. Under a charter power to sell bonds at such a rate as the directors think best, the bonds may be issued below par and may be issued to pay for iron at less than par value. Coe *v.* Columbus, etc. R. R., 10 Ohio St. 372 (1859). Where the charter allows the directors to borrow money on such terms as they deem best, they may issue and sell mortgage bonds at sixty-six and two-thirds cents on the dollar. Traders' Nat. Bank *v.* Lawrence Mfg. Co., 96 N. C. 298 (1887). In Junction Railroad *v.* Bank of Ashland, 12 Wall. 226 (1870), the court held a sale of bonds below par to be valid because the statute expressly authorized it. In White Water, etc. Co. *v.* Vallette, 21 How. 414 (1858), the court held a sale of bonds below par to be valid because the legislature had expressly approved the particular transaction. Under a power to borrow at such rate of interest and upon such terms as the directors should think fit, the directors may sell £250 debentures for £95 each. *Re* Regents', etc. Co., 24 W. R. 687 (1876). The power to make the issue in this case was given by

In several of the states there are constitutional and statutory provisions to the effect that fictitious bonds and stock shall be void. The purpose of these provisions was to prevent the issue of bonds and stock at a price far below par. The courts, however, have practically construed such provisions as not invalidating bonds and stock issued for property or construction work.[1]

the "articles of association," *i. e.*, the by-laws.

[1] See ch. III, § 47, *supra*. Thus, although the constitution of Arkansas prohibits the issue of stock and bonds except for value, and declares void all fictitious stock and bonds, the supreme court of the United States held that although property worth only $1,300,000 was turned in to a corporation for $1,300,000 of stock and $2,600,000 of bonds, yet that the bonds were valid. Memphis, etc. R. R. *v.* Dow, 120 U. S. 287 (1887). The court said: "Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations — at least when acting with the approval of their stockholders — in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question, for a given amount of its stock and bonds, falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders." See also the important case of Peoria, etc. R. R. *v.* Thompson, 103 Ill. 187 (1882), where a very large amount of bonds and cash was given to a contractor for construction work, and the bonds were upheld by the court, although prohibited by a constitutional provision, similar to that in Arkansas, passed upon in the case cited *supra*. In regard to the constitutional provision against the issue of fictitious bonds and stock, the supreme court of Alabama has said: "The constitutional provision, standing by itself, does not require that the amount of money, or the value of the labor or property, for which stock or bonds are issued, shall correspond with the face value of the stock or bonds for which it is issued." Hence the court held that bonds might be issued at less than their par value, provided that some substantial value was paid for them, such value to be fair and reasonable, and "not a mere trick or device to evade the law." Nelson *v.* Hubbard, 96 Ala. 238 (1892). Bonds may be issued at sixty-five cents on the dollar even though the constitution and statutes of the state forbid the issue of fictitious bonds. Subsequent con-

The supreme courts of Alabama and Missouri have zealously sought to enforce these constitutional provisions in those states,

solidated bondholders cannot complain. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). It is legal for a company to issue $67,000 of bonds and $67,000 of full-paid stock, even to one of its directors, for $67,000 in cash, if this was all that the whole $134,000 of securities were worth, and if all the directors and stockholders knew of it and agreed to it. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). The Illinois constitutional provision does not render invalid the issue of $9,000,000 of bonds and $18,000,000 of stock for property purchased at foreclosure sale for $1,500,000, there having been added to the property $6,000,000 worth of improvements. The court pointed out that the issue of the stock did not interfere with creditors collecting their claims, inasmuch as their claims were ahead of the stock, and the bonds by themselves were not in excess of the value of the property itself. Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897); also 86 Fed. Rep. 929. Although $50,000 of stock, issued as full-paid, and $25,000 of mortgage bonds are issued for $2,500 worth of property, yet the parties receiving the same are not liable to corporate creditors for the value of the bonds, the bonds still being in the possession of the parties receiving the same. The parties receiving the stock, however, are liable to corporate creditors on the stock as being unpaid. Roman *v.* Dimmick, 22 S. Rep. 109 (Ala., 1897). See n. 1, p. 1680.

In Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892), the court held that the provision in Alabama against watered stock and bonds did not invalidate bonds, although $10,000 of bonds and $10,000 of stock were issued for every mile of road constructed, even though it cost much less than $20,000 cash per mile. Where $100,000 of bonds and $125,000 of stock are issued in payment of construction work of the value of $121,000, the bonds are valid and may be enforced by *bona fide* purchasers. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). This last case held, also, that only the state could object to an issue of "watered" stock and bonds as being in violation of this constitutional provision. In Brown *v.* Duluth, etc. R'y, 53 Fed. Rep. 889 (1893), the court refused to enjoin an issue of stock, and refused to cancel stock already issued, although $900,000 of bonds and $945,000 of stock were issued for construction work which cost $580,000. The court so held, although the statute required the stock to be fully paid, and prohibited issues except for property actually received. The plaintiff, however, was a holder who purchased with full knowledge of the facts. The court said: "This statute was not intended to prevent or interfere with the usual method of raising money to build railroads, or for any legitimate corporate purpose. It is not to be construed as obstructive to the extent of restricting and hampering corporations in their internal management, and embarrass them in procuring means to carry out the legitimate purposes of the corporation; and unless it appears that, under the guise of building its road, bonds and stock of the defendant company are to be issued and put upon the market fraudulently, that do not and are not intended to represent money and property, this corporation is not prohibited from entering into a real transaction, based upon a present consideration, and having reference to legitimate corporate purposes." The court also said that "such a pro-

but in doing so they have been obliged to depart from the strong current of authority to the contrary.[1] In Ohio the issue

vision does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued." A contractor who receives bonds in payment for construction work, and sells them, cannot claim that they are void as contrary to the statute prohibiting "watered" bonds. Reed's Appeal, 122 Pa. St. 565 (1888). Where a consolidated company of New York and Pennsylvania issues bonds in New York, fictitiously, such bonds cannot be enforced in Pennsylvania, since they are void by its constitution. A foreclosure in New York of the mortgage securing the bonds may be set aside and the bonds declared void so far as the Pennsylvania part of the property was concerned. Pittsburgh, etc. R. R. *v.* Rothschild, 4 Cent. Rep. 107, decided by the supreme court of Pennsylvania in 1886. A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). See also, to same effect, note 3, p. 1715. Although watered stock and bonds are issued in Pennsylvania, yet a *bona fide* purchaser of the bonds may foreclose the mortgage securing them in order to obtain payment. Woodbury *v.* Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895). The provision in the California constitution relative to fictitious stock and bonds does not invalidate them. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). The California constitutional prohibition against the issue of fictitious bonds or stock does not prevent the company pledging its bonds for a debt less than the par value of such bonds. Atlantic Trust Co. *v.* Woodbridge Canal, etc. Co., 79 Fed. Rep. 812 (1897). A sale of bonds at ninety-five is legal, even under the Texas constitution. Northside R'y *v.* Worthington, 88 Tex. 562 (1895). Where railroad constructors pay themselves in stock and then issue bonds without any consideration whatsoever, and pledge them to a bank, which knows all the facts, the bank is not protected. Farmers', etc. Bank *v.* Waco, etc. R'y, 36 S. W. Rep. 131 (Tex., 1896). In Manhattan Trust Co. *v.* Seattle Coal, etc. Co., 16 Wash. 499 (1897), a person bought coal mines for $70,000, and then organized a corporation and sold them to the corporation for $5,000,000 full-paid stock and $320,000 mortgage bonds. The company did not pay the interest on the bonds and incurred a floating debt of $135,000. The bonds were still held by the original parties, and the trustee of the mortgage took possession under the mortgage and filed a bill in equity to protect the possession and to obtain a receiver. The court held that the transaction was fraudulent, and that under the statutes of Washington the capital stock must be subscribed for before business is commenced, and hence that the claims of the general creditors should be allowed priority. But see S. C., § 47, *supra*. A provision in a charter of an Illinois and Indiana railroad company that its bonds shall not be sold at less than par does not invalidate the bonds of the company issued and sold in New York at ninety cents on the dollar. Ellsworth *v.* St. Louis, etc. R. R., 33 Hun, 7 (1884); aff'd, 98 N. Y. 553.

[1] See § 47, *supra*, for a discussion of this subject.

of bonds at less than par to a director is made illegal.[1] The statutes of Ohio regulating the price at which bonds may be issued do not affect bonds issued to a contractor for construction work, unless it is shown that the price was palpably in violation of the statute and that the parties knew it so to be.[2]

In Wisconsin bonds issued by a corporation as collateral for a debt will not be ordered to be canceled because issued in violation of a state statute requiring payment in money or prop-

[1] Section 3313 of the Revised Statutes of Ohio sets forth that "all capital stocks, bonds, notes, or other securities of a company purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." In Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859), this provision was held not to affect the liability of a guarantor of such bonds. But in Union Trust Co. *v.* New York, etc. R. R., 1 R'y & Corp. L. J. 50 (Ohio Com. Pl., 1887), the court applied the statute and held that where $50,000,000 of paid-up stock and $15,000,000 of bonds were issued to a syndicate, of which a director was a member, for $18,000,000, the stocks, bonds, and mortgage were void. The bondholders became unsecured creditors, the *bona fide* holders being unsecured creditors to the amount of the par value of their bonds and interest, and the other holders being unsecured creditors to the amount actually invested by them. The statute of Ohio rendering void bonds which are issued to a director at less than par affects only the bonds issued to him. Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897). The Ohio statute against a director purchasing bonds at less than par does not apply to bonds purchased by the directors from *bona fide* holders. Continental T. Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). Where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract; and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par. Continental T. Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898).

[2] Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897). In this case the court held that the Ohio statute against the issue of bonds at less than seventy-five cents on the dollar is not necessarily violated by the issue of $9,000,000 of bonds and about $12,000,000 of stock for work which will cost less than $10,000,000. The Ohio statute prohibiting the issue of bonds at less than seventy-five cents on the dollar does not render invalid $9,000,000 of bonds issued to a contractor, even though he received also $12,250,000 of stock, all for construction and work which cost him, including ten per cent profit, $10,300,000, the proof showing, however, that the $12,250,000 of stock was worth not more than $3,400,000. Continental T. Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. Farmers' L. & T. Co. *v.* Toledo, etc. R'y, 67 Fed. Rep. 49 (1895).

erty of a certain per cent of their face value, unless the money received by the company upon the pledge of the bonds has been repaid or otherwise secured.[1]

Under the New Jersey statutes it is particularly dangerous to issue bonds and stock for property and construction work at a large overvaluation, inasmuch as the courts of that state hold that the bonds are illegal, and that the stockholders are liable on the stock.[2] In Indiana, also, there is a statute on this subject.[3]

The invalidity of some of the bonds does not render invalid

[1] Andrews *v.* National, etc. Works, 76 Fed. Rep. 166 (1896). The Wisconsin statute that bonds should not be issued for less than seventy-five per cent of their par value does not apply to a transaction where old bonds are placed under a new mortgage, and the holders of the old bonds receive new bonds in lieu thereof. Mowry *v.* Farmers' L. & T. Co., 76 Fed. Rep. 38 (1896). Where a statute forbids the issue of bonds at less than seventy-five cents on the dollar, and they are pledged by the company at forty cents on the dollar, they are void in the hands of the pledgee. National, etc. Works *v.* Oconto Water Co., 52 Fed. Rep. 29 (1892). See also, as to pledges, § 763, *supra*.

[2] Bonds issued by a street railway before the capital stock is paid in are illegal under the New Jersey statute, except those which are in *bona fide* hands, and these latter are entitled to the amount actually received therefor by the corporation. Vanderveer *v.* Asbury Park, etc. R'y, 82 Fed. Rep. 355 (1897). A railroad mortgage in New Jersey is not valid if it exceeds the amount of cash paid in on its capital stock. The mortgage, however, may be made in advance of construction. Where $900,000 of bonds and $900,000 of stock are issued to a contractor for work costing only $900,000, the bonds are invalid, except in *bona fide* hands. On a bill filed by the receiver to cancel the mortgage, the court so decreed, upon condition, however, that *bona fide* holders were first paid the amounts they paid for their bonds. Various parties' rights were passed on by the court. Directors and other participating parties holding bonds are allowed nothing. Baker *v.* Guarantee, etc. Co., 31 Atl. Rep. 174 (N. J., 1895). On appeal the court held that where the statutes prohibit debts in excess of the capital stock actually paid in, the excessive bonds in the hands of a director cannot be enforced. Steelman *v.* Baker, 53 N. J. Eq. 672 (1896). But where one issue of bonds was legal and a second issue was illegal, a director holding bonds of the first issue may enforce them. Physick *v.* Baker, 53 N. J. Eq. 673 (1896). A bill in equity

[3] Where a water-works company issues $197,000 of stock as full paid and $150,000 of mortgage bonds to a contractor for construction work, the work actually costing less than $150,000, and the contractor pays to one of the directors $6,000 in cash, and gives to the two others $20,000 each of the stock, such directors are liable to corporate creditors for the debts due to the latter, under the Indiana statute rendering the directors liable where the provisions of the statute have been violated. Clow *v.* Brown, 48 N. E. Rep. 1034 (Ind., 1898).

the mortgage securing the bonds.[1] On the contrary, although bonds secured by a mortgage are issued illegally or fraudulently, yet the mortgage is good to the extent of protecting *bona fide* holders in full, and also protecting other holders to the extent of their actual investment.[2]

In other words, where bonds have been illegally or fraudulently issued, the court will allow those which are in the hands of the guilty parties, or persons taking with notice, to be collected only for such amounts as were actually received therefrom by the corporation.[3] *Bona fide* holders may collect the par value.[4]

is not multifarious when filed by a receiver of an insolvent corporation against the stockholders and bondholders, alleging that some of them as owners of a large number of paper mills, and others as promoters of the same, caused them to be conveyed to the corporation for bonds and preferred stock, and common stock, the par value of all of which was much greater than the actual value of the property so conveyed, even though such bill asks that the claims of the bondholders be reduced to the amount actually paid for the bonds, and that the stockholders be held liable for such part of the par value as was not fairly paid for by the property, and even though such bill asks that the promoters be held liable on loss due to stock and bonds which passed into *bona fide* hands. See *v.* Heppenheimer, 36 Atl. Rep. 966 (N. J., 1897). Where a corporation which has no profits on hand issues its bonds in payment for its stock, the party so receiving the bonds cannot enforce them, but on the contrary remains liable for the unpaid subscription price of the stock, it not having been properly issued as paid-up stock, and he not being a *bona fide* holder. Hebberd *v.* Southwestern, etc. Co., 36 Atl. Rep. 122 (N. J., 1896). In this case it was held that *bona fide* holders of bonds illegally issued could enforce them only for the amount paid therefor by such *bona fide* holders; and, where bonds with a bonus of stock had been issued, that, as against the parties receiving the bonds, the liability on the stock could be offset against the amount due on the bonds, the company having become insolvent.

[1] Graham *v.* Boston, etc., R. R. 118 U. S. 161 (1886).

[2] Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883); Central Trust Co. *v.* New York, etc. R. R., 18 Abb. N. Cas. 381, 403 (1886). See also § 770, *infra*, and § 762, *supra*.

[3] Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883). See Union Trust Co. *v.* New York, etc. R. R., 1 R'y & Corp. L. J. 50 (Ohio Com. Pl., 1887). The courts will require substantial equity to be done to the persons receiving "watered" bonds before requiring them to account for the bonds. Thus, although bonds are irregularly issued to a contractor, yet his contract is not held invalid unless he is repaid the sums actually expended in good faith by him under the contract. Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 672 (1887). See also § 744, and ch. XXXIX, *supra;* Kappner *v.* St. Louis, etc. R. R., 3 Dill. 228 (1875); S. C., 14 Fed. Cas. 132. *Cf.* note 2, p. 1703.

[4] Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886).

The courts go very far in protecting *bona fide* holders of corporation bonds, and will uphold and enforce such bonds under nearly all circumstances. The defense that the bond was issued below par does not avail as against a *bona fide* holder.[1] The

[1] Coupon bonds of a railroad company "payable to bearer pass by delivery; and a *bona fide* purchaser of them before maturity takes them freed from any equities that might have been set up against the original holders of them. The burden of proof is on him who assails the *bona fides* of such purchase." Kneeland *v.* Lawrence, 140 U. S. 209 (1891); Ellsworth *v.* St. Louis, etc. R. R., 33 Hun, 7; aff'd, 98 N. Y. 553 (1885), where the issue below par was even prohibited by statute. Though the directors fraudulently issue bonds to another railroad to build the latter, and the latter uses the proceeds to purchase control of the former, the *bona fide* holders of the bonds are protected. State *v.* Brown, 64 Md. 199 (1885). Bonds issued below par or without consideration are nevertheless valid in *bona fide* hands. *Ex parte* Chorley, L. R. 11 Eq. 157 (1870); Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859) — two cases in which the corporation received nothing for the bonds; Woods *v.* Lawrence County, 1 Black, 386 (1861); Mercer County *v.* Hacket, 1 Wall. 83 (1863); Whitney *v.* Peay, 24 Ark. 22 (1862), a case of pledge of bonds. A bond like a note purchased by a *bona fide* party may be enforced at its par value although purchased at less than the par value. Cromwell *v.* Sac County, 96 U. S. 51 (1877); Bronson *v.* La Crosse, etc. R. R., 2 Wall. 283 (1863); Alexander *v.* Atlantic, etc. R. R., 67 N. C. 198 (1872); Railway Co. *v.* Sprague, 103 U. S. 756 (1880), where nothing was received by the corporation for the bonds; Grand Rapids, etc. R. R. *v.* Sanders, 17 Hun, 552 (1879). *Bona fide* purchasers of bonds from a contractor are not affected by the fact that he did not complete the work according to contract, for which he received the bonds in payment. McElrath *v.* Pittsburg, etc. R. R., 55 Pa. St. 189 (1867). The fact that the proceeds received from the sale of the bonds are misappropriated by the stockholders does not affect the validity of the bonds in *bona fide* hands. Western, etc. R. R. *v.* Drew, 3 Woods, 692 (1879); S. C., 29 Fed. Cas. 747. The *bona fide* purchaser is not affected by the fact that the president sold the bonds and used all the proceeds for his individual purposes. Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859). Where bonds have been illegally or fraudulently issued the court will allow those which are in the hands of the guilty parties or persons taking with notice only for such amounts as were actually received therefor by the corporation. *Bona fide* holders may have greater rights. Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883). See Union Trust Co. *v.* New York, etc. R. R., 1 R'y & Corp. L. J. 50; also note 4, p. 1719. Where the holder is not a *bona fide* purchaser he stands in the shoes of his vendor, and where the officers use the corporate bonds to pay the debts of other corporations illegally, the court will order the bonds and mortgage canceled, there being no *bona fide* holders of the bonds. Chicago *v.* Cameron, 120 Ill. 447 (1887). The *bona fide* purchaser of municipal bonds may enforce them, although the railroad to which they were issued sold them at a discount of twenty-five per cent, contrary to the charter. Woods *v.* Lawrence County, 1 Black, 386 (1861).

question of what constitutes *bona fide* holdership is largely a question of fact in cases where bonds have been fraudulently issued, and each case is determined on its own peculiar circumstances.[1] Moreover, the *bona fide* holdership may be destroyed by the fact that the bond itself may not be drawn in negotiable form.[2]

If the holder of the bonds purchased them from an officer of the corporation, and such officer made the sale, not for the corporation, but as the holder and owner of the bonds himself, this in itself may destroy the *bona fides* of the purchaser, if it turn out that the officer was committing a breach of trust.[3]

The danger incident to an issue of mortgage bonds at less

[1] After many years' delay in foreclosing the mortgage, the court will scrutinize closely the validity of the bonds. A purchaser of the bonds at from three to twenty cents on the dollar, after an ineffectual foreclosure, and after the unpaid accrued interest nearly equals the principal, is not a *bona fide* purchaser, and if the original issue was for no consideration he cannot enforce them. But a *bona fide* purchaser from him, and any subsequent purchaser from such *bona fide* purchaser, may enforce the bonds. *Bona fides* must be proved in such a case. Simmons *v.* Taylor, 38 Fed. Rep. 682 (1889); rev'd on other points, *sub nom.* Simmons *v.* Burlington, etc. R'y, 159 U. S. 278 (1895). A purchaser may be *bona fide* although he took the bonds in exchange for other bonds worth only ten cents on the dollar. Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885). *Bona fides* is not presumed where the fraudulent issue has been proved. Gilman *v.* New Orleans, etc. R. R., 72 Ala. 566 (1882). Where overdue railroad mortgage bonds, which belong to the railroad company, are bought at forty cents on the dollar from the vice-president of the company after suit to foreclose has been begun, and a receiver has taken possession of the mortgaged property, the purchasers of such bonds are not *bona fide* holders where inquiry on their part would have shown that the vice-president had no authority to sell the bonds. American, etc. Co. *v.* St. Louis, etc. Co., 42 Fed. Rep. 819 (1890). A person who purchases four bonds of $1,000 each for $150 is bound to inquire into the legality of the issue. Riggs *v.* Pennsylvania, etc. R. R., 16 Fed. Rep. 804 (1883). Where a purchaser of bonds knows that he is purchasing from an agent of the corporation, and that the agent intends to use the proceeds for his private purposes, he is not a *bona fide* purchaser. Chew *v.* Henrietta, etc. Co., 2 Fed. Rep. 5 (1880). A partner of one of the contractors who is a party to a fraudulent issue of bonds was held not to be a *bona fide* purchaser under the facts in the case. Smith *v.* Florida, etc. R. R., 43 Fed. Rep. 731 (1890), a case involving the bonds which were passed upon in Railroad Cos. *v.* Schutte, 103 U. S. 118 (1880), and Trask *v.* Jacksonville, etc. R. R., 124 U. S. 515 (1888). See 84 N. Y. 190.

[2] See § 767, *infra*.

[3] See §§ 293, 727, *supra*. A purchaser of a note of a corporation payable to an officer of the corporation is not a *bona fide* purchaser. Stough *v.* Ponca Mill Co., 74 N. W. Rep. 868 (Neb., 1898).

than their par value is generally added to by the fact that the directors of the corporation are usually personally interested in the issue. It is an old and well-established principle of law that a director is disqualified from contracting with his corporation. He is acting as a trustee, and as trustee cannot contract with himself as an individual.[1] It is undoubtedly true that a director may buy bonds at less than par if the transaction is fair, and if no stockholder objects.[2] But any stockholder may object to bonds issued for construction work in which the directors were interested. Upon such objection, the mortgage securing the bonds being under foreclosure, the court will allow the bondholders taking with notice to prove only such part of the bonds as represent actual cash invested, while *bona fide* holders may enforce their bonds for their investment.[3] If, however, all the stockholders assent, and the general creditors of the corporation are not injured, the issue is legal.[4] In

[1] See §§ 649, 653, 662, *supra*.

[2] A purchaser at ninety cents on the dollar of bonds issued to a director at seventy cents is protected, even though he was informed of the facts. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892); *Re* Compagnie Bellegarde, L. R. 4 Ch. D. 470 (1876).

[3] Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883). As to *bona fide* holders, see notes, p. 1709. See also Wardell *v.* Union, etc. R. R., 103 U. S. 651 (1880); S. C., 4 Dill. 330; S. C., 29 Fed. Cas. 211. Where the incorporating act requires all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of $500,000 in bonds, of which bonds $480,000 are turned back by the vendor to the directors, who divide them among themselves, the bonds are void in the hands of directors. The directors in this instance had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." Campbell *v.* Cypress, etc. Cemetery, 41 N. Y. 34 (1869). Bonds may be issued by a corporation to a director as security for a debt from it to him. A director cannot buy bonds from the corporation at less than par, except at the risk that the company will undo the transaction. A director must give up bonds which he takes as a bonus on his subscription. But the *bona fide* purchasers may enforce them. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190 (1881). Fraud in issuing them to a director does not affect a *bona fide* purchaser. Hulett's Case, 2 J. & H. 306 (1862). For a case that carefully considers the facts which render certain bonds legal and others fraudulent, see Bronson *v.* La Crosse R. R., 2 Wall. 283 (1863). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1890). On this subject of laches see also ch. XLIV, *supra*.

[4] Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid

Ohio this disqualification of directors from purchasing from the corporation its bonds at a discount is embodied in the statutes, and the bonds are declared not merely voidable, but absolutely void.[1] It is of course legal for the company to sell its bonds to stockholders.[2]

A more difficult question arises when bonds are issued to persons who control the directors of the company, such directors being mere "dummies" of the persons to whom the bonds are issued. There have been decisions to the effect that bonds issued below par to the persons who have put in their "dummies" as directors of the company are invalid and may be attacked by stockholders or corporate creditors, or by the corporation itself.[3] If, however, these decisions are correct, it is difficult

and enforceable, where all the stockholders assented to such contract. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). See also ch. XLIV, *supra*, and §§ 649, 730, *supra*.

[1] See note 1, p. 1707, *supra*.

[2] The holder of a majority of the stock of a railroad company may legally cause its bonds to be issued to himself at ninety cents on the dollar in payment of a debt due him. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891). A stockholder may of course purchase bonds upon their original issue by the corporation. Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397 (1886).

[3] In Central Trust Co. *v.* New York, etc. R. R., 18 Abb. N. Cas. 381 (1887), the foreclosure of a railroad mortgage was sought. The corporation defended against the bonds on the ground that they were issued below par to persons who controlled the board of directors by means of "dummies." The court sustained this contention and held that the bonds still in the hands of the guilty parties must be reduced in amount to the amount actually paid therefor. Judge Andrews said: "Upon principle it would seem that whatever practical difficulties might arise in ascertaining the facts in any given case, if it were proven that a board of directors had literally no wills of their own, but merely carried out the orders of a third party in making a contract, the corporation should, if it desired, be relieved from the contract, without being compelled to prove that it was fraudulent or disadvantageous to the company. It seems to be rather a dangerous doctrine to hold that, as a matter of law, a board of directors who are mere dummies can irrevocably bind a corporation by a contract with the person who has placed them in office for the express purposes of having them make the contract." In Cleveland Rolling M. Co. *v.* Crawford, 9 R'y & Corp. L. J. 172 (Ill. Cir. Ct., 1891), corporate creditors sought to hold the defendant liable for corporate debts, by reason of the fact that bonds and stocks, whose par value was four times greater than the value of construction work done by defendant, had been issued to defendant for construction work, and that the corporation was controlled by defendant through "dummies." A demurrer was overruled, the court saying: "He could no more shield himself behind the nominal action of the corporation by its "dummy" board of directors than a guardian or executor *de son tort* could shield himself behind the

to see how railroads are to be built and corporate enterprises launched. The usual way to obtain the necessary funds is by the sale of stock and bonds at less than par, and the only mode of profit to the originators, promoters, and builders is by taking the construction contract or by realizing a profit by the sale of the stock and bonds. Unless there is a profit they will not undergo the labor, time, and care. It is easy to declare that the board of directors must be independent of the parties who furnish the money or talent to carry the enterprise through and realize a profit, but, as a matter of fact, the directors are always friends of the promoters or are "dummies" of the promoters. In either case they readily vote as the promoters wish. Theoretically the principle of law laid down above may be correct, but practically it would overthrow probably nine-tenths of the railroad-construction contracts. The law should render such contracts voidable only when they are actually fraudulent. The fraud should not be implied.

It may be illegal for the directors to vote to issue a large amount of bonds at less than their real value to a construction company in which they have stock or in which they are directors.[1] If, however, all the stockholders assent, the contract and issue are legal.[2] It is fraudulent to issue bonds at less than their actual value in order to defraud other creditors and the stockholders, and to buy in the property cheaply at foreclosure sale.[3]

accounts of the legal guardian or executor procured to be made in the name of such legal guardian or executor." Where two persons organize a railroad corporation by means of "dummy" stockholders, their clerks and employees, and put their clerks, etc., in as "dummy" directors, and these "dummies" issue all the stock and a large mortgage on the corporate property to the two promoters for construction work, one of the promoters cannot call the other to an account. The court will not aid the parties. Jackson *v.* McLean, 100 Mo. 130 (1890). And where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two by means of "dummy" intermediaries at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson *v.* McLean, 36 Fed. Rep. 213 (1888). See also §§ 663, 664, *supra*.

[1] See §§ 649, 662, 663, *supra*.

[2] Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892), and §§ 649, 662, 663, 730.

[3] A foreclosure sale based on fraudulently issued bonds will be set aside as against purchasers with notice, and such purchasers held liable for the real value of the road. Drury *v.*

Even though the validity of an issue of bonds is questionable, yet it is not every person who can complain.[1] A stockholder may enjoin the issue or cause it to be set aside where it is fraudulent or beyond the powers of the corporation.[2] But all stockholders who have assented to the issue, and all transferees of their stock, are estopped from objecting to the bonds.[3]

Cross, 7 Wall. 299 (1868). Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. Phenix Nat. Bank *v.* Cleveland Co., 11 N. Y. Supp. 873 (1890). For an issue of bonds fraudulently by issuing them in pledge and then purchasing the bonds at a pledgee's sale, see James *v.* Railroad Co., 6 Wall. 752 (1867).

[1] See § 848, *infra*, and § 788, *supra*.

[2] See chs. XXXIX, XL, and § 659, *supra*; §§ 828, 848, *infra*. A stockholder may object to the payment of bonds issued to other stockholders for construction work which was never performed. But *bona fide* holders of the bonds are protected. State *v.* Brown, 64 Md. 199 (1885). Where bonds have been illegally or fraudulently issued and stockholders may object, the court will allow those bonds which are in the hands of the guilty parties or persons taking with notice to be collected only for such amounts as were actually received therefrom by the corporation. *Bona fide* holders may collect their investment. Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883).

[3] See ch. XLIV and §§ 730, 735, *supra*. A subsequent purchaser of the stock cannot complain where the stock which he holds has ratified the transaction. Several of the cases cited above expressly state this to be the law, and there are many other decisions to the same effect. In *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883), the court said of the plaintiff stockholder who had purchased his stock after the transaction: "He was not a stockholder or an elector, and if it be claimed that he represents those from whom he acquired his certificate of stock, the answer is that they are the very parties who committed the wrong which the court was asked to redress." Where $59,000 of stock and $20,000 of bonds are issued for a gas plant worth $34,000 besides the franchise, a judgment creditor cannot hold the stockholders liable on the stock where he himself is a stockholder and no charge of fraud is made. Woolfolk *v.* January, 131 Mo. 620 (1895). A stockholder cannot file a bill to enjoin a pending suit of foreclosure on the ground that the bonds were fraudulently issued. The proper remedy is for the corporation to set up this defense, and, if it declines to set it up, then the stockholder may intervene. Waymire *v.* San Francisco, etc. R'y, 112 Cal. 646 (1896). A person who buys mortgage bonds with stock as a bonus from a party to whom the stock and bonds were originally issued cannot be held liable on the stock at the instance of other stockholders, who did not object at the time of the issue, and who now come into the foreclosure suit and attempt to defeat the bonds on the ground that the amount due thereon is not more than the unpaid par value of the stock, the bonds and stock having originally been issued in payment for property. Northern

The attorney-general, in behalf of the state, certainly cannot enjoin the issue.[1] Where a railroad has been sold under foreclosure proceedings, a judgment creditor of the company who

Trust Co. *v.* Columbia, etc. Co., 75 Fed. Rep. 936 (1896). See also cases cited in §§ 40, 733, *supra*. In Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887), where a railroad road-bed worth $2,000 was turned in to a corporation for $200,000 of its notes and $3,600,000 of its stock, the court held that the notes were good and could be collected. The court said: "It does not appear in this case that there was any deception or fraud practiced by the parties. The property was open to inspection, and the approximate cost of constructing it was easily obtainable. Its value to the company for the purpose desired was not difficult to ascertain. I find no evidence of any representations as to its value or cost or purchase price made by the parties selling; but there is record evidence that the board of directors, several months after the sale and with full knowledge of the transaction, formally approved and ratified it, and not only that, but subsequently, at a meeting of all the stockholders, the transaction was again ratified. Now, who was defrauded or deceived? All parties — directors and stockholders — assented to it; and, surely, subsequent purchasers of stock, or the corporation itself, cannot now object to it. It is true the vendors got a very large advance on the price they paid, but that is not alone the test by which the *bona fides* of the transaction is to be tried. To them as individuals the property was of little or no value. To the railroad company it could be made worth the price paid for it; and the vendors bent every energy to make the property useful to the company and to make the enterprise successful, for their chances of making money or any other value for the property depended very largely on the result. As before remarked, parties taking stock afterwards in the company cannot complain of the purchase. The records of the company showed the transaction. It was not kept a secret. There was no law compelling any person or municipality to take stock in the company unless they voluntarily chose to do so; and if they were deceived by misrepresentations of the officers, their cause of action rests on that deception and not on an attack on the original contract of purchase." A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). Although the bonds are sold at sixty-five to seventy cents on the dollar, and the purchaser holds a majority of the stock of the company and controls it, yet the bonds cannot be attacked by a stockholder who has acquiesced in their issue for eleven years. Alexander *v.* Searcy, 81 Ga. 536 (1889). A purchaser of stock issued to a contractor for work cannot attack the issue on the ground that it was watered stock, even though the contractors immediately sell a part of the stock and bonds at the rate of ninety cents on the dollar for the bonds, with nearly an equal amount of stock thrown in. Drake *v.* New York, etc. Co., 26 N. Y. App. Div. 499 (1898). See also Central T. Co. *v.* Columbus, etc. R'y, 87 Fed. Rep. 815 (1898), and § 735, *supra*.

[1] Injunction is not the proper remedy for the state in objecting to *ultra*

seeks to set the sale aside on the ground that the mortgage was invalid is in the position of one who asks to be let in to redeem from a mortgagee in possession under an unforeclosed mortgage. He cannot in the same action ask that the purchaser at foreclosure sale, who is about to bond the property, shall pay the judgment creditors' claim out of such bonds.[1] But a judgment creditor may attack the legality of the bonds or of the foreclosure where the company has become insolvent and

vires acts of corporations. *Quo warranto* is its remedy. See § 635, *supra*. In State *v.* Janesville Water Co., 92 Wis. 496 (1896), the court refused leave to the attorney-general to bring suit to forfeit the charter of a waterworks company, although it was alleged that watered stock and bonds had been issued, it being shown in opposition that there had been eight years' delay. In the case of Columbus, etc. R'y *v.* Burke, 19 Week. L. Bull. 27 (Ohio, 1887); 20 Week. L. Bull. 287 (1888), the arbitrators said: "The theory that a corporation, even when exercising public franchises, holds its property upon any trust in favor of the public, was met and unqualifiedly denied by Chancellor Kent in his luminous and learned opinion in the great case of Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371 (1817), where it was held that equity had no jurisdiction of a bill filed by the attorney-general to enjoin the defendant from carrying on the business of banking in violation of the statute. In adverting to the class of cases in which the English court of chancery had exercised control over corporations for breach of trust, Chancellor Kent pointed out that in every instance the jurisdiction had been confined to charitable institutions. He cited with evident approval the case of Colchester *v.* Lotten, 1 Ves. & B. 226 (1813), which was a bill to set aside a mortgage of corporate property as unduly made by an officer of the corporation, under the corporate seal, for purposes not corporate, in which he said the lord chancellor had held that there was no instance of a trust attaching upon the ground of misapplication of funds by corporations, except in the case of corporations holding to charitable uses. 'The charge of a breach of trust,' continued Chancellor Kent, 'ought to come from, or on behalf of, the *cestuis que trustent* or stockholders of the company. If they are satisfied, no other person is entitled to complain. If they approve of the act of their trustees in instituting banking operations, there is no ground of any allegation of a breach of trust.'" See also § 37, *supra*. The state will not be allowed to intervene in a foreclosure suit for the purpose of preventing it on the ground that the bonds are illegal and void, and that on a reorganization a greater issue will be made. State *v.* Farmers', etc. Co., 81 Tex. 530 (1891). Where $100,000 of bonds and $125,000 of stock are issued in payment for construction work of the value of $121,000, the bonds are valid and may be enforced by *bona fide* purchasers. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). In this case the court held also that only the state could object to watered stock and bonds issued upon the organization of the company in violation of the statutes.

[1] Merriman *v.* Chicago, etc. R. R., 64 Fed. Rep. 535 (1894).

he has exhausted his remedy against it.[1] General creditors who have proved their claims may attack the legality of an issue of

[1] Drury *v.* Cross, 7 Wall. 299 (1868). Judgment creditors may bring an action to set aside a mortgage and to restrain a foreclosure, where the bonds secured thereby were issued to the stockholders for purposes foreign to the corporate purposes, in fraud of corporate creditors, the object being to close out the property and organize a new corporation for the purpose of going on with the business. Phenix Nat. Bank *v.* Cleveland Co., 11 N. Y. Supp. 873 (1890). The deed of trust and bonds may be declared invalid in a suit instituted against the trustee and all known bondholders. Other bondholders cannot afterwards follow the property into other hands. Beals *v.* Illinois, etc. R. R., 27 Fed. Rep. 721 (1886). A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). Although, after foreclosure and purchase by the trustee and reorganization, the foreclosure is declared fraudulent and void at the instance of judgment creditors, yet it is valid except as to those judgment creditors who attacked it, and hence a new foreclosure need not be had. Milwaukee, etc. R. R. *v.* Soutter, 13 Wall. 517 (1871); to same effect, Barnes *v.* Chicago, etc. R. R., 8 Biss. 514 (1879); S. C., 2 Fed. Cas. 862. In Drury *v.* Cross, 7 Wall. 299 (1868), a person who was a general creditor at the time of the foreclosure sale, but became a judgment creditor after the sale, caused the sale to be set aside as fraudulent on the ground that most of the bonds were issued without consideration, and for the purpose of "wrecking" the company for the benefit of the directors, who were indorsers of the company's paper. The case of James *v.* Railroad, 6 Wall. 752 (1867), was to the same effect. The court, at the instance of judgment creditors, set aside the sale because, of the $2,000,000 of bonds on which the foreclosure was obtained, only $200,000 were *bona fide* and enforceable. But a decree invalidating the sale does so only as to complaining judgment creditors, and not as to other creditors or bondholders, or the company itself. Barnes *v.* Chicago, etc. R'y, 122 U. S. 1 (1887). A foreclosure and reorganization, the latter being agreed upon before the foreclosure, by the terms of which the bondholders and stockholders buy the property at the foreclosure sale, and then organize a new company to own it, is fraudulent as against the unsecured creditors of the company, and they may cause the stockholders' interest to be applied to their debts. Railroad *v.* Howard, 7 Wall. 392 (1868). See also § 886, *infra*. "If one creditor objects to the claim of another creditor, and succeeds in showing it to be invalid, such claim does not stand good as against other creditors who interpose no objection to it. The opposition of one enures to the benefit of all." Duncan *v.* Mobile, etc. R. R., 3 Woods, 567 (1877); S. C., 8 Fed. Cas. 19. Although a mortgage and a foreclosure thereof, and a purchase thereunder by the mortgagee, are declared void as a fraud on creditors of the company, except as to *bona fide* holders of the bonds, yet it is merely voidable, and a sale of the property to satisfy another debt bars the right of such mortgagee to recover for liens which it had paid. Such payment was a payment of liens on its own property. Barnes *v.* Chicago, etc. R. R., 8 Biss. 514 (1879); S. C., 2 Fed. Cas. 862. See also §§ 828, 848, *infra*.

mortgage bonds.[1] General creditors whose suit against the company has been consolidated with a foreclosure suit may contest the validity of the bonds. An intervening creditor may also attack them.[2] Creditors who become such after the bonds were issued cannot attack the validity of the bonds on the ground that they were issued for less than their real value, together with a large amount of stock.[3] A subsequent mortgagee, however, cannot make such an attack except as a judgment creditor.[4] A purchaser of the bonds with notice cannot complain.[5] In England it is held that although none of the

[1] Vanderveer *v.* Asbury Park, etc. R'y, 82 Fed. Rep. 355 (1897). See §§ 848, 735.

[2] Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897).

[3] Continental T. Co. *v.* Toledo, etc. R. R., 82 Fed. Rep. 642 (1897); 87 id. 828.

[4] Where a third mortgage is made expressly subject to a second mortgage, the third mortgagee in his suit to foreclose cannot attack the validity of the second-mortgage bonds. Bronson *v.* La Crosse, etc. R. R., 2 Wall. 283 (1863). Where one telegraph corporation holds the bonds of another and exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and mortgage on the property of the second corporation. Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288 (1888); aff'd *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). The statute of limitations runs against an action by taxpayers against the officers and promoters of a railroad to which municipal aid was voted, to compel them to account for watered stock and bonds, and to cause the stock, bonds, and mortgage to be canceled. Allen *v.* Wisconsin, etc. R'y, 90 Iowa, 473 (1894).

[5] A purchaser of bonds who purchases with notice that an alleged covenant in the mortgage securing the bonds, to devote the proceeds of the bonds to the improvement of the property, has been broken, cannot complain of such breach of covenant, even though the entire proceeds of the bonds were, through the medium of sales of property, diverted to the personal benefit of stockholders. Belden *v.* Burke, 147 N. Y. 542 (1885). The court (p. 551) said as to the action of the stockholders: "They had raised a vast sum of money by placing a mortgage upon their own property, and had expended and disbursed the money as they thought would best promote their own interests. There is no one who, in this action, has any right to complain of this, unless the bondholders, from whom they borrowed the money, were intentionally deceived to their loss or injury, for which they have no adequate redress at law." The court also said that neither on the ground of a breach of covenant — the covenant being a covenant of the corporation only — nor on the ground of fraud could

stockholders and creditors of a company which is in difficulties object to a new issue of bonds and stock for contract work, a part of the bonds and stock being then given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company the scheme is illegal, and innocent purchasers of the stock may hold the directors who did the act liable for the stock and bonds thus given as a bonus.[1] Such a purchaser's remedy, however, is not to have the whole issue set aside as illegal.[2]

The corporation itself cannot complain, unless some of the stockholders object;[3] but it is held that a receiver may.[4] Even if the bonds, and hence the mortgage, are held to be invalid, the court may retain jurisdiction of the property.[5]

the action be maintained. The court referred to the fact that the plaintiff had not paid more for his bonds than they actually were worth, the interest having been promptly paid, and the bonds having appreciated in market value. If the bondholder charges fraud he cannot obtain relief on other grounds, the charge of fraud not being substantiated. Spies *v.* Chicago, etc. R. R., 40 Fed. Rep. 34 (1889). In a bondholders' and stockholders' bill to set aside an amicable foreclosure and reorganization, the parties charged with participating therein must be made defendants. Ribon *v.* Railroad Cos., 16 Wall. 446 (1872). The holder of a part of the mortgage bonds may attack the validity of other bonds of that issue. Farmers', etc. Bank *v.* Waco, etc. R'y, 36 S. W. Rep. 131 (Tex., 1896).

[1] London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893).

[2] Church *v.* Citizens' Street R. R., 78 Fed. Rep. 526 (1897).

[3] Columbus, etc. R. R. *v.* Burke, 19 Week. L. Bull. 27 (Ohio, 1887); 20 Week. L. Bull. 287 (1888). But see New Castle Northern R'y *v.* Simpson, 21 Fed. Rep. 533 (1884). A reorganized company may be charged with notice of the reorganization agreement, and may be estopped from complaining that a part of the securities issued by the old corporation were overissues. Davidson *v.* Mexican Nat. R. R., 11 N. Y. App. Div. 28 (1896). In a suit between the corporation and bondholders to test the validity of the bonds, stockholders are not proper parties. Des Moines Gas Co. *v.* West, 50 Iowa, 16 (1878). Where a trustee sells at great sacrifice, and at the sale makes statements disparaging the title, and the purchaser is a former trustee of the mortgage, the court will set the sale aside. Equitable Trust Co. *v.* Fisher, 106 Ill. 189 (1883). The legislature has no power to validate a foreclosure sale which is invalid by reason of fraud. White Mountains R. R. *v.* White Mountains R. R., 50 N. H. 50 (1870).

[4] A receiver may bring an action to determine the validity of bonds. See *v.* Heppenheimer, 36 Atl. Rep. 966 (N. J., 1897); Hubbell *v.* Syracuse, etc. Works, 42 Hun, 182 (1886). After a receiver has been appointed for a corporation its creditors cannot sue to set aside mortgages by the corporation. National State Bank *v.* Vigo County Nat. Bank, 141 Ind. 352 (1895).

[5] Although the bonds are held to be invalid, yet the foreclosure suit being started, and receiver's certificates being out, and all the property

It is to be borne in mind that the statute against usury may invalidate bonds issued below par. A bond bearing the full legal interest and yet issued below par is practically an agreement to pay more than the legal rate of interest. Consequently this defense may in certain cases be set up by the corporation.[1]

in the receiver's hands, the court will sell and administer the property, all parties consenting. The phrase all property "intended to be used," in the mortgage, covers material for construction, such as rails, etc. If the receiver has notes belonging to the company the court will administer them also. Farmers' L. & T. Co. *v.* San Diego St. Car Co., 49 Fed. Rep. 188 (1892).

[1] Craven County Com'rs *v.* Atlantic, etc. R. R., 77 N. C. 289 (1877), where a stockholder brought action to have declared void railroad bonds so issued. In Schermerhorn *v.* Talman, 14 N. Y. 93 (1856), the court came to the same conclusion, and said that the sale of the securities (certificates of deposit in that case) is not a sale, but a loan, and "that neither individuals nor corporations can sell their mere promises to pay." That which is called a sale is nothing but a loan (p. 117). "If it appears that, at the end of all the payments, the lender will have received more than his principal, with lawful interest, the contract is usurious" (p. 121). See also Neuse River Nav. Co. *v.* Newbern, 7 Jones, L. (N. C.) 275 (1859). In Sturges *v.* Stetson, 1 Biss. 246 (1858); S. C., 23 Fed. Cas. 311, McLean, J., in a railroad case, said: "From the authority given to the directors to sell notes, bonds, scrip, and certificates for the payment of money or property which the company had previously received as donations, or in payment of the subscriptions to the capital stock, above or below par, an argument is drawn that stock may be disposed of to subscribers for less than $50 a share. It appears to me the provision authorizes an inference in conflict with the one drawn. If bonds or other instruments for the payment of money be transferred at less than their face, with legal interest on the entire sum, in payment for the money loaned, it would be usurious, and this was the reason for the above provision. Without it the sale of the bonds, etc., would have been illegal." A $1,000 bond may be sold for $850, and yet not be usurious. McTighe *v.* Macon Constr. Co., 94 Ga. 306 (1894). Bonds may be issued at less than their par value where corporations are forbidden by statute from setting up the defense of usury. Stevens *v.* Watson, 4 Abb. App. Dec. 302 (1865). Where the charter authorizes the company to borrow money "on such terms as might be agreed upon by the parties," twelve per cent interest may be agreed upon. Morrison *v.* Eaton, etc. R. R., 14 Ind. 110 (1860). If the rate of interest is legal where the corporation exists and the bonds are payable, there is no usury, although the rate is higher than in other states where suit is brought. Butler *v.* Edgerton, 15 Ind. 15 (1860). *Cf.* Butler *v.* Myer, 17 Ind. 77 (1861). Where the bonds of a corporation were sold for cash by the corporation for eighty-seven and one-half cents on the dollar, with an agreement that, if other bonds were sold at a less rate within a certain time, any difference would be paid to the first vendee, and bonds were sold later at seventy-one cents on the dollar, a suit will not lie by the first vendee to recover the sixteen and one-half cents on the dollar. The issue below par was held to be usurious. The Ohio statute relative to such is-

A corporation, like any person, may at common law set up the defense of usury. But the statutes of many of the states now prohibit this defense on the part of the corporation, and in all the states the courts go to the extreme in defeating the defense if possible.[1]

If a company sells all its property it may divide the proceeds among its stockholders after paying the corporate creditors.[2]

sues was held to apply to domestic corporations. McGregor *v.* Covington, etc. R. R., 1 Disney (Ohio), 509 (1857).

[1] For various statutes on this subject, see Part VII, *infra*. In North Dakota, by statute, a railroad company cannot plead usury against the holder of a bond or other obligation. Rev. Civ. Code (1895), § 2962; also in South Dakota, Comp. L. of Dak. (1887), § 2993. In Iowa a railroad corporation may dispose of bonds for construction and equipment at less than par, and cannot plead usury against them. 1 Rev. Code (1888), ¶ 1283; so also in Maine, Rev. Stat. (1883), ch. 51, § 56; Minnesota, § 2529 (1891); Nebraska, Comp. Stat. (1895), ¶ 1820 (ch. 16, § 117); New Jersey, Gen. Stat. (1895), vol. 3, p. 3703, § 6. In Wisconsin also a corporation cannot plead usury. Rev. Stat. (1878), § 1690. Many states have no usury laws. See Jones, Mortgage, § 633. A charter provision authorizing the corporation to issue securities at not over seven per cent interest does not prevent the company borrowing money at a greater rate of interest. Union Nat. Bank *v.* Wheeler, 60 N. Y. 612 (1875). "A foreign corporation sued in New York state cannot avail itself of the statute of limitations." Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 185 (1881); Rathbun *v.* Northern, etc. R'y, 50 N. Y. 656 (1872). See also Curtis *v.* Leavitt, 15 N. Y. 9, 66 (1857); Central Gold Min. Co. *v.* Platt, 3 Daly, 263 (1870); Graham *v.* Atlantic, etc. Co., N. Y. Daily Reg., Oct. 14, 1884. The issue of bonds in New York below par cannot be attacked on the ground of usury, even by a lien creditor of the corporation. Atlantic Trust Co. *v.* The Vigilancia, 73 Fed. Rep. 452 (1896). The statutory provision that a corporation shall not plead usury in defense does not prevent a suit in equity being brought so set aside as inequitable and usurious a settlement of accounts, in which a corporation is retrospectively charged with compound interest, since equity has power to afford relief against improvident and extravagant bargains, irrespective of the statutes against usury. Higgins *v.* Lansingh, 154 Ill. 301 (1895). The courts are inclined to extend the application of laws which forbid a corporation from setting up the defense of usury. Junction R. R. *v.* Bank of Ashland, 12 Wall. 226 (1870); Cromwell *v.* Sac County, 96 U. S. 51 (1877). Coupons at an illegal rate do not prevent a recovery of the sum actually loaned and legal interest. Philadelphia, etc. R. R. *v.* Lewis, 33 Pa. St. 33 (1859). But any corporation as assignee of a usurious contract may set it up. Merchants', etc. Nat. Bank *v.* Commercial, etc. Co., 49 N. Y. 635 (1872). As to usury set up against a corporation, see § 690, *supra*.

[2] See §§ 548, 671, *supra*. Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general

Before leaving this subject of the issue of bonds at less than par, it is well to refer to bonds issued to a contractor for work which the contractor does not complete. The general rule is that where bonds are issued to a contractor in payment for work which he afterwards fails to complete, the bonds cannot be enforced at their full par value unless they have passed into *bona fide* hands.[1]

creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895); Boston, etc. Co. *v.* Bankers', etc. Tel. Co., 36 Fed. Rep. 288; affirmed, *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). Here the defendant, in order to control the American Rapid Telegraph Company, bought the stock of the latter company and paid for it by giving to the stockholders of the vendor first-mortgage bonds on all the property of the American Rapid Telegraph Company, those bonds being issued to the defendant under the defendant's contract with the Rapid Company to construct new lines, etc. When the bondholders came to foreclose, the defense was set up that the transaction was fraudulent, *ultra vires*, illegal, etc. But the court upheld the bonds and enforced the mortgage. In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. In McCaleb *v.* Goodwin, 21 S. Rep. 967 (Ala., 1897), one street railway purchased all the stock of another street railway and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor.

[1] State *v.* Brown, 64 Md. 199 (1885); Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876); Chicago, etc. R'y *v.* Loewenthal, 93 Ill. 433 (1879), holding that the mortgage becomes invalid. Where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void. Sargent *v.* Kansas Mid. R. R., 48 Kan. 672 (1892). Where, according to contract, bonds are issued to a contractor in payment for work before the work is done, a purchaser or pledgee of the bonds from him is protected, even though he took the bonds with full knowledge of all the facts. Mercantile Trust Co. *v.* Zanesville, etc. R'y, 52 Fed. Rep. 342 (1892). It is no defense to bonds in *bona fide* hands that they were issued to a contractor for work which he did not finish in the time agreed upon. McElrath *v.* Pittsburg, etc. R. R., 55 Pa. St. 189 (1867). Where a contractor who has been paid in bonds in advance does not perform, and by compromise he

A promise and contract of promoters to subscribers to certain bonds may create an equitable lien on the bonds enforce-

gives up all the bonds except a few which it is agreed he may retain, such compromise cannot afterwards be repudiated by the company. Oregon, etc. R. R. *v.* Forrest, 128 N. Y. 83 (1891). The court will not enjoin a corporation from selling its bonds and stock, although a contractor is entitled to receive them after his contract work is finished. The theory of this case is that the court could not compel the contractor to perform, and hence will not enjoin the other party. Peto *v.* Brighton, etc. R'y, 1 H. & M. 468 (1863). When one telegraph company agrees to extend the lines of another telegraph company and to take pay therefor in advance in bonds of the latter company, and then exchanges the bonds for the stock of the latter corporation, a subsequent mortgagee of the first corporation cannot attack the validity of the bonds and the mortgage on the property of the second corporation. Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288 (1888). This case was affirmed *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). The court said in regard to the method of issuing the stocks and bonds: "It violated no principle of law and no rule of good morals." Bonds which are to be issued for building an extension must be delivered when the extension is completed. San Antonio, etc. R'y *v.* Busch, 21 S. W. Rep. 164 (Tex., 1893). Where a road agrees to issue bonds and fails to do so, the measure of damages is the highest market price of the bonds between the time they should have been delivered and the time of the trial, with interest thereon, irrespective of the price which was to be paid for the bonds. San Antonio, etc. R'y *v.* Busch, 21 S. W. Rep. 164 (Tex., 1893). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. American Water-works Co. *v.* Venner, 18 N. Y. Supp. 379 (1892). Where a corporation deposits stock with its treasurer to be delivered in payment for property according to contract, the treasurer is liable in trover for the value of the stock if he refuses to deliver the stock to the party after such party has completed the contract. McDonald *v.* McKinnon, 92 Mich. 254 (1892). As to the form of a syndicate contract to build the Southern Pennsylvania Railroad, and action by a member to break it up, and that no injunction will be granted *pendente lite*, see Bagaley *v.* Vanderbilt, 16 Abb. N. Cas. 359 (1885). As to an issue of bonds on certificates as fast as a road is completed, see § 816, *infra*. A vendor taking mortgage bonds in payment thereby waives a condition in the contract of sale that title should not pass until the sale was completed. Hinchman *v.* Point Defiance R'y, 14 Wash. 349 (1896). In U. S. Trust Co. *v.* Western Contract Co., 81 Fed. Rep. 454 (1897), bonds and stock were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed the former corporation became insolvent, and the court passed upon the various rights of the parties. Where bonds are to be issued *pro rata* for each five miles of completed railroad ready for rolling-stock on the certificate of the chief engineer, but the contract is to be forfeited if

able in equity, if the bonds have not passed into *bona fide* hands.[1] Where a corporation has issued stock for work to be done, and the work is not done, the corporation may compel a person in whose hands the stock was deposited to deliver it back to the corporation. The person holding the stock may interplead.[2] But where a contractor who is paid in stock assigns the stock and then fails to complete the contract, the assignee who took with full knowledge of the contract is not entitled to the stock, the contract saying that if it was not performed it should be null and void.[3] Various questions arise where stock is to be issued or has been issued for contract work and there occurs a default on the part of one party. Many decisions are given in the notes below as to the measure of damages and the rights of the parties in such cases.[4]

the road is not completed, the contractor is entitled to his bonds for completed sections on the engineer's certificate, even though the road is not completed. Perkins *v.* Locke, 27 S. W. Rep. 783 (Tex., 1894). Where a water-works company issues all its stock and bonds to a contractor for construction work in advance of the work, and the contractor pledges them to a banker for advances, the other creditors of the water-works company cannot claim an interest in such securities, even though the banker had assumed the contractor's obligation to one other creditor. McNeal Pipe, etc. Co. *v.* Bullock, 174 Pa. St. 93 (1896).

[1] Badgerow *v.* Manhattan Trust Co., 64 Fed. Rep. 931 (1894). An agreement of a railroad company to deliver its bonds in payment for sections of its road as fast as such sections were completed does not give any lien upon the bonds, and if the railroad company pledges them to others the pledgee is protected. There is not even an equitable lien upon the bonds. Badgerow *v.* Manhattan Trust Co., 74 Fed. Rep. 925 (1896).

[2] Equity Gas-Light Co. *v.* McKeige, 139 N. Y. 237 (1893).

[3] Sargent *v.* Kansas Midland R. R., 48 Kan. 672 (1892). In Hampton, etc. R. R. *v.* Bank, 26 S. E. Rep. 238 (S. C., 1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

[4] A contractor cannot recover any damages for the failure to deliver stock if the stock is worthless and the company insolvent. Central Trust Co. *v.* Condon, 67 Fed. Rep. 84 (1895). Several persons defrauded as to their contract whereby they were to receive stock cannot sue jointly. Each must sue separately. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). If an employee is by contract to be paid in stock, and payment is not made, he may obtain judgment for money to an amount equal to the par value of the stock. Delafield *v.* San Francisco, etc. R'y,

§ 767. *Negotiable character of bonds and coupons of a corporation payable to order, bearer, or holder — Lost bonds.* — A *bona fide* purchaser of the bonds of a corporation is protected

40 Pac. Rep. 958 (Cal., 1895). A landowner who agrees to take pay from a railroad for a right of way in shares of stock must take the stock at its par value, and not at its market value. Hoffman *v.* Bloomsburg, etc. R. R., 157 Pa. St. 174 (1893). Stock issued to a contractor instead of money to be paid to him may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. Price *v.* Holcomb, 89 Iowa, 123 (1893); Pendleton Mfg. Co. *v.* Mahanna, 18 Pac. Rep. 563 (Oreg., 1888). If a corporation accepts an absolute order upon it by the contractor to deliver to a third person certain stock, it cannot afterwards decline to issue the stock on the ground that the contractor has not performed his work. Hite Nat. Gas Co.'s Appeal, 118 Pa. St. 436 (1888). The courts of Massachusetts will not, at the suit of a foreign construction company, enjoin a foreign railroad company and a resident from the issue by the railroad company to the resident of bonds and stock which the railroad company has contracted to deliver to the construction company. The suit should be at the residence of the railroad company. Kansas, etc. Co. *v.* Topeka, etc. R. R., 135 Mass. 34 (1883). Where property is deeded to trustees to deed to a corporation for part of the stock, the remaining stock to be for working capital, the *cestuis que trust* are entitled to the stock before the rest is sold. The statute of limitations does not run. Philes *v.* Hickies, 18 Pac. Rep. 595 (Ariz., 1888). If the corporation prevents the completion of the contract, the contractor may recover as damages the value of the work already done, and also the profits lost. Myers *v.* York, etc. R. R., 2 Curtis, 28 (1854); S. C., 17 Fed. Cas. 1122. If the corporation refuse to issue the stock according to contract, the contractor may recover as damages the *market* value of the stock. Porter *v.* Buckfield Branch R. R., 32 Me. 539 (1851); Barker *v.* Troy, etc. R. R., 27 Vt. 766 (1855). If the contract provides for payment to the contractor in stock, without stating that the stock is to be taken at its par value, the contractor may demand the stock at its market value; and if it is worthless, he may then demand money in lieu thereof. Hart *v.* Lauman, 29 Barb. 410 (1859). The contractor cannot, however, complain because the capital stock has been increased, nor is a tender of the stock to him necessary. Moore *v.* Hudson River R. R., 12 Barb. 156 (1851). If, in organizing and issuing the stock, the amount to be issued for the property is not what the contract calls for, the vendor may compel a specific performance. Bailey *v.* Champlain, etc. Co., 77 Wis. 453 (1890). See also §§ 61, 335, *supra*. For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. San Antonio, etc. R'y *v.* Wilson, 4 Tex. Civ. App. 178 (1893). Where, after a subscription for stock is made, the company contracts to issue all its stock to a contractor in payment for work, and thereupon the subscriber gives up his stock to the company and it is issued to the contractor, the subscriber is not liable on such stock, even though the contractor does not fulfill, and even though the subscriber causes the contract with the contractor to be made. Riverton Water Co. *v.* Hummel, 175 Pa. St. 575 (1896). Although a contractor who is to take stock and bonds in payment assigns

not only against defenses set up by the corporation,[1] but also against the claims of prior owners of the bonds. This class of bonds are negotiable like promissory notes,[2] and this feature of negotiability is by far the most important feature of corpo-

his contract to a trustee and issues debenture bonds against it, and also assigns scrip certificates of the company exchangeable for mortgage bonds on completion of the work, yet no equitable lien on the property of the company is thereby created. Falmouth, etc. Bank *v.* Cape, etc. Co., 44 N. E. Rep. 617 (Mass., 1896). Where the company defaults in paying in stock as agreed, the measure of damages is the actual value of the stock. Central Trust Co. *v.* Richmond, etc. R. R., 68 Fed. Rep. 90 (1895). An executory contract of a corporation to issue debentures is enforceable, even though the corporation has become insolvent. Pegge *v.* Neath, etc. Co., 77 L. T. Rep. 550 (1897). As to the usual railroad contract for construction work, see § 911, *infra.*

[1] See § 766, also § 38, *supra.*

[2] White *v.* Vermont, etc. R. R., 21 How. 575 (1858): Murray *v.* Lardner, 2 Wall. 110 (1864); Pittsburgh, etc. R'y *v.* Lynde, 44 N. E. Rep. 596 (Ohio, 1896); Carr *v.* Le Fevre, 27 Pa. St. 413, 418 (1856); Bunting *v.* Camden, etc. R. R., 81 Pa. St. 254 (1876); Hubbard *v.* New York, etc. R. R., 36 Barb. 286 (1862); New Albany, etc. Co. *v.* Smith, 23 Ind. 353 (1864); Junction R. R. *v.* Cleneay, 13 Ind. 161 (1859); American File Co. *v.* Garrett, 110 U. S. 218 (1884); Wickes *v.* Adirondack Co., 2 Hun, 112 (1874); Galveston R. R. *v.* Cowdrey, 11 Wall. 459 (1870); Morris Canal, etc. Co. *v.* Lewis, 12 N. J. Eq. 323 (1858); Chapin *v.* Vermont, etc. R. R., 74 Mass. 575 (1857). In this case railway bonds payable "to ——" were held negotiable, the legislature having ratified "the proceedings" whereby the mortgage was executed. Brainerd *v.* New York, etc. R. R., 25 N. Y. 496 (1862); Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883); Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885); Grand Rapids, etc. R. R. *v.* Sanders, 17 Hun, 552 (1879); Chesapeake, etc. Co. *v.* Blair, 45 Md. 102 (1876); Stanton *v.* Alabama, etc. R. R., 2 Woods, 523 (1875); S. C., 22 Fed. Cas. 1070; State *v.* Cobb, 64 Ala. 127 (1879); Langston *v.* South Carolina R. R., 2 S. C. 248 (1870). In Massachusetts, corporation bonds under seal are negotiable by statute. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889). This statute declares negotiable all bonds or other obligations under seal for the payment of money to bearer, or some person or bearer, or to order, and issued by a corporation or joint-stock company. Stat. 1852, ch. 76. Scrip calling for a bond in the future is negotiable. Goodwin *v.* Robarts, L. R. 1 App. Cas. 476 (1876); S. C., L. R. 10 Exch. 337 (1875), distinguishing Crouch *v.* Credit Foncier, L. R. 8 Q. B. 374 (1873). But trust certificates are not negotiable. Railroad *v.* Howard, 7 Wall. 392 (1868). Coupon bonds payable to bearer, issued by a corporation under proper authority, have all the qualities of commercial paper and are negotiable instruments. Virginia *v.* Chesapeake, etc. Co., 32 Md. 501 (1870). Railroad bonds are negotiable. Society for Savings *v.* New London, 29 Conn. 174 (1860). The bonds of a manufacturing corporation are negotiable. Lehman *v.* Tallassee Mfg. Co., 64 Ala. 567, 593 (1879). See also many cases in § 766, *supra.* In England the negotiability of foreign bonds is recognized. Gorgier *v.* Mieville, 3 B. & C. 45 (1824). The House of Lords, in London, etc. Bank *v.*

ration bonds. The fact that the parties to whom bonds are issued are aware of their invalidity does not affect the rights of subsequent holders of the same bonds in good faith and without notice.[1] The bond of an individual is not negotiable like a note.[2]

The negotiability of corporate "bonds" seems to have arisen in the following manner: The seal may be looked upon in any one of three ways: (1) as merely the signature of the corporation, thus making the instrument one not under seal and hence a negotiable note; (2) or as corresponding to an individual's seal, making the instrument a regular bond; or (3) as being both the signature and also the seal, similar to an individual seal. The first way of considering the corporate seal probably gave rise to the negotiability of corporate "bonds." In modern times, however, these instruments are called bonds and not notes.[3] However, the law is well settled that the bonds of a corporation are negotiable although the seal of the corporation is attached. The negotiability of a bond is not destroyed by the fact that the corporate seal is attached,[4] or that the com-

Simmons, [1892] A. C. 201, reversed [1891] 1 Ch. 270, and held that *bona fide* holders of negotiable bonds of a corporation were protected.

[1] Belden *v.* Burke, 147 N. Y. 542 (1895). Bonds negotiated by the president without authority are valid in *bona fide* hands. Pittsburgh, etc. R'y *v.* Lynde, 44 N. E. Rep. 596 (Ohio, 1896).

[2] Bonds issued by an individual, though negotiable in form, are specialties and are not negotiable. Bockes *v.* Hathorn, 20 Hun, 503 (1880). The bonds of an individual, when once paid, cannot be re-issued. Bockes *v.* Hathorn, 20 Hun, 503 (1880).

[3] Railway bonds "are called bonds, or railway bonds, but they are in fact, both the bonds and the coupons, mere bills or notes, and as strictly negotiable as bank bills." The court said also that they should not be under seal, but the court would disregard the seal anyway. Ide *v.* Passumpsic, etc. R. R., 32 Vt. 297 (1859). The fact that an obligation for money issued by a corporation is under seal does not make it a bond. "It is under seal; but so, in the absence of special powers, must every instrument be which is executed by a corporation." *Re* Imperial, etc. Co., L. R. 11 Eq. 478, 491 (1870). A debenture similar to an American bond is held in England to be nothing but a promissory note. *Re* Imperial, etc. Co., L. R. 11 Eq. 478 (1870). See also § 770, *infra*, where this same question arises in connection with the statute of limitations. The corporate seal upon a bond raises a presumption of a consideration. Campbell *v.* Cypress, etc. Cemetery, 41 N. Y. 34 (1869).

[4] Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863); *Re* General Estates Co., L. R. 3 Ch. 758 (1868). See also cases in preceding notes.

pany retains the right to pay the bond before maturity,[1] or that registration is provided for,[2] or that it is convertible into stock,[3] or that it is payable on or before a specified date,[4] or that overdue coupons are attached to the bonds,[5] or by the fact that the interest has been due and unpaid for a period sufficient, if the interest had been demanded, to make the bonds due, no demand having been made.[6] But the negotiability is destroyed by the fact that the bonds call for labor to be done,[7] or that

[1] Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889).

[2] Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878); Reid *v.* Bank of Mobile, 70 Ala. 199 (1881).

[3] Welch *v.* Sage. 47 N. Y. 143 (1872); Hotchkiss *v.* National Bank, 21 Wall. 354 (1874).

[4] Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). Corporate bonds are negotiable, even though they are payable in fifty years, with the right to pay in five years. American Nat. Bank *v.* American, etc. Co., 32 Atl. Rep. 305 (R. I., 1895),

[5] Long Island L. & T. Co. *v.* Columbus, etc. R'y, 65 Fed. Rep. 455 (1895). A purchaser may be *bona fide* although he buys bonds two days before maturity and there are eight overdue semi-annual coupons thereon. But he is not a *bona fide* purchaser of such overdue coupons. Gilbough *v.* Norfolk, etc. R. R., 1 Hughes, 410 (1877); S. C., 10 Fed. Cas. 354. Several past-due coupons on a municipal bond are sufficient to put upon inquiry a purchaser of the bond from a thief. First Nat. Bank *v.* Scott County, 14 Minn. 77 (1869). "The dishonor of the unpaid coupons for interest did not infect with dishonor the bond or other coupons, putting on inquiry those who, in the usual course of trade, in good faith, and upon a valuable consideration, should acquire them." State *v.* Cobb, 64 Ala. 127, 158 (1879); Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885). The fact that an unpaid coupon is attached to a bond does not render the purchaser a non *bona fide* purchaser. Cromwell *v.* Sac County, 96 U. S. 51 (1877); Railway Co. *v.* Sprague, 103 U. S. 756 (1880). Unpaid coupons on bonds do "not necessarily constitute notice of any invalidity in the bonds." Grand Rapids, etc. R. R. *v.* Sanders, 54 How. Pr. 214 (1877). "It cannot be said that the holder of the bond, with its undetached coupons, is put upon notice of a defense as to the delay because some of the coupons happened to be overdue." McElrath *v.* Pittsburgh, etc. R. R., 55 Pa. St. 189 (1867). It is legal for a company to issue its bonds with overdue coupons attached. McElrath *v.* Pittsburgh, etc. R. R., 55 Pa. St. 189 (1867).

[6] Railway Co. *v.* Sprague, 103 U. S. 756 (1880). See also Morgan *v.* United States, 113 U. S. 476 (1885); Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221 (1887). Where, after six months' default, the principal is to become due by the terms of the bonds, it is doubtful whether at the end of the six months the bonds become past due and non-negotiable, but certainly not where the defaulted interest is afterwards paid. Pittsburgh, etc. R'y *v.* Lynde, 44 N. E. Rep. 596 (Ohio, 1896).

[7] Knight *v.* Wilmington, etc. R. R., 1 Jones, L. (N. C.) 357 (1854).

provision is made for extending the time of payment,[1] or by the fact that the bonds are overdue,[2] or by the place and method of payment being left in blank.[3] If the purchaser took with notice, and there were no *bona fide* purchasers in the line of his title, he takes subject to the equities.[4] Where a party purchases bonds from a *bona fide* holder, he thereby becomes a *bona fide* holder himself, even though he had notice of defenses to the bonds.[5]

In determining who is and who is not a *bona fide* purchaser, the facts of each case by itself must be taken into consideration,[6] especially where the original issue of the bonds was fraud-

[1] McClelland *v.* Norfolk, etc. R. R., 110 N. Y. 469 (1888).

[2] Vermilye *v.* Adams, etc. Co., 21 Wall. 138 (1874).

[3] Ledwich *v.* McKim, 53 N. Y. 307 (1873).

[4] Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221 (1887); Hervey *v.* Illinois Mid. R'y, 28 Fed. Rep. 169 (1884).

[5] Grand Rapids, etc. R. R. *v.* Sanders, 54 How. Pr. 214 (1877); Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221 (1887); Cromwell *v.* Sac County, 96 U. S. 51 (1877). A holder of bonds is a *bona fide* holder if any prior holder thereof was a *bona fide* holder. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). A purchaser of bonds with notice does not, by repurchasing the bonds from a *bona fide* party to whom the former has sold the bonds, become thereby a *bona fide* purchaser himself. Elwell *v.* Tatum, 6 Tex. Civ. App. 397 (1893).

[6] The rule laid down in Welch *v.* Sage, 47 N. Y. 143 (1872), is as follows: "The law may be regarded as settled that a purchaser, for value advanced, of negotiable paper, including bonds, is not bound to exercise such care and caution as wary, prudent men would exercise. Negligence will not impair his title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict." A purchaser of bonds at an auction sale, no interest having been paid for ten years, and the purchaser knowing that they had been the subject of litigation, is not a *bona fide* purchaser. Trask *v.* Jacksonville, etc. R. R., 124 U. S. 515 (1888). The amount paid for bonds as well as the value of the bonds themselves may be taken into consideration in determining whether the holder is a *bona fide* purchaser. Grand Rapids, etc. R. R. *v.* Sanders, 54 How. Pr. 214 (1877). Where the trustee named in the mortgage is himself the vendor of the bonds, and he sells $4,000 of bonds for $150, the purchaser is not a *bona fide* purchaser. Riggs *v.* Pennsylvania, etc. R. R., 16 Fed. Rep. 804 (1883). Where a party contracts to deliver notes for stock, and before the delivery of the notes the stock is sent to the corporation for transfer, and the corporation refuses to transfer the same on the ground that it was overissued stock, the vendee has no recourse against the corporation if he delivers the notes to the vendor after receiving such information from the corporation. In this case the vendor was president of the corporation. Hayden *v.* Charter, etc. Park, 27 Atl. Rep. 232 (Conn., 1893).

ulent or without consideration.[1] A person taking bonds from a corporation to secure a private debt is bound to ascertain the right of the officer to so issue the bonds.[2] A *bona fide*

The fact that one certificate of stock gives notice of irregularity does not convey notice to the holder thereof as regards another certificate of stock held by him. Knox *v.* Eden Musee, etc. Co., 74 Hun, 483 (1893). Rev'd on another point in 148 N. Y. 441. A purchaser of negotiable bonds or other commercial paper, in good faith, for valuable consideration, and before maturity, is entitled to protection, although he may have had suspicion of a defect of title or knowledge of circumstances sufficient to excite such suspicion in the mind of a prudent man, and even although he may have been guilty of gross negligence; and this protection equally extends to a mortgage or other security given for such commercial paper or bond. Spence *v.* Mobile, etc. R'y, 79 Ala. 576, 587 (1885). Mere suspicion on the part of a purchaser of negotiable paper of a defect in the seller's title, or knowledge of facts which would excite suspicion in the mind of a prudent man, is not sufficient to vitiate or impair his title; there must be bad faith or something equivalent to it; and while gross negligence is not of itself bad faith, it may be evidence of it. The bonds in this case referring on their face to the deed of trust executed by the railroad company for their security, which deed expressly provided that the entire debt, principal and interest, should become due and payable within ninety days after refusal to pay the semi-annual interest due by the coupons, on demand made at the agency of the corporation in the city of New York, a purchaser having knowledge of such demand and refusal at the time he acquired the bonds cannot claim to be an innocent purchaser without notice; but when he has proved the payment of value, the onus of proving knowledge or notice of such extrinsic fact is on the party who seeks to impeach his title. Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885), the above statement being from the syllabus. Concerning the subject of what constitutes a *bona fide* purchaser, see also § 771, *infra*, and § 293, *supra*.

[1] See § 766, *supra*.

[2] Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896). See also § 293, *supra*. Where a corporate note is issued to a third person and then passes into the hands of an officer, the person taking it from the officer is not affected by the rule that a person taking corporate paper in its original issue by a corporation is bound to ascertain the facts if the officer is personally interested in the transaction. Cheever *v.* Pittsburgh, etc. R. R., 150 N. Y. 59 (1896). In the federal courts a person taking from the president of a corporation a note signed by the corporation and indorsed by him is not bound to inquire into the consideration. Doe *v.* Northwestern Coal, etc. Co., 78 Fed. Rep. 62 (1896). A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896). A principal taking bonds as collateral security to a note sent to him by his agent is not chargeable with notice of the fact that the agent, as the agent of a corporation, has fraudulently put the bonds into circulation. Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., 56 Fed. Rep. 849 (1893).

purchaser of a bond which has been stolen takes good title.[1] Where bonds have been lost or destroyed, a court of equity will direct the company to issue new and suitable representatives thereof to the owner upon full indemnity being given.[2]

Although there is a suit pending to restrain a mortgagor railroad company from negotiating its bonds, yet where the company does negotiate them, even in violation of an injunction,

[1] A *bona fide* purchaser of negotiable corporation bonds is protected even though the bonds were stolen by the vendor. Dutchess County Ins. Co. *v.* Hachfield, 73 N. Y. 226 (1878). A *bona fide* purchaser of stolen railroad bonds is protected. Murray *v.* Lardner, 2 Wall. 110 (1864); Evertson *v.* Newport Nat. Bank, 66 N. Y. 14 (1876). The *bona fide* purchaser of stolen railroad bonds payable to bearer is protected. Carpenter *v.* Rommel, 5 Phila. 34 (1862). So, also, as to water-works bonds. Consolidated Assoc. *v.* Avegno, 28 La. Ann. 552 (1876). The *bona fide* purchaser of a stolen bond is protected. Gilbough *v.* Norfolk, etc. R. R., 1 Hughes, 410 (1877); S. C., 10 Fed. Cas. 354. Buying a security *bona fide* twelve months after receiving notice that it had been stolen does not invalidate the purchaser's title. Raphael *v.* Bank of England, 17 C. B. 161 (1855). The purchase, by a national bank, of government bonds which have been stolen may be made *in bona fide*, although it had not paid any attention to a notice sent to it of the theft of the bonds. Seybell *v.* National Currency Bank, 54 N. Y. 288 (1873). Where the bonds are stolen before the trustee's certificate is attached, such certificate being required by the terms of the bond, the bonds are void absolutely, and there can be no *bona fide* purchaser of them. Maas *v.* Missouri, etc. R'y, 83 N. Y. 223 (1880). If stolen bonds are sold, the owner may follow the proceeds of the sale into the hands of one who takes with notice. Newton *v.* Porter, 69 N. Y. 133 (1877). Where negotiable bonds are stolen from the owner, and they pass into *bona fide* hands, and then the thief obtains them by fraud from such *bona fide* hands and returns them to the first owner, the latter is entitled to keep them. London, etc. Co. *v.* London, etc. Bank, 61 L. T. Rep. 37 (1889). See also § 771, notes, *infra*.

[2] Chesapeake, etc. Co. *v.* Blair, 45 Md. 102 (1876). A person losing negotiable bonds may compel the company to issue new ones to him upon giving ample indemnity, since a *bona fide* purchaser of the lost bonds may enforce them, and he may be a *bona fide* holder although he had suspicions and grounds of suspicion as to the title, and was guilty of gross negligence in not investigating, but yet acted in good faith. New Orleans, etc. R. R. *v.* Mississippi College, 47 Miss. 560 (1873). See also Lawrence *v.* Lawrence, 42 N. H. 109 (1860). Equity will compel payment of a lost bond where full indemnity is given. Force *v.* Elizabeth, 27 N. J. Eq. 408 (1876). So, also, of coupons where the bonds and coupons were destroyed by fire on a steamboat. Rogers *v.* Chicago, etc. R'y, 6 Abb. N. Cas. 253 (1878). A lost bond will be paid if indemnity is given. Miller *v.* Rutland, etc. R. R., 40 Vt. 399 (1867). The owner of a lost coupon may recover interest from the date when he made a demand and tendered proper indemnity. Fitchett *v.* North Pennsylvania R. R., 5 Phila. 132 (1863).

the *bona fide* purchaser of the bonds is protected. The doctrine of *lis pendens* does not apply.[1] A person selling bonds has no purchase-money lien on such bonds for the price thereof.[2] The holder of bonds is presumed to be the *bona fide* holder of them,[3] but this burden is easily shifted.[4] The person suing on bonds payable to bearer need not show how he came by them,[5] or to whom they were first issued.[6] Coupons may be detached from the bond and sold like promissory notes. They are negotiable, and a *bona fide* purchaser of them is protected.[7] The holder

[1] Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893). The doctrine of *lis pendens* does not apply to negotiable corporate bonds. Pittsburgh, etc. R'y *v.* Lynde, 44 N. E. Rep. 596 (Ohio, 1896).

[2] Barstow *v.* Pine Bluff, etc. R'y, 21 S. W. Rep. 652 (Ark., 1893).

[3] Macon County *v.* Shores, 97 U. S. 272 (1877); Murray *v.* Lardner, 2 Wall. 110 (1864). The holder of a municipal bond is presumed to be a *bona fide* holder. Kennicott *v.* Wayne County, 6 Biss. 138 (1874); S. C., 14 Fed. Cas. 333. The possession of a negotiable bond is *prima facie* evidence of title, and ordinarily is presumptive evidence that the holder is *bona fide*. Western N. C. R. R. *v.* Drew, 3 Woods, 691 (1879); S. C., 29 Fed. Cas. 747. The burden of proof that the plaintiff is not a *bona fide* purchaser of bonds which he is suing on, and which were stolen and the theft advertised, is upon the company which is being sued. Gilbough *v.* Norfolk, etc. R. R., 1 Hughes, 410 (1877); S. C., 10 Fed. Cas. 354. *Bona fide* ownership is presumed. Lehman *v.* Tallassee, etc. Co., 64 Ala. 567 (1879). The holder of bonds payable to "holder" is presumed to be the owner of them. Martin *v.* Somerville, etc. Co., 16 Fed. Cas. 903 (1863). The holder of bonds payable to bearer is presumed to be the owner upon foreclosure proceedings until the contrary is shown. Chicago, etc. Land Co. *v.* Peck, 112 Ill. 408 (1885); Carr *v.* Le Fevre, 27 Pa. St. 413 (1856).

[4] Smith *v.* Sac County, 11 Wall. 139 (1870); Stewart *v.* Lansing, 104 U. S. 505 (1881).

[5] A holder of bonds payable to bearer need not prove how he came by them. He is presumed to be the rightful owner. Chicago, etc. R. R. *v.* Peck, 112 Ill. 408 (1885).

[6] Where the bonds are payable to bearer, "no rule of law requires it to be shown by averment to whom such bonds, or any of them, were negotiated in the first instance." Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878). The bondholder need not show how much was paid for the bonds or when they were issued. Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878).

[7] Fox *v.* Hartford, etc. R. R., 38 Atl. Rep. 871 (Conn., 1897); Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501, 547 (1870); Spooner *v.* Holmes, 102 Mass. 503 (1869), where the coupons had been stolen; Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863), where a guaranty of the coupon was enforced; Haven *v.* Grand Junction, etc. Co., 109 Mass. 88 (1871), the coupons being payable to bearer; Miller *v.* Rutland, etc. R. R., 40 Vt. 399 (1867). To same effect, and holding that detached coupons create a distinct obligation, National Exch. Bank *v.* Hartford, etc. R. R., 8 R. I. 375 (1866). See also Arents *v.*

need not prove his title.[1] But if the bonds are not negotiable the coupons are not, even though the latter are negotiable in form.[2] If the coupon does not run to any person or order or bearer, it is not negotiable.[3] Coupons resemble promissory

Commonwealth, 18 Gratt. (Va.) 750 (1868); Clark *v.* Iowa City, 20 Wall. 583 (1874); Walnut *v.* Wade, 103 U. S. 683 (1880); Thompson *v.* Lee County, 3 Wall. 327 (1865); Aurora City *v.* West, 7 Wall. 82, 105 (1868); Morris Canal, etc. Co. *v.* Fisher, 9 N. J. Eq. 699 (1855). That coupons are negotiable, see also Chesapeake, etc. Canal Co. *v.* Blair, 45 Md. 102 (1876), where bonds were lost and representatives thereof were issued by the company to the owner. Cicero *v.* Clifford, 53 Ind. 191 (1876), a municipal bond coupon case; Gilbough *v.* Norfolk, etc. R. R., 1 Hughes, 410 (1877); S. C., 10 Fed. Cas. 354, holding that a *bona fide* purchaser of stolen bonds might enforce coupons not yet due, but not the overdue coupons. See also Dillon, Mun. Corp., for many cases relative to coupons on municipal bonds. The purchaser from a *bona fide* purchaser is protected, even though the former was not a *bona fide* purchaser himself. Grand Rapids, etc. R. R. *v.* Sanders, 54 How. Pr. 214 (1877); Miller *v.* Berlin, 13 Blatchf. 245 (1876); S. C., 17 Fed. Cas. 306; Northampton Nat. Bank *v.* Kidder, 106 N. Y. 221 (1887). Coupons are negotiable without indorsement, and title passes by delivery. Johnson *v.* Stark County, 24 Ill. 75 (1860). Where overdue coupons from bonds stolen before maturity are sued for, the holder must prove that he, or a *bona fide* purchaser prior to him, purchased the coupons before maturity. Hinckley *v.* Merchants' Nat. Bank, 131 Mass. 147 (1881). Payment of interest coupons on bonds cannot be refused on the ground that certain forged bonds are in circulation. Wood *v.* Consolidated, etc. Co., 36 Fed. Rep. 538 (1888). The numbers on coupons do not destroy their negotiability. Evertson *v.* Newport Nat. Bank, 66 N. Y. 14 (1876). "Coupons, where payable to bearer, are promissory notes negotiable by the law merchant, and possess all the attributes of promissory notes." Cooper *v.* Thompson, 13 Blatchf. 434 (1876); S. C., 6 Fed. Cas. 491.

[1] The holder of coupons suing thereon need not prove the origin of his title. He sues as holder and not as assignee. McCoy *v.* Washington County, 3 Wall. Jr. 381 (1862). A possession of uncanceled coupons, detached from negotiable bonds, is *prima facie* evidence of title with all the rights of a purchaser. Duncan *v.* Mobile, etc. R. R., 3 Woods, 567 (1877); S. C., 8 Fed. Cas. 19.

[2] McClelland *v.* Norfolk, etc. R. R., 110 N. Y. 469 (1888), holding that under a mortgage power the majority of the bondholders might extend the time of payment of the coupons. But see Manning *v.* Norfolk, etc. R. R., 29 Fed. Rep. 838 (1887).

[3] In Myers *v.* York, etc. R. R., 43 Me. 232 (1857), and Jackson *v.* York, etc. R. R., 48 Me. 147 (1858), the court held that a coupon worded, the company "will pay thirty dollars on this coupon," is not negotiable, it not being to bearer or order, though taken from a negotiable bond. But a similar coupon attached to a municipal bond was held to be negotiable in Smith *v.* Clark County, 54 Mo. 58 (1873), and in McCoy *v.* Washington County, 3 Wall. Jr. 381 (1862), a municipal-bond case, where the court said that the coupon took its negotiability from the bond. In Wright *v.* Ohio, etc. R. R., 1 Disney (Ohio), 465

notes, and a purchaser of the coupon after it becomes due is not a *bona fide* purchaser.[1] A purchaser of overdue coupons is not bound by a general understanding between his vendor and the company that the coupons would not be presented for payment until it was convenient for the company to pay.[2]

§ 768. *The negotiability of the bonds extends also to the mortgage.*— The bonds of a corporation are negotiable, and the corporation is unable to set up many defenses against *bona fide* holders which it might have set up against the parties to whom the bonds were originally issued. But does this protection and negotiability extend also to the mortgage as well as the bonds? Can the corporation defend against the mortgage on grounds which it cannot set up against *bona fide* holders of the bonds? In the federal courts and in most of the states of the Union the corporation cannot. The mortgage follows and partakes of the negotiability of the bonds.[3]

(1857), the court held that coupons worded as "warrants for thirty-five dollars . . . payable in New York on the first day of," etc., were not negotiable. Coupons are not negotiable if they are not payable to bearer nor to any one's order. Evertson *v.* Newport Nat. Bank, 66 N. Y. 14 (1876). See also Clarke *v.* Janesville, 1 Biss. 98 (1856); S. C., 5 Fed. Cas. 962, holding a municipal-bond coupon not negotiable.

[1] Arents *v.* Commonwealth, 18 Gratt. (Va.) 750 (1868), holding also that a guaranty of the coupon passes to any holder. Where railroad-bond coupons are stolen and are purchased after they become due, the purchaser is not protected. Wylie *v.* Speyer, 62 How. Pr. 107 (1881). A contract to sell railroad bonds implies that the unpaid coupons are included, where the intent of the parties was to practically give title to a railroad free from all debts. Another purchaser of the coupons with notice is not protected. Farmers' L. & T. Co. *v.* Oregon, etc. R. R., 58 Fed. Rep. 639 (1893). Where a person sells coupon bonds on a contract, by which he is entitled to the bonds on the payment of a certain sum, the coupons which accrue in the meantime belong to the vendee. Fox *v.* Hartford, etc. R. R., 38 Atl. Rep. 871 (Conn., 1897).

[2] Fox *v.* Hartford, etc. R. R., 38 Atl. Rep. 871 (Conn., 1897).

[3] A negotiable note secured by a mortgage enables a *bona fide* indorsee thereof to enforce the mortgage free from defenses that exist against the payee. Carpenter *v.* Longan, 16 Wall. 271 (1872). See also § 775, *infra*. Such also is the rule where bonds are so secured and have passed into *bona fide* hands. Kenicott *v.* Supervisors, 16 Wall. 452 (1872); Chicago R'y, etc. Co. *v.* Merchants' Bank, 136 U. S. 268, 283 (1890); Swift *v.* Smith, 102 U. S. 442, 444 (1880); Collins *v.* Bradbury, 64 Me. 37 (1875); Towne *v.* Rice, 122 Mass. 67, 73 (1877); Heath *v.* Silverthorn, etc. Co., 39 Wis. 146 (1875). In Spence *v.* Mobile, etc. R'y, 79 Ala. 576, 587 (1885), the court said: "Two states — Ohio and Illinois — depart from the general ruling which extends the im-

This rule of law would seem to be one of the first requirements of trade. The average corporate bond would be a very dangerous instrument if the mortgage were liable to be swept away by some defense which the bond purchaser knew nothing about. It is a wise rule of public policy which causes the mortgage to partake of the negotiability of the instrument which it secures. Nevertheless in Ohio and Illinois a contrary rule prevails.[1]

munity accorded to negotiable instruments to the mortgages given to secure their payment. Baily *v.* Smith, 14 Ohio St. 396 (1863); Kleeman *v.* Frisbie, 63 Ill. 482 (1872). And in 2 Pom. Eq., § 708, n. 1, the reasoning of these cases is commended. Our ruling in Hawley *v.* Bibb [69 Ala. 52] is supported by the great weight of authority." See also Converse *v.* Michigan Dairy Co., 45 Fed. Rep. 18 (1891); Swett *v.* Stark, 31 Fed. Rep. 858 (1887). "The same immunity from defenses in the hands of *bona fide* holders applies to mortgages securing such bonds as to the bonds themselves." Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883). The general rule is that, where a negotiable note is secured by a mortgage, the mortgage may be enforced by a *bona fide* purchaser of the note. But in some states the negotiability of the note does not extend to the mortgage. The former rule prevails in the federal courts. Myers *v.* Hazzard, 50 Fed. Rep. 155 (1881). See also § 764, *supra*. The question of whether the mortgage partakes of the negotiability of the negotiable paper which it secures has not often arisen, because in most of the states the practice is to give a non-negotiable bond instead of a note for the principal debt. The early cases holding that the negotiability of the note extends to the mortgage are Reeves *v.* Scully, Walk. (Mich.) 248 (1843); Dutton *v.* Ives, 5 Mich. 515 (1858); Fisher *v.* Otis, 3 Chand. (Wis.) 83 (1850); Croft *v.* Bunster, 9 Wis. 503 (1859). The mortgagee of a corporation is not chargeable with knowledge of facts appearing on its records in regard to the title to the property. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885). In regard to the question whether the negotiability of a bond carries with it the negotiability of the mortgage, the court said, in Belden *v.* Burke, 72 Hun, 51, 74, 75: "It has never been understood that mortgages of the character of the one before us are negotiable instruments; nor has it ever been the theory of the courts that a purchaser of a bond acquires an interest in the mortgage which he can assign when he sells his bond, or that present holders of mortgage bonds are entitled to the benefit of the mortgaged security because assigned with the secured debt. But rather that a bondholder's claim is founded on the direct promise of the railway company to himself, by virtue of the trust instrument in which he is described as the beneficiary. Clearly there is no legal obstacle to the making of a contract in which the obligations, with respect to the security for the bonds put out, shall be co-extensive with the obligation of the bonds themselves for the purpose of enhancing their public credit and currency." Reversed on other grounds in 147 N. Y. 542.

[1] The supreme court of Ohio, in the early case of Baily *v.* Smith, 14 Ohio St. 396 (1863), established the rule for that state that the mortgage did *not* partake of the negotiability of the

Where the bondholders purchased their bonds with knowledge of the fact that a manufacturing company has erected machinery on the property covered by the mortgage, under a contract by which said company reserved title in the machinery, and the right to take it away in default of payment, the lien of the manufacturing company is prior in right to that of the bondholders.[1] If negotiable bonds are given as collateral security to a note that is not negotiable, the bonds lose their negotiability as regards that note.[2]

§ 769. *Miscellaneous features of bonds — Issue in payment of the property of another corporation — Consolidations — Bondholders' suits — Bonds exchangeable into stock.* — Where the bonds are secured by a mortgage on property which is taken over from an insolvent party, difficult questions arise as to the rights of creditors of that insolvent party as against the bondholders and stockholders.[3]

A railroad company is liable on its bonds although by consolidation with another company all its property has passed

note which it secured. A *bona fide* purchaser of a note who takes with the note an assignment of chattels mortgaged to secure the note takes the latter subject to the equities. Commercial Nat. Bank *v.* Burch, 141 Ill. 519 (1892). Railroad bonds are negotiable, and the mortgage securing them may be enforced in behalf of *bona fide* purchasers, even though the bonds were issued below par, in violation of the statute. Peoria, etc. R. R. *v.* Thompson, 103 Ill. 187 (1882), overruling Chicago, etc. R'y *v.* Loewenthal, 93 Ill. 433 (1879). *Cf.* Hodson *v.* Eugene Glass Co., 156 Ill. 397 (1895). If a statute prohibits the issue of bonds below par, a *bona fide* holder may enforce them, but the mortgage is void and he becomes an unsecured creditor. Union Trust Co. *v.* New York, etc. R. R., 1 R'y & Corp. L. J. 50 (1887, Cleveland, Ohio, Court). In general, see also Kleeman *v.* Frisbie, 63 Ill. 482 (1872). In Pomeroy, Eq., § 708, note 1, the reasoning of these cases is commended. Where by the charter all rights are to be forfeited unless the road is completed within a certain time, and it is not so completed, and the state forfeits all its rights and turns them over to another company, a mortgage of the old company falls also. Where no part of the money from the bonds was expended on the road, holders of bonds with notice get nothing. Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876).

[1] Central Trust Co. *v.* Arctic, etc. Mfg. Co., 77 Md. 202 (1893).

[2] Thomson-Houston Elec. Co. *v.* Capitol Elec. Co., 56 Fed. Rep. 849 (1893).

[3] As to this, see ch. XL, *supra*. Bondholders who took with notice that the property was received by the corporation from another corporation or firm in payment for stock, and that the latter corporation or firm was in debt, cannot hold as against such creditors. Blair *v.* St. Louis, etc. R'y, 22 Fed. Rep. 36 (1884).

out of its possession.[1] The consolidated company may be made liable on the bonds.[2]

A judgment creditor cannot attack consolidated bonds on the ground that the old bonds which have been taken up were informally and illegally issued.[3]

A contract to deliver the bonds of a company is not fulfilled by tendering the bonds of a company into which the former company has been merged by consolidation.[4]

Bonds are sometimes by their terms made convertible into stock. This subject is considered elsewhere.[5]

[1] A bondholder in a corporation that is afterwards consolidated with another cannot be compelled to look to the consolidated company only. Market Street R'y *v.* Hellman, 109 Cal. 571 (1895); Gale *v.* Troy, etc. R. R., 51 Hun, 470 (1889).

[2] See § 897, *infra.* The holder of a bond unsecured by mortgage cannot prevent a consolidation where such consolidation is authorized by an existing statute. The consolidated company is liable for the debts of the constituent companies, including this bonded debt; but one of the constituent companies may place a mortgage on the property to secure other debts and still leave this bonded debt unsecured. Where a consolidated company agrees to "protect" unsecured bonds of the consolidating companies, an equitable lien is created on the consolidated company property. Tysen *v.* Wabash R'y, 11 Biss. 510 (1883); S. C., 15 Fed. Rep. 763. As to this litigation, see Compton *v.* Jesup, 167 U. S. 1 (1897). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey *v.* Illinois Mid. R'y, 28 Fed. Rep. 169 (1884). In suing a foreign consolidated company on bonds issued by one of the constituent companies, the statutes rendering the former liable must be pleaded. Rothschild *v.* Rio Grande, etc. R'y, 59 Hun, 454 (1891). As to the liability of the consolidated company under the New York statute, see Janes *v.* Fitchburg R'y, 50 Hun, 310 (1888); Polhemus *v.* Fitchburg R. R., 50 Hun, 397 (1888).

[3] Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). It is no defense to a mortgage that a consolidation was irregular, or that the debt exceeded the capital stock, contrary to statute, or that an increase of stock was irregular, or that there had been an overissue of bonds, all parties having concurred therein and interest having been paid for three years. Farmers' L. & T. Co. *v.* Toledo, etc. R'y, 67 Fed. Rep. 49 (1895). A street-railway company and a land company cannot legally join in the execution and issue of bonds and mortgages on the property of both, even though the proceeds are used to pay the debts of the latter and to construct the railway of the former. But each is liable on the bonds to the extent of the proportion of the money received by it. Northside R'y *v.* Worthington, 88 Tex. 562 (1895). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. Louisville T. Co. *v.* Louisville, etc. R'y, 84 Fed. Rep. 539 (1898).

[4] New Jersey, etc. R'y *v.* Strait, 35 N. J. L. 322 (1872).

[5] See § 283, *supra.*

The right of bondholders to complain of *ultra vires* or fraudulent acts of the corporation and directors, and in general to bring suits to protect the corporate property, is considered elsewhere.[1]

§ 770. *Suits at law on bonds — Demand of payment — Form of action — Statute of limitations.* — A suit at law may be brought to obtain judgment on a bond of a corporation, even though the bond, with many other bonds, is secured by a mortgage.[2] Nevertheless the bondholder, after obtaining judgment, cannot levy execution on the property covered by the mortgage. The law does not allow this as against the mortgagor, nor as against the other bondholders.[3] No demand of payment need be made.[4] In New Jersey, by statute, a mortgage bond or coupon cannot be sued upon until after foreclosure is had.[5]

The formalities connected with the issue of bonds depend upon the orders of the board of directors.[6]

The corporation cannot set up in defense to its bonds that it was irregularly incorporated.[7]

[1] See § 735, *supra*, and § 830, *infra*.

[2] The holders of bonds which are due may sue upon them, notwithstanding they are secured by a mortgage. "The fact that a mortgage had been given as security for the debt, with trusts and covenants, which a court of equity would control and enforce in a proper case, afforded not a shadow of defense. The bond was the principal debt, the mortgage the incidental security. Remedies peculiar to each exist, both in law and equity, but they do not clash and destroy each other — they co-exist." Philadelphia, etc. R. R. *v.* Johnson, 54 Pa. St. 127 (1867).

[3] See § 772, *infra*.

[4] Shaw *v.* Bill, 95 U. S. 10 (1877), where the corporation was insolvent. Demand of payment need not be made, alleged, or proved in an action on the bond, even though the bond is payable at a certain place, but the defendant may set up that the money was there to pay the bond. Langston *v.* South Carolina R. R., 2 S. C. 248 (1870). If the bonds are payable at the office of the company in a particular place and it has no office there, the demand may be made elsewhere. Alexander *v.* Atlantic, etc. R. R., 67 N. C. 198 (1872). See also § 772, *infra*, concerning demand of payment of coupons. Where the company has the right to pay off the bonds, it may do so and stop interest by depositing the money at the place stated in the bond as the place of payment. But the offer to pay must not be conditioned on all the past-due coupons being also turned in. So held in regard to municipal bonds. Bailey *v.* Buchanan County, 54 N. Y. Super. Ct. 237 (1887).

[5] Holmes *v.* Seashore Electric R'y, 57 N. J. L. 16 (1894).

[6] As to the right of a particular officer to sell them, see Chew *v.* Henrietta, etc. Co., 2 Fed. Rep. 5 (1880). If valid on their face, compliance with the charter is presumed. Nichols *v.* Mase, 94 N. Y. 160 (1883). See also ch. XLIII, *supra*.

[7] § 637, *supra*.

The bond may be sued upon as though it were a promissory note.[1]

The statute of limitations begins to run the same as on other agreements to pay money, but it is a matter of doubt whether the statute relative to sealed instruments or the statute applicable to promissory notes applies to the bonds of a corporation.[2] Where a party sues to foreclose a mortgage and fails because the mortgage was *ultra vires* of the corporation, he cannot in that action recover on the bonds.[3]

§ 771. *Coupons and interest on bonds — Negotiability of coupons — Participation in foreclosure — Interest on overdue bonds and coupons — Purchase of coupons when presented for payment.*— Nearly all bonds of corporations have attached to them coupons, representing the semi-annual or annual interest on the bonds themselves. These coupons are usually in the form of promissory notes payable to the bearer. They are generally signed by the engraved signature of the treasurer of the company.[4] They may be detached from the bond and sold like promissory notes. They are negotiable, and a *bona fide* purchaser of them is protected.[5]

The holder need not prove his title.[6] But, if the bonds are not negotiable, the coupons are not, even though the latter are negotiable in form.[7] If the coupon does not run to any person or order or bearer, it is not negotiable.[8] A purchaser of the

[1] A corporation bond may be sued and declared upon as though it were a bill of exchange or promissory note. Ide *v.* Passumpsic, etc. R. R., 32 Vt. 297 (1859). A railway bond payable to bearer may be sued upon in assumpsit and set forth as a "bond." It may be joined with the common counts in *indebitatus assumpsit.* Ide *v.* Passumpsic, etc. R. R., 32 Vt. 297 (1859). The holder of bonds payable to bearer is an original payee and not an assignee merely. Rutten *v.* Union Pac. R'y, 17 Fed. Rep. 480 (1883). For the form of complaint on a railroad bond, see Miller *v.* New York, etc. R. R., 8 Abb. Pr. 431 (1859). The holder of the bond may of course sue upon it in his own name. Carr *v.* Le Fevre, 27 Pa. St. 413 (1856). See also § 761, *supra.*

[2] See § 772, *infra,* as to coupons; and § 846, *infra.*

[3] Dudley *v.* Congregation, etc. St. Frances, 138 N. Y. 451 (1893).

[4] A lithographed signature on the coupons is good. McKee *v.* Vernon County, 3 Dill. 210 (1874); S. C., 16 Fed. Cas. 188. Coupons of bonds may be signed by a printed fac-simile of a corporate officer's autograph adopted by the corporation for that purpose, though not expressly authorized by statute. Pennington *v.* Baehr, 48 Cal. 565 (1874).

[5] See § 767, *supra.*

[6] See § 767, *supra.*

[7] See § 768, *supra.*

[8] See § 768, *supra.*

coupon after it becomes due is not a *bona fide* purchaser.[1] Coupons stand upon the same footing as the bond in regard to the terms of the bond.[2] A provision in the bond that it and the coupons shall be redeemable within a certain time follows the coupons, although the latter are detached, the coupons being still held by the bondholder.[3]

The coupon, although detached from the bond, is secured by the mortgage.[4] The coupons participate ratably in any mortgage which secures the bonds, but they are not entitled to any priority in payment over the bonds when a foreclosure takes place on all together.[5]

[1] See note 1, p. 1735.

[2] Guilford *v.* Minneapolis, etc. R'y, 48 Minn. 560 (1891).

[3] And a tender stops the interest on the coupons. Bailey *v.* Buchanan County, 115 N. Y. 297 (1889). Detached coupons in the hands of the holders of the bonds are mere incidents of the latter, and may be redeemed if the bonds may be. Bailey *v.* Buchanan County, 115 N. Y. 297 (1889).

[4] Miller *v.* Rutland, etc. R. R., 40 Vt. 399 (1867); Sewall *v.* Brainerd, 38 Vt. 364 (1865); Stevens *v.* New York, etc. R. R., 13 Blatchf. 412 (1876); S. C., 23 Fed. Cas. 22, giving a priority in payment to the coupons. Although the coupons are detached from the bond, yet they are protected by the mortgage and secured by it. Union Trust Co. *v.* Monticello, etc. R. R., 63 N. Y. 311 (1875).

[5] Miller *v.* Rutland, etc. R. R., 40 Vt. 399 (1867); *Re* Sewall, 38 Vt. 364 (1865). The coupons are not entitled to any priority of payment over the bonds on a distribution of the funds after a foreclosure. Duncan *v.* Mobile, etc. R. R., 3 Woods, 567 (1877); S. C., 8 Fed. Cas. 19. *Cf.* Stevens *v.* New York, etc. R. R., 13 Blatchf. 412 (1876); S. C., 23 Fed. Cas. 22. The acceptance of funded interest bonds for overdue coupons does not waive the mortgage security. It is a change and extension of the debt, but not of the security. Gibert *v.* Washington, etc. R. R., 33 Gratt. (Va.) 586 (1880). See § 765, *supra*. The court may, with the consent of the interested parties, authorize the receiver to issue certificates extending the unpaid coupons without invalidating the lien of the coupons. Skiddy *v.* Atlantic, etc. R. R., 3 Hughes, 320, 341 (1879); S. C., 22 Fed. Cas. 274. No preference is given to the coupons. Dunham *v.* Cincinnati, etc. R'y, 1 Wall. 254 (1863). As to distribution, see also § 881, *infra*. Where a corporation issues debentures secured by a deposit of mortgages with coupons, and the coupons are to be and are actually delivered to the corporation as they become due, and the corporation fails, and the depository forecloses the mortgage, not knowing that the coupons on the mortgage had not been paid, the holder of such coupons cannot claim an interest in the property which has been bought in by the depository. State Finance Co. *v.* Commonwealth, etc. Co., 72 N. W. Rep. 68 (Minn., 1897). Where past-due coupons are, by the terms of the mortgage, entitled to payment before the bonds themselves, the holders of such coupons may intervene in the foreclosure suit, and, if they do so in time, may compel the purchaser at the sale to pay them in

When coupons are presented for payment and are cashed, they are held to be canceled so far as the bonds and other coupons are concerned.[1] Even though a third person was buying them instead of the company paying them, the bondholders may insist on their mortgage lien free from these purchased coupons, unless the party presenting the coupons knew that he was selling them. The reason is that it takes two parties to make a sale, and moreover the coupon holders might have preferred to foreclose rather than to sell.[2]

cash, where such purchaser made payment in bonds. Holland Trust Co. *v.* Thomson-Houston Elec. Co., 9 N. Y. App. Div. 473 (1896). See also Low *v.* Blackford, 87 Fed. Rep. 392 (1898).

[1] United, etc. Co. *v.* Farmers' L. & T. Co., 53 Pac. Rep. 511 (Colo., 1898).

[2] Quoted and approved in Farmers' L. & T. Co. *v.* Iowa Water Co., 78 Fed. Rep. 881 (1897). In Cameron *v.* Tome, 64 Md. 507 (1885), the court stated the law as follows: "That as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up, under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured." Although the president and manager of the corporation claims that when he paid coupons he did so from his personal funds and for the purpose of holding the coupons as unpaid and as a lien, yet where the parties presenting the coupons supposed that they were paid, and the directors knew nothing to the contrary, the coupons cannot be enforced by the president. Lloyd *v.* Wagner, 93 Ky. 644 (1893). In Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501 (1870), the court held that persons "taking up and holding" coupons as they came due under agreement with the directors, whose authority was only to obtain a loan and pay the coupons, cannot claim that the coupons are still unpaid. In the case of Duncan *v.* Mobile, etc. R. R., 3 Woods, 567 (1877); S. C., 8 Fed. Cas. 19, the court allowed the purchaser of coupons to participate in the assets, although purchased when they came due and were presented for payment, where the owners presenting them knew that they were purchased instead of being paid, and did not object, the court saying that the rule was that "there was no purchase unless there was an intent on the part of the original holder to sell;" but in this case there was such intent. Where coupons are presented at the place of payment, and money is paid for them, such coupons cannot participate in the security as against bondholders who supposed the coupons were so paid and canceled. This is the rule even though, instead of being paid, the coupons were purchased by an outside party when they were received at the place of payment. Union Trust Co. *v.* Monticello, etc. R'y, 63 N. Y. 311 (1875); Martin *v.* Citizens' Trust Co., 94 Tenn. 176 (1894). Coupons cashed by the mortgagor are paid as against the bondholders, although actually purchased by an outside party instead of being paid. Bockes *v.* Hathorn, 20 Hun, 503 (1880). A purchase of coupons by a syndicate is not payment and can-

A person who sells bonds with a representation that past-due coupons have been paid may be compelled to deliver up such

cellation of them by the company. Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). A person who advances money to the corporation to pay coupons cannot claim that the coupons are a lien under the mortgage unless the bondholders consented. Fidelity, etc. Co. *v.* West Pennsylvania R. R., 138 Pa. St. 494 (1891). Where bondholders are entitled to participate in a reorganization on a certain basis, a person purchasing coupons under an agreement with the company when they become due may be shut out of the reorganization. Child *v.* New York, etc. R. R., 129 Mass. 170 (1880). In Hand *v.* Savannah, etc. R. R., 17 S. C. 219 (1881), the court held that uncanceled coupons having been taken up by parties who advanced the money to an embarrassed corporation for that purpose—although marked paid in the company's books,—these parties have an equity to claim for their coupons the benefit of the lien which originally secured them. The court also said that the recognition of this equity may be required at the hands of persons seeking the equitable powers of the court to enable them to contest the liability of the company to pay these coupons. When the parties practically know that the company is not paying out its money for the coupons, the sale is sustained and the coupons are enforceable. Ketcham *v.* Duncan, 96 U. S. 659 (1877). But where the parties presenting them know nothing about this, they may exclude these from participating in the assets until they are first paid. South Covington, etc. R'y *v.* Gest, 34 Fed. Rep. 628 (1888). Railroad coupons which are paid and so understood cannot afterwards be enforced as having been merely assigned. Hollister *v.* Stewart, 111 N. Y. 644 (1889). It is a question of fact whether a taking up of overdue coupons was intended as a cancellation of them or only a transfer of interest. Wood *v.* Guarantee, etc. Co., 128 U. S. 416 (1888). Where a person pays corporate bond coupons as they become due, and takes a note of the corporation in payment, the coupons no longer exist as a corporate liability. The person cannot claim that he is secured by the mortgage which secured the coupons. South Covington, etc. R'y *v.* Gest, 34 Fed. Rep. 628 (1888). But where, in order to maintain the credit of a company, a director, upon presentation of its coupons for payment, pays out his own money and takes the coupons, he may enforce them, there being sufficient assets to pay all other creditors first. Haven *v.* Grand Junction, etc. Co., 109 Mass. 88 (1871). Where a parent company, owning the stock of branch companies, passes into a receiver's hands, coupons paid by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 771 (1894). Where on the sale of bonds sufficient is deducted from the price to pay the first coupons, and is left with the vendee for that purpose, such coupons are considered paid. Farmers' L. & T. Co. *v.* Oregon, etc. R. R., 67 Fed. Rep. 404 (1895). As to the purchase of coupons, compare Atlantic Trust Co. *v.* Kinderhook, etc. R'y, 17 N. Y. App. Div. 212 (1897). Where the coupons are cashed by a bank and punched as being paid, the bank cannot afterwards claim that they are still secured by mortgage. United Waterworks Co. *v.* Farmers' L. & T. Co., 82 Fed. Rep. 144 (1897).

coupons.[1] The pledgee of bonds may collect the coupons thereon as they become due.[2] Money deposited to pay coupons cannot be attached as belonging to the company.[3]

It is well settled that bonds bear interest after they become due, unless the corporation has the money ready for payment at the time and place of payment and continues to keep the money there for that purpose.[4] So also the coupons bear inter-

[1] And his wife may also be compelled so to do. Chicago, etc. R'y *v.* Turner, 79 Mich. 133 (1889).

[2] The pledgees of bonds have a right to collect the coupons, although the debt which is secured by the bonds is not yet due. Such a pledgee may also start foreclosure proceedings the same as the full owner. "He only differed from an absolute owner in this: that he was bound to account for any surplus received from the bonds and coupons, over and above what was necessary to the payment of his debt." Warner *v.* Rising Fawn Iron Co., 3 Woods, 514 (1878); S. C., 29 Fed. Cas. 261.

[3] Rogers Locomotive, etc. Works *v.* Kelley, 88 N. Y. 234 (1882), aff'g 19 Hun, 399.

[4] Interest at the legal rate as fixed by statute runs on bonds after their maturity, and commences to run on bonds and coupons from the time they fall due, even though no demand of payment is made; but of course the company may show that the money was there to pay with. Langston *v.* South Carolina R. R., 2 S. C. 248 (1870). When the principal becomes due it continues to bear interest, unless the company is ready to pay. Price *v.* Great Western, etc. R'y, 4 R'y & Can. Cas. 707 (1847). Where the company does not deposit the money for the payment of the bonds at the time and place of payment, it is liable for interest up to the time when payment is actually made. Publication of a notice in a newspaper is not sufficient to stop interest unless the bondholders actually receive such notice. A circular stating that a higher rate of interest will be paid if the bonds are not presented for payment is binding on a corporation. Kelley *v.* Phenix Nat. Bank, 17 N. Y. App. Div. 496 (1897). Simple interest at the legal rate is recoverable on the principal of the bonds after they become due, "not upon and by virtue of the original contract, but as damages for the detention of money due." Ashuelot R. R. *v.* Elliot, 57 N. H. 397, 437 (1874); Langston *v.* South Carolina R. R., 2 S. C. 248 (1870); Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501, 551 (1870). Interest is allowed on the bonds after they are declared due. Welsh *v.* St. Paul, etc. R. R., 25 Minn. 314 (1878). If bonds are redeemable and are called by the company, which, however, is unable to pay them, they continue to bear interest. Gordillo *v.* Weguelin, L. R. 5 Ch. D. 287 (1877). Bonds do not bear interest after they become due, and no demand is made, where the company proves that it was ready, able, and willing to pay them, even though it did not set aside a specific sum for that purpose, the money being in its general account. Emlen *v.* Lehigh, etc. Co., 47 Pa. St. 76 (1864). Municipal bonds after maturity bear interest at the rate which they bore before maturity, even though it is in excess of the legal rate. Pruyn *v.* Milwaukee, 18 Wis. 367 (1864). The principal bears interest unless the company is ready to pay and gives notice. Price *v.* Great West-

est from the time when they become due, and no presentation or demand of payment is necessary to set this interest running; but the company is not obliged to pay interest on the coupons if it can show that it was ready and willing to pay the coupons if they had been presented for payment, and has continued to keep separate, for that purpose, sufficient funds.[1] There is some doubt as to whether coupons have three days of grace.[2]

ern, etc. R'y, 16 M. & W. 244 (1847), on the ground that the debentures were practically a mortgage. See also Ohio *v.* Frank, 103 U. S. 697 (1880); Brewster *v.* Wakefield, 22 How. 118 (1859). The interest on the bonds after maturity is the same as that before maturity. Beckwith *v.* Hartford, etc. R. R., 29 Conn. 268 (1860); Cromwell *v.* Sac County, 96 U. S. 51 (1877). Interest continues on the bonds from the time of foreclosure at the rate specified in the bond, although different from the statutory rate. Jackson, etc. Co. *v.* Burlington, etc. R. R., 29 Fed. Rep. 474 (1887). Interest is allowed up to the date of distribution. *Re* London, etc. Co., L. R. [1892] 1 Ch. 639.

[1] Philadelphia, etc. R. R. *v.* Smith, 105 Pa. St. 195 (1884); North Pennsylvania, etc. R. R. *v.* Adams, 54 Pa. St. 94 (1867), holding also that demand of payment at maturity is excused if the corporation was unable to pay; Langston *v.* South Carolina R. R., 2 S. C. 248 (1870); Mills *v.* Jefferson, 20 Wis. 50 (1865); Arents *v.* Commonwealth, 18 Gratt. (Va.) 750 (1868); Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863), allowing same as damages for delay of payment; Welsh *v.* St. Paul, etc. R. R., 25 Minn. 314 (1878); Burroughs *v.* Commissioners, 65 N. C. 234 (1871); Beaver County *v.* Armstrong, 44 Pa. St. 63 (1862); Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501, 547 (1870); Gelpcke *v.* Dubuque, 1 Wall. 175 (1863); Hollingsworth *v.* Detroit, 3 McLean, 472 (1844); S. C., 12 Fed. Cas. 352; Walnut *v.* Wade, 103 U. S. 683 (1880). In Alexander *v.* McDowell County, 67 N. C. 330 (1872), the court said that demand was necessary before action on a municipal coupon, inasmuch as the changing officials necessitated such a rule, although a different rule prevailed as to individuals. But interest runs from the time of non-payment. McLendon *v.* Anson County, 71 N. C. 38 (1874). Interest may be recovered on overdue coupons from the time of demand of payment. Fox *v.* Hartford, etc. R. R., 38 Atl. Rep. 871 (Conn., 1897). Coupons bear interest after their maturity. Cromwell *v.* Sac County, 96 U. S. 51 (1877); Aurora City *v.* West, 7 Wall. 82 (1868) — municipal-bond cases. In New York it is held that coupons which remain in the hands

[2] Wood *v.* Consolidated, etc. Co., 36 Fed. Rep. 538 (1888). The coupon is deemed due on the day fixed for the payment of interest. It is not a bill of exchange, although in the form of an order to pay money. Arents *v.* Commonwealth, 18 Gratt. (Va.) 750 (1868). In New York they are entitled to days of grace. Evertson *v.* Newport Nat. Bank, 66 N. Y. 14 (1876). But the common-law rule has now been changed in New York by statute. L. 1894, ch. 607. There are no days of grace on coupons so far as concerns the provision that the bonds shall become due six months after default on maturity and demand of payment. Alabama, etc. Mfg. Co. *v.* Robinson, 56 Fed. Rep. 690 (1893).

§ 772. *Suit to collect coupons — Execution cannot be levied upon the mortgaged property — Demand of payment — Statute of limitations.*— A coupon-holder may sue at law on an overdue coupon.[1] But it is well-settled law that neither a mortgage

of the holder of the bonds, whether attached or detached, do not bear interest from the maturity of such coupons. Williamsburg Sav. Bank *v.* Solon, 136 N. Y. 465 (1893). To same effect, Beattys *v.* Solon, 136 N. Y. 662 (1893); Buffalo Loan, etc. Co. *v.* Medina Gas, etc. Co., 12 N. Y. App. Div. 199 (1896); Jackson *v.* York, etc. R. R., 48 Me. 147 (1858); Crosby *v.* New London, etc. R. R., 26 Conn. 121 (1857). Bond coupons detached from the bond bear interest from maturity. Philadelphia, etc. R. R. *v.* Knight, 124 Pa. St. 58 (1889); Internal Imp. Fund *v.* Lewis, 34 Fla. 424 (1894). In Rhode Island the coupons bear interest from the time of demand of payment. Whitaker *v.* Hartford, etc. R. R., 8 R. I. 47 (1864); National Exch. Bank *v.* Hartford, etc. R. R., 8 R. I. 375 (1866). Coupons bear interest from the time that the company is in default in paying them. Gibert *v.* Washington, etc. R. R., 33 Gratt. (Va.) 586 (1880). There are many municipal corporation cases also on this subject; and to the same effect, San Antonio *v.* Lane, 32 Tex. 405 (1869); Genoa *v.* Woodruff, 92 U. S. 502 (1875); Jeffersonville *v.* Patterson, 26 Ind. 15 (1866); Davis *v.* Yuba County, 75 Cal. 452 (1888), a municipal-bond case, where the interest was allowed from the time when payment was demanded. Interest is a creation of contract and not of the common law. Pekin *v.* Reynolds, 31 Ill. 529 (1863). In Corcoran *v.* Chesapeake, etc. Co., 1 MacArthur (D. C.), 358 (1874); aff'd, 94 U. S. 741, the court held that interest began to run on coupons only after demand and refusal of payment, and that a waiver by the state of its lien so as to make it second to other bonds and coupons is not a waiver of interest on those coupons. In Connecticut the coupon does not bear interest after maturity. Rose *v.* Bridgeport, 17 Conn. 243 (1845). The company may decline to pay a coupon unless it is presented and delivered up. Warner *v.* Rising Fawn Iron Co., 3 Woods, 514 (1878); S. C., 29 Fed. Cas. 261. If the bonds are payable in England with interest at five per cent, the interest collectible after default is the legal rate in England, and not the legal rate in the state wherein the railroad company is. Coghlan *v.* South Carolina R. R., 142 U. S. 101 (1891). The trustee is not the party to demand payment of the coupons. Taber *v.* Chicago, etc. R'y, 15 Ind. 459 (1860).

[1] Montgomery, etc. Soc. *v.* Francis, 103 Pa. St. 378 (1883). In New Jersey a statute prevents such a suit. Holmes *v.* Seashore Elec. R'y, 57 N. J. L. 16 (1894). A holder of coupons from railroad bonds may sue on them, and his right to do so is not taken away by the fact that they are secured by a mortgage. Manning *v.* Norfolk, etc. R. R., 29 Fed. Rep. 838 (1887). The holder of a coupon may obtain judgment thereon although the mortgage provides that he shall not levy execution on the road. Widener *v.* Railroad, 1 W. N. Cas. 472 (Pa., 1875). Suit on one interest coupon is no bar to a subsequent suit on another, though the latter was due at the time of the first suit. Butterfield *v.* Ontario, 44 Fed. Rep. 171 (1890). The holder of coupons may sue on them even though the mortgage is being foreclosed and the principal sum mentioned in the bonds has become due,

bondholder nor the holder of a coupon can levy an execution upon the mortgaged property in order to enforce a judgment obtained upon the bond or coupon. There are two reasons for this rule: First, that a mortgagee at common law cannot so enforce his security; second, other bondholders and coupon holders are entitled to participate equally in the security.[1]

Other bondholders may enjoin the execution or attachment.[2]

even though in the trustee's foreclosure suit no judgment for deficiency can be granted, the trustees not suing on the bonds. Welsh *v.* St. Paul, etc. R. R., 25 Minn. 314 (1879).

[1] The bondholders cannot recover judgment at law and then sell out the mortgaged premises. Pugh *v.* Fairmount, etc. Co., 112 U. S. 238 (1884). A bondholder who has obtained judgment on his bonds cannot, by an execution levied on the property mortgaged to secure the bonds, obtain an advantage over other bondholders. Bowen *v.* Brecon R'y, L. R. 3 Eq. 541 (1867). In West Branch Bank *v.* Chester, 11 Pa. St. 282 (1849), it seems that a sale of the equity of redemption, based on a judgment obtained by a bondholder for interest, was upheld. The holder of coupons may obtain judgment and levy on such property as is not covered by the mortgage securing his coupons. Commonwealth *v.* Susquehanna, etc. R. R., 122 Pa. St. 306 (1888); Dupont *v.* Bushong, 1 W. N. Cas. 378 (1875); Pennock *v.* Coe, 23 How. 117 (1859). A bondholder cannot obtain judgment at law on unpaid coupons or the bond, and by levy of execution sell the mortgaged railway and franchises and buy it in and turn it over to a reorganized company to operate. The state will oust such a corporation from possession. The only execution which the bondholder can levy in such a case is on property not subject to the mortgage. The mortgage securing that bond and others still exists. Commonwealth *v.* Susquehanna, etc. R. R., 122 Pa. St. 306, 321 (1888). Where bonds are secured by a chattel mortgage, one bondholder cannot obtain payment from such chattels in preference to other bondholders by levying an execution on them, even though the chattel mortgage has not been recorded as required by the statutes. Fish *v.* New York, etc. Paper Co., 29 N. J. Eq. 16 (1878). One of the parties secured by a mortgage cannot levy an attachment on the mortgaged property "without alleging that the residue of the debts secured had been paid, and bringing the trustees or legal titleholders before the court." Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870). Where a judgment is obtained upon coupons, the judgment cannot be levied on the income of the road. The mortgagor company and the trustee of the mortgage may enjoin such collection. Roberts *v.* Denver, etc. R. R., 8 Colo. App. 504 (1896). A holder of bonds, secured by a trust deed on all the property of a corporation, who seeks to enforce payment by an action at law, will not be permitted to enforce a lien by execution, to the embarrassment of the other bondholders. Hackettstown Nat. Bank *v.* Yuengling Brewing Co., 74 Fed. Rep. 110 (1896).

[2] A bondholder may enjoin another bondholder from levying an execution on the property mortgaged. They are to be treated as partners, and one is not allowed to obtain an advantage over others. Moreover, they have all agreed that the property shall be sold

The holder of coupons need not demand payment before commencing suit thereon.[1]

The question whether a demand of payment is necessary before commencing foreclosure proceedings turns upon the provisions of the mortgage.[2]

The holder of coupons, upon which he is suing, need not produce the bonds to which they were attached, nor need he be interested in them.[3] Inasmuch as coupons are practically prom-

as a whole. And again, the reorganization provision in the mortgage is a covenant that is binding. See Philadelphia, etc. R. R. *v.* Woelpper, 64 Pa. St. 366 (1870), giving the decision of the court below. A bondholder may enjoin an execution sale. Butler *v.* Rahm, 46 Md. 541 (1877).

[1] Walnut *v.* Wade, 103 U. S. 683 (1880); Warner *v.* Rising Fawn Iron Co., 3 Woods, 514 (1878); S. C., 29 Fed. Cas. 261; Smith *v.* Tallapoosa County, 2 Woods, 574 (1874); S. C., 22 Fed. Cas. 682. Demand of payment need not be alleged in a suit on coupons. It is a matter of defense to the company. Philadelphia, etc. R. R. *v.* Johnson, 54 Pa. St. 127 (1867). A coupon is like a note, and not like a bill. Williamsport Gas Co. *v.* Pinkerton, 95 Pa. St. 62 (1880). Coupons are like other commercial paper in that, although payable at a particular place, suit may be brought or foreclosure commenced on them without demand of payment at that place. So held where payment was to be "at the financial office of said company in the city of New York." Warner *v.* Rising Fawn Iron Co., 3 Woods, 514 (1878); S. C., 29 Fed. Cas. 261. Coupons need not be presented before suit if the company has resolved to default, and has no funds to pay with. In the suit the mortgage need not be introduced. Conshohocken Tube Co. *v.* Iron Car Equip. Co., 161 Pa. St. 391 (1894).

[2] No demand of payment of bonds need be made before foreclosure proceedings if an allegation is made that the company is insolvent and such demand would have been useless. Shaw *v.* Bill, 95 U. S. 10 (1877). No demand of payment of interest is necessary before the commencement of foreclosure proceedings. The defendant must prove payment or readiness to pay. Marlor *v.* Texas, etc. R'y, 21 Fed. Rep. 383 (1884). Presentation and demand of payment of coupons need not be shown in order to prove that the company had failed for more than six months to pay the interest. Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878). A demand of payment of coupons is necessary in order to set running a provision of the mortgage that the principal shall become due and a remedy become available six months after default. Potomac Mfg. Co. *v.* Evans, 84 Va. 717 (1888). See also § 800, *infra*. Non-payment of coupons is no cause for foreclosure where no demand of payment is shown. Davies *v.* New York Concert Co., 41 Hun, 492 (1886). See also Union, etc. Ins. Co. *v.* Union, etc. Co., 37 Fed. Rep. 286 (1889).

[3] Thomson *v.* Lee County, 3 Wall. 327 (1865). "Suits on the coupons are sustained entirely independently of the bonds to which they were originally annexed. It is therefore of very little consequence whether they are promissory notes, bills, drafts, or checks, for they have the same quality of negotiability as either of those instruments, and the holder sues upon them and recovers in his own name."

issory notes, the form of action on coupons is the same as that upon promissory notes.[1]

The statute of limitations applicable to coupons is the same as that applicable to the bonds. This is generally twenty years.[2] The statute commences to run from the time when the coupons become due.[3] The right of the company to pay coupons in

Beaver County *v.* Armstrong, 44 Pa. St. 63 (1862). It is not necessary to produce the bond, and the surrender and cancellation of the bond after the coupon was transferred do not affect the coupon. Miller *v.* Berlin, 13 Blatchf. 245 (1876); S. C., 17 Fed. Cas. 306. In suing on the coupons the bonds to which they were attached need not be set out. Ring *v.* Johnson County, 6 Iowa, 265 (1858). The holder of a coupon may sue on it although he does not own the bond. National Exch. Bank *v.* Hartford, etc. R. R., 8 R. I. 375 (1866); Knox County *v.* Aspinwall, 21 How. 539 (1858); Cromwell *v.* Sac County, 94 U. S. 351, 362 (1876); City *v.* Lamson, 9 Wall. 477 (1869). The holder of coupons who sues thereon need not produce or prove an interest in the bond itself. He should set forth the number of the bond, however, the date, sum, and time of payment. Kennard *v.* Cass County, 3 Dill. 147 (1874); S. C., 14 Fed. Cas. 307; City *v.* Lamson, 9 Wall. 477 (1869). Coupons may be sued on without producing the bonds. Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501 (1870); New London, etc. Bank *v.* Ware, etc. R. R., 41 Conn. 542 (1874). The payment of a coupon payable to bearer must be to the holder of it, and not to the holder of the bond. *Re* Sewall, 38 Vt. 364 (1865).

[1] A general count in debt is sufficient to recover on a coupon. National Exch. Bank *v.* Hartford, etc., R. R., 8 R. I. 375 (1866). May be proved under the common counts. Johnson *v.* Stark County, 24 Ill. 75 (1860). An action in tort for the conversion of coupons lies against a purchaser of the same from a thief, but not if such purchaser is *bona fide*. Spooner *v.* Holmes, 102 Mass. 503 (1869). A single count may include several coupons. New London, etc. Bank *v.* Ware, etc. Co., 41 Conn. 542 (1874). In suing upon coupons they should be put in evidence. De Graaf *v.* Wyckoff, 13 Daly, 366 (1885). For the pleading, etc., on an interest warrant, see Crosby *v.* New London, etc. R. R., 26 Conn. 121 (1857).

[2] City *v.* Lamson, 9 Wall. 477 (1869). "A suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond." Lexington *v.* Butler, 14 Wall. 282 (1871). See also Huey *v.* Macon County, 35 Fed. Rep. 481 (1888). See ch. XLIX, § 846, *infra*. In Best *v.* Davis S. M. Co., 65 Hun, 72 (1892), it was held that the six-year statute of limitations applied to corporate bonds, the court saying: "The obligations being promissory notes and not sealed instruments, the six-year statute of limitations applies." Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. Rusling *v.* Union Pipe, etc. Co., 5 N. Y. App. Div. 448 (1896).

[3] Clark *v.* Iowa City, 20 Wall. 583 (1874). So held whether the coupons are detached from the bonds or not. Koshkonong *v.* Burton, 104 U. S. 668 (1881); Amy *v.* Dubuque, 98 U. S. 470 (1878); Huey *v.* Macon County, 35 Fed. Rep. 481 (1888). *Contra*, where

land scrip does not prevent the holders from suing for money if the scrip is not issued.[1]

§ 773. *Income bonds.*— A corporation may issue an "income bond," the interest on which is not payable annually, but is payable only in case there is income sufficient to pay the regular charges and interest due from the corporation and to leave a surplus which is applicable to the income bonds.[2] An income bond differs from preferred stock in that it cannot vote; it generally is secured by mortgage; and its right to interest is more clear than that of stock to dividends. The power to issue irredeemable bonds, interest on which is to be paid after certain dividends have been declared on the stock, is a question still in dispute.[3]

the coupon is not detached. City *v.* Lamson, 9 Wall. 477 (1869); Lexington *v.* Butler, 14 Wall. 282 (1871). The statute of limitations on the coupons of municipal bonds begins to run from the date when the coupons became due. Huey *v.* Macon County, 35 Fed. Rep. 481 (1888). The statute of limitations of ten years applies to detachable interest coupons. Griffin *v.* Macon County, 36 Fed. Rep. 885 (1888). As to the effect of the statute of limitations on the interest, see *Re* Cornwall Minerals R'y, 76 L. T. Rep. 832 (1897).

[1] Marlor *v.* Texas, etc. R'y, 19 Fed. Rep. 867 (1884); S. C., 21 Fed. Rep. 383 (1884); Barry *v.* Missouri, etc. R'y, 27 Fed. Rep. 1 (1886). Land scrip issued in payment of coupons, the coupons, however, being kept alive as collateral, should be retired, and the coupons paid in money, whenever the finances of the company fully warrant it. Little Rock, etc. R'y *v.* Huntington, 120 U. S. 160 (1887). The statute of limitations does not begin to run six months after default, merely because at that time the bondholders have an option to declare the whole sum due. Nebraska, etc. Bank *v.* Nebraska, etc. Co., 14 Fed. Rep. 763 (1883). Fifteen years' delay in enforcing a railroad mortgage after the principal became due is, in Vermont, a bar to foreclosure; but a foreclosure commenced during that time preserves the security for all bondholders, although they are not parties to the suit. *Re* Chickering, 56 Vt. 82 (1883). *Cf.* Simmons *v.* Burlington, etc. R'y, 159 U. S. 278 (1895), rev'g Simmons *v.* Taylor, 38 Fed. Rep. 682 (1889).

[2] Garrett *v.* May, 19 Md. 177 (1862), upholding the giving of a mortgage which took precedence over prior income bonds.

[3] The supreme court of Pennsylvania, by a divided court, about 1882, held that a railroad company without express authority might issue irredeemable interest-bearing bonds at a large discount, the interest to be paid only after a certain dividend had been declared on the common stock. The bonds were called "deferred income bonds." Philadelphia, etc. R. R. *v.* Stichter, 21 Am. L. Reg. (Pa.) 713 (1882); 11 W. N. Cas. 325. A contrary conclusion was reached in Taylor *v.* Philadelphia, etc. R. R., 7 Fed. Rep. 386 (1881). An "income bond" under the New York statute is secured by a lien in regard to its principal only. Its interest is unsecured. The income bondholder cannot control the discretion of the di-

The rights of income bondholders are governed and determined entirely by the terms of the bonds themselves and the mortgage securing them, if such a mortgage exists.[1]

Frequently there is difficulty in determining whether any "income" actually exists which should be applied to the payment of interest on income bonds. The same difficulty that is

rectors in paying such interest or using the funds for other purposes. Day *v.* Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887).

[1] An income mortgage was foreclosed in Seibert *v.* Minneapolis, etc. R'y, 58 Minn. 39 (1894), for default in applying net earnings to the payment of interest due on the bonds, and also for failure to repair and replace rolling-stock, the mortgage providing for foreclosure in such a case. In State *v.* Cowen, 83 Md. 549 (1896), trustees representing income bondholders were placed in control of the property by the court for four years. The trustees expended $500,000 in improvements, and thereby the business greatly increased. The court thereupon extended the time to the trustees to operate the canal, and said that if the income did not pay the operating expenses and produce a net revenue the property would be sold. The court held also that such trustees might contract with other companies for the use of the property. The case of Barry *v.* Missouri, etc. R'y, 27 Fed. Rep. 1 (1886), considered the rights of income bondholders under the particular mortgage in that case. The income bond provided for the payment of the interest, "provided such net or surplus earnings shall be sufficient therefor." The court held that "unless within some one of the six months' periods between the date and the maturity of the bonds net income is realized, the company is not in default, and is under no present obligation to pay interest," but nevertheless the words of the bond may give the holder the right to claim this interest at a later date, "whenever there is net income applicable thereto." It must be paid before any dividends are declared. "According to the scheme of the mortgage, as denoted by the several provisions referred to, the surplus earnings of each interest period belong to the holders of coupons for that period. If the earnings are insufficient to pay the interest in full, the holders are entitled to scrip certificates for the residue; if the net earnings more than suffice to pay the interest for the six months, the surplus falls into a general fund for the payment of holders of scrip certificates ratably; if there are no net earnings until an exercise of the power of sale under the eighth article, the unearned interest becomes principal, and is to be paid as principal out of the proceeds of the sale. The coupon-holders have the first lien upon the surplus earnings for the period represented by their coupons, but as to earnings from any other period they have only the rights of certificate-holders; and whether they surrender their coupons or not, if the earnings are insufficient to pay the interest in full they stand as certificate-holders for their interest unearned." The coupon-holders and the certificate-holders were held to stand upon substantially the same ground. It was the duty of the company to keep its accounts so as to show the net income for each six months. The trustee was bound to see that this was done. An accounting was ordered.

experienced in ascertaining whether there are net profits for a dividend is experienced in ascertaining whether there is a surplus properly applicable to income bonds. In general, the courts decide each case on the terms and conditions of the income bonds themselves. The various rights, remedies, and incidents peculiar to different kinds of income bonds are set forth in the notes below.[1]

[1] Passing upon the rights of income bondholders in a suit brought by them to have their interest paid, the court said: "The expenses defrayed or incurred in producing the earnings for a given interest period are the only charges which can enter into the income account for that period. . . . It is preposterous to assert that the company could properly charge against income for any period during the life of the mortgage a payment or a liability incurred on account of old indebtedness existing before the mortgage was created, or arising from a loss incurred by the sale of bonds issued to pay off old indebtedness. It might with equal propriety seek to offset its whole funded debt against its income." Barry *v.* Missouri, etc. R'y, 27 Fed. Rep. 1, 5 (1886). An income bondholder may obtain an accounting by the mortgagor railroad in order to determine whether there is any income applicable to his bonds. Improper items of the account will be stricken out. But where most of the income bonds have been turned in for a lower security, the complainant is entitled to an income based only on all the income bonds as originally issued. Barry *v.* Missouri, etc. R'y, 34 Fed. Rep. 829 (1888). An income bondholder may file a bill for an accounting where the funds upon which he has a lien have been mingled with other funds and no separate account has been kept. If the directors have made no determination in the matter, it is immaterial that the mortgage provided for a final determination by them. Suit lies. Losses incurred by reason of new lines, leased lines, etc., are not to be paid before funds are set apart to pay the interest on income bonds, the income mortgage being a lien on the income of the main line. Ordinarily an income mortgage on present and future property as a security for interest is "but little more than the pledge of the good faith of the company in managing its lines." The company ordinarily under such a mortgage may improve, alter, or extend its lines and may lease others without violating its obligation to the income bondholders. If the directors have neglected to ascertain whether net income exists, the court will undertake to do so. Spies *v.* Chicago, etc. R. R., 40 Fed. Rep. 34 (1889). Although an income bondholder is entitled to an accounting as to the income applicable to the interest on his bonds, yet, if he charges fraud against the directors, he must prove fraud or his bill will be dismissed, even though fraud need not have been alleged. Spies *v.* Chicago, etc. R. R., 40 Fed. Rep. 34 (1889).

In Day *v.* Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887), income bondholders were held not entitled to any surplus in one year to make up for a deficiency in the payment of interest in a prior year. The court held also that the company might take a lease of another railroad and use its income to pay the rental, and the income bondholders could not object.

The ordinary income bond of a corporation does not create such a trust relationship between the holder and the company

Where an income bondholder applies for an injunction against a misappropriation of the income of the railroad, giving figures, the injunction will be granted though in large part the allegations are made on information and belief, if the defendant does not specifically explain the figures and merely denies the misapplication. Barry *v.* Missouri, etc. R'y, 36 Fed. Rep. 228 (1888). An income bondholder may enjoin an application of the company's funds to other unusual corporate purposes, thereby affecting the payment of interest due to him. Barry *v.* Missouri, etc. R'y, 36 Fed. Rep. 228 (1888). The holder of coupon bonds secured by a mortgage on the proceeds from the sale of certain lands owned by a railroad may by bill in equity subject that income to the payment of the coupons, even though the railroad has been consolidated with another and the consolidated railroad owns the lands. Rutten *v.* Union Pac. R'y, 17 Fed. Rep. 480 (1883). For an instance of bonds and a mortgage on the income of the property of a canal company, see Stewart *v.* Chesapeake, etc. Canal Co., 5 Fed. Rep. 149 (1881). In this case a bondholder asked to have a receiver appointed for the purpose of operating the canal and applying the profits to the interest on the bonds. Mismanagement was charged. The court refused to appoint the receiver, the proof not being sufficient, but retained the suit for the purpose of compelling the company to render accounts from time to time. The court stated that the only remedy of the bondholders was a receiver, foreclosure not being possible of such a mortgage. Concerning the construction of the rights of an income bondholder, see also Lehigh, etc. Co. *v.* Central R. R., 34 N. J. Eq. 88 (1881). Income bonds do not necessarily restrict the owner to payment in land scrip, where the company may so pay interest thereon, in any year when the income is sufficient. Unless the company declares its election to pay in scrip, the owner may sue for the money as soon as the income is sufficient. Failure of the bondholder to demand payment of the interest is no bar, he having been notified that the company could not pay it. Texas, etc. R'y *v.* Marlor, 123 U. S. 687 (1887). Where an income bond has its coupons payable in money or land scrip at the option of the company, and the company does not exercise its option when the coupons become due, the holder may insist on payment in money and sue therefor. Marlor *v.* Texas, etc. R'y, 21 Fed. Rep. 383 (1884). It is immaterial that the mortgage is a lien on land only and not on the railroad. Marlor *v.* Texas, etc. R'y, 19 Fed. Rep. 867 (1884). Where the income mortgage contains no provision for the trustee taking possession, the only remedy may be "that no dividend can be declared until the interest on it is regularly paid." Union Trust Co. *v.* Missouri, etc. R'y, 26 Fed. Rep. 485 (1880). In New York, by statute, income bonds with voting privileges may be issued. Laches on the part of a dissenting stockholder in objecting to interest-bearing stock will bar his remedy. Taylor *v.* South, etc. R. R., 13 Fed. Rep. 152 (1882). An income bondholder bringing suit to compel the corporation to account and pay his interest coupons must allege a request to the trustee in the deed of trust to bring the suit and a refusal by him. The trustee must also be joined as a party defendant. Morgan *v.* Kansas, etc. R'y, 15 Fed. Rep. 55 (1882).

as authorizes a suit for an accounting. The bond does not operate as an equitable assignment of the profits, and does not create an equitable lien thereon. If the company refuses to apply the profits as called for by the bond, it is a breach of contract, the remedy for which is at law. If the income bond gives discretion to the directors as to payments for repairs, an error of judgment on their part cannot be reviewed by the court where there was room for a difference of opinion.[1] Income bondholders cannot prevent the consolidation of the company with another company under statutes existing at the time when the income bonds were issued.[2]

§ 774. *Accommodation paper by a corporation — Bona fide holders.*— It is a well-established rule that a corporation cannot ordinarily be bound by its signature to or indorsement or guaranty of the note or paper of another person for the accommodation of the latter. The directors are authorized by the stockholders to do business for corporate purposes, but are not authorized to use the corporation to perform acts of friendship or accommodation to others. The general rule is that the accommodation indorsement, signature, or guaranty of the corporation is illegal and cannot be enforced.[3]

[1] Thomas *v.* New York, etc. R'y, 139 N. Y. 163 (1893), holding also that a refusal of the directors to certify that the interest had been earned is sufficient as an allegation without alleging a demand for such certificate. As to the pleadings of an income bondholder in a suit to compel the payment of interest, see Thomas *v.* New York, etc. R'y, 19 N. Y. Supp. 766 (1892).

[2] Hart *v.* Ogdensburgh, etc. R. R., 69 Hun, 378 (1893).

[3] Bank of Genesee *v.* Patchin Bank, 13 N. Y. 309 (1855); National Bank *v.* Wells, 79 N. Y. 498 (1880), reversing S. C., 15 Hun, 51; Central Bank *v.* Empire, etc. Co., 26 Barb. 23 (1857); Morford *v.* Farmers' Bank, 26 Barb. 568 (1857); Bridgeport City Bank *v.* Empire, etc. Co., 30 Barb. 421 (1859); Fox *v.* Rural Home Co., 90 Hun, 365 (1895); South, etc. Nat. Bank *v.* La Grange, etc. Co., 40 S. W. Rep. 328 (Tex., 1897); *Ex parte* Estabrook, 2 Low. 547 (1877); S. C., 8 Fed. Cas. 794; Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299 (1876); West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557 (1877), holding that a cashier is not presumed to have power to bind his bank as indorser of his personal note. The payee of such a note, in order to hold the bank, must prove that he had such power; Ætna Nat. Bank *v.* Charter Oak L. I. Co., 50 Conn. 167 (1882), holding that a president has no implied power to bind his corporation as accommodation indorser; Culver *v.* Reno Real Estate Co., 91 Pa. St. 367 (1879); Beecher *v.* Dacey, 45 Mich. 92 (1881); Smead *v.* Indianapolis, etc. R. R., 11 Ind. 104 (1858). A general manager has no power to guarantee in the corporate name the

The indorsement, however, though not enforceable by parties taking it with notice that it was for accommodation, may be enforced by *bona fide* holders.[1]

payment of a third person's note. Dobson *v.* More, 164 Ill. 110 (1896). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. Usher *v.* Raymond Skate Co., 163 Mass. 1 (1895). A warehouse corporation has no power to indorse paper as an accommodation, even for a consideration paid. A person discounting the same for the maker thereby has notice of the illegal indorsement. National Park Bank *v.* German, etc. Co., 116 N. Y. 281 (1889). A corporation organized for freight transfer business is not bound, and is not liable on its bond of surety for the debt of another. Even a co-surety cannot enforce contribution. Lucas *v.* White Line, etc. Co., 70 Iowa, 541 (1886). A corporation cannot be surety on a note which has nothing to do with its business — pure accommodation. The payee cannot collect. Hall *v.* Auburn Turnp. Co., 27 Cal. 255 (1865). A national bank cannot become an accommodation indorser. National Bank *v.* Atkinson, 55 Fed. Rep. 465 (1893); Bowen *v.* Needles Nat. Bank, 87 Fed. Rep. 430 (1898). *Cf.* note 5, p. 1761.

[1] Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312 (1859), holding also that a third party is not put upon his inquiry if the paper purports on its face to be regularly indorsed in the course of busin ss; *Ex parte* Estabrook, 2 Low. 547 (1877); S. C., 8 Fed. Cas. 794; Florence, etc. Imp. Co. *v.* Chase Nat. Bank, 106 Ala. 364 (1895); *Re* Jacoby-Mickolas Co., 70 N. W. Rep. 1085 (Minn., 1897). An innocent purchaser of paper indorsed for accommodation by a trading corporation may enforce the same against the corporation. Jacobs Pharmacy Co. *v.* Southern Bkg. etc. Co., 97 Ga. 573 (1895). The fact that the constitution of the state prohibits fictitious indebtedness does not render void, as against a *bona fide* holder, an accommodation indorsement by a corporation. Marshall, etc. Bank *v.* O'Neal, 34 S. W. Rep. 344 (Tex., 1895). A *bona fide* purchaser of a bill of exchange accepted for accommodation by a corporation may enforce it. Farmers' Nat. Bank *v.* Suttan, etc. Co., 52 Fed. Rep. 191 (1892). To same effect, Mechanics' Banking Assoc. *v.* New York, etc. Lead Co., 35 N. Y. 505 (1866), and cases cited; Central Bank *v.* Empire, etc. Co., 26 Barb. 23 (1857), holding that a note made by the president and indorsed by the corporation is binding upon the corporation in the hands of one who had been induced by its agent to accept it as a transaction of the corporation and within the scope of its business. Morford *v.* Farmers' Bank, 26 Barb. 568 (1857); Bridgeport City Bank *v.* Empire, etc. Co., 30 Barb. 421 (1859); Monument Nat. Bank *v.* Globe Works, 101 Mass. 57 (1869); Lafayette Sav. Bank *v.* St. Louis Stoneware Co., 2 Mo. App. 299 (1876), holding also that in a suit on the note the burden of showing that it was taken by a third party with notice of the inability of the corporation to indorse lies upon the defendant. A corporation cannot be an accommodation indorser. Yet a *bona fide* holder of the paper may hold the corporation liable. National Bank *v.* Young, 41 N. J. Eq. 531 (1886); Credit Co. *v.* Howe Mach. Co., 54 Conn. 357 (1887). A manufacturing corporation has no right to give accommodation paper, but such paper may be enforced by a *bona fide* holder. Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J., 1897).

Notwithstanding the general rule on this subject, there is no rule of public policy which prohibits an accommodation indorsement of commercial paper by a corporation. Consequently, if such an indorsement is made with the knowledge and assent of all the directors and stockholders, and creditors' rights are not affected, the indorsement is valid and enforceable.[1]

Where the directors of a business corporation accept paper for accommodation, they are personally liable for payments made or liabilities incurred on such paper.[2] But where an officer causes a manufacturing company to indorse for accommodation the note of a party all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.[3] A corporation engaged in selling manufactured goods may indorse a manufacturer's note to enable him to furnish goods.[4] Where a trading corporation owns most of the stock of a manufacturing corporation, and is the agent of the latter in making sales, and furnishes it with money, and pays dividends to the minority stockholders under an arrangement to that effect, the indorsements by the manufacturing company on the trading company's paper are not accommodation indorsements.[5]

§ 775. *Guaranty by one corporation of the bonds or dividends of another corporation — Guaranty by an individual.*—One of the most important and yet difficult branches of railroad and corporation law is the question whether one railroad corporation may guarantee the bonds or dividends of another railroad corporation. After a great deal of litigation the rule has be-

[1] Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890). *Cf.* McClellan *v.* Detroit, etc. Works, 56 Mich. 579 (1885). Where all the stockholders and all the directors cause the corporation to sign a note which is given to one of the stockholders in consideration of the sale of his stock to another stockholder, the corporation is bound. Solomon Co. *v.* Barber, 49 Pac. Rep. 524 (Kan., 1897). See also § 3, *supra*.

[2] Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893).

[3] Willard *v.* Holmes, 142 N. Y. 492 (1894).

[4] Holmes, etc. *v.* Willard, 125 N. Y. 75 (1890).

[5] Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J., 1897). The accommodation indorsement may be valid if the proceeds of the note are used to pay a debt due to the corporation. Lyon, P. & Co. *v.* First Nat. Bank, 85 Fed. Rep. 120 (1898).

come established that such a guaranty is valid, provided it is based on a valuable consideration, and the consideration is such as the guarantor has power to receive or invest in.[1]

[1] Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859), where a stockholder's suit to enjoin the fulfillment of a guaranty, which had not been made in accordance with a statute authorizing it, failed because of the laches of the stockholder; Harrison *v.* Union Pac. R'y, 13 Fed. Rep. 522 (1882), where the guarantor was a stockholder in the corporation whose bonds were guaranteed, and the new road, when finished, would become a feeder to the guarantor. The guaranty was enforced; Macon, etc. R. R. *v.* Georgia R. R., 63 Ga. 103 (1879), upholding a mortgage given by the guaranteed corporation to the guarantor corporation; Madison, etc. R. R. *v.* Norwich Sav. Assoc., 24 Ind. 457 (1865), where the guaranty of bonds in the hands of a *bona fide* purchaser was sustained, the bonds having been issued to and in the name of the guarantor, although the latter acted only for accommodation; Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863), where an Ohio guaranty was upheld, though the required assent of the stockholder had not been obtained. Though the bonds were void, the guaranty was enforced; Arnot *v.* Erie R'y, 67 N. Y. 315 (1876), aff'g 5 Hun, 608, upholding a guaranty which the defendant had made on bonds sold by it; Railroad Co. *v.* Howard, 7 Wall. 392 (1868), where the guaranty by a railroad of bonds given to it by a city was upheld; Green Bay, etc. R. R. *v.* Union Steamboat Co., 107 U. S. 98 (1882), holding that under the charter a contract of a railroad with a steamboat company running in connection with its line, by which it guaranteed that the gross earnings of each of its boats should amount to a certain sum for two years, was valid; Sheffield Nickel Co. *v.* Unwin, L. R. 2 Q. B. D. 214 (1877), where a release by a corporation of a guaranty of certain profits made to it by a person who had sold property to it was upheld. However, in Madison, etc. Co. *v.* Watertown, etc. Co., 7 Wis. 59 (1858), where a plank-road company guaranteed and paid the debts of another plank-road company which built and owned a road over that part of the former's route which the former had not constructed, the guarantor was defeated in a suit for repayment from the guaranteed corporation. In Simpson *v.* Denison, 10 Hare, 51 (1852), the stockholder of a railroad company enjoined the company from guaranteeing a certain dividend on all the stock of another railroad in consideration of the right to carry on the business of the latter railroad. But in De Groff *v.* American, etc. Co., 21 N. Y. 124 (1860), a corporation was held liable on its guaranty that the patronage of the employees of the corporation should continue to a store which the corporation sold with such guaranty. A railroad corporation may guarantee and sell the bonds of another railroad company which have been given by the latter to the former company in payment of a debt. Rogers, etc. Works *v.* Southern R. R., 34 Fed. Rep. 278 (1888). Guarantors of bonds sold to a corporation are liable, though the corporation had no power to purchase. State *v.* Woram, 6 Hill, 33 (1843). A corporation's guaranty of another corporation's bonds is an original undertaking, and may be enforced without resorting to the latter company. Philadelphia, etc. R. R. *v.* Knight, 124 Pa. St. 58 (1889). A bank may guarantee the interest on the debentures of a company. *Ex parte* Booker, L.

A land and lumber company having power to consolidate with a railroad company may own the stock and guarantee the

R. 14 Ch. D. 317 (1880). A lessee railroad, which on the face of the bonds of the lessor agrees to pay the coupons, cannot, as against *bona fide* holders, set up that its agreement was *ultra vires* or informally authorized. Singer *v.* St. Louis, etc. R. R., 6 Mo. App. 427 (1879). Where the complaint alleges that the defendant had authority to guarantee the bonds, the suit being upon the guaranty, the question of *ultra vires* cannot be raised by a demurrer. Bryce *v.* Louisville, etc. R'y, 73 Hun, 233 (1893). A saw-mill and lumber company has implied power to guarantee the interest of bonds of a railroad constructed for the purpose of supplying the mill with logs, even though the railroad also serves the public. All the officers and stockholders of the former company assented to the guaranty. The aid in procuring logs was sufficient. Consideration Mercantile Trust Co. *v.* Kiser, 91 Ga. 636 (1893). Damages were allowed to a contractor for breach of contract of a railroad company to guarantee bonds in Leroy, etc. R. R. *v.* Sidell, 66 Fed. Rep. 27 (1895).

In Leavenworth County *v.* Chicago, etc. R. R., 25 Fed. Rep. 219 (1885), it appeared that the Rock Island railroad guaranteed the interest on the bonds of another railroad. Where the guarantor becomes insolvent, the maker of the bonds being solvent and continuing to pay the coupons, the distribution of the assets of the guarantor will not be delayed or restricted by the possibility of future liability on the guaranty. Gay Mfg. Co. *v.* Gittings, 53 Fed. Rep. 45 (1892). A construction company's contract to pay certain interest on bonds, which it received in payment in advance, does not obligate it to pay interest on bonds received by it in regular payment. Foster *v.* Mansfield, etc. R. R., 36 Fed. Rep. 627 (1888); aff'd, 146 U. S. 88 (1892). A guaranty that certain construction work will be done free from any lien ahead of a specified mortgage does not render the guarantor liable to parties who have furnished materials to the contractor. Holly Mfg. Co. *v.* New Chester Water Co., 48 Fed. Rep. 879 (1891). In March *v.* Eastern R. R., 43 N. H. 515 (1862), where one railroad leased its entire property and franchises to another, it was held that, under the provisions of the lease, there was neither a union of interest and capital between the two roads, nor any warrant of an equality of dividends between the stockholders of the two corporations. A brewing company has power to guarantee a lease of premises occupied by one of its customers, and containing fixtures mortgaged to the company. Fuld *v.* Burr Brewing Co., 18 N. Y. Supp. 456 (1892). A corporation organized to deal in the stock of a stockyard corporation, and hold personal and real estate, may buy competing stockyards; also may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891). Where a company is in financial distress, and its creditors agree to an extension of time provided the company assumes certain private debts of the directors, the company has power to do so, but bad faith may invalidate the trans-

bonds and preferred stock of such railroad company, the railroad of which is beneficial to the land company in its mining, manufacturing, and lumbering business.[1] If the guaranty is

action. Stark Bank *v.* United States Pottery Co., 34 Vt. 144 (1861). Where one railroad company contracts with another company to pay the interest on the bonds of the latter company, and then caused or consented to the latter company's issuing bonds with a statement in such bonds that the interest was guaranteed by the former company, the former company is liable for such interest, even though it was not a party to the bonds themselves. Opdyke *v.* Pacific R. R., 3 Dill. 55 (1874); S. C., 18 Fed. Cas. 744. Coupon-holders may assume that the stockholders have authorized a guaranty as required by statute. Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863). Where the guarantor of bonds is secured by a mortgage, the holder of the bonds is entitled to the benefit of the mortgage. Young *v.* Montgomery, etc. R. R., 2 Woods, 606 (1875); S. C., 30 Fed. Cas. 850. Where, under its power to lease, a railroad buys all the stock of another railroad, it may, as a consideration for such stock, guarantee the bonds of the lessor railroad. Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886). Where a lease of one railroad to another is valid, the consideration of the lease may be the guaranty by the lessee of the bonds of the lessor. Low *v.* Central Pac. R. R., 52 Cal. 53 (1877). It is sufficient consideration for a guaranty that the guarantor is the lessee of the principal debtor and the proceeds are to be used in equipping the leased road. Codman *v.* Vermont, etc. R. R., 16 Blatchf. 165 (1879); S. C., 5 Fed. Cas. 1157. It is a sufficient consideration for the guaranty that it was to enable a connecting line to adopt the same gauge as the guaranteeing line, and thereby increase the business of the latter. Connecticut, etc. Ins. Co. *v.* Cleveland, etc. R. R., 41 Barb. 9 (1863). A railroad may guarantee the payment of municipal bonds which are issued to aid the railroad. Railroad Co. *v.* Howard, 7 Wall. 392 (1868). An additional obligation in the bond, making it payable in gold, and added after the guaranty was made, binds the company, but not the guarantor. Wallace *v.* Loomis, 97 U. S. 146 (1877). The consideration of a guaranty may be the changing of the gauge of the railway whose bonds are guaranteed. Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859). A stockholder in a railway company cannot set aside the company's indorsement of another company's bonds in consideration of certain contracts between them, the indorsing company having paid the interest for five years. Cozart *v.* Georgia, etc. Co., 54 Ga. 379 (1875). Where the payment of the coupon is guaranteed, demand of payment at the place where the coupon is payable should be made within a reasonable time after it becomes due. Arents *v.* Commonwealth, 18 Gratt. (Va.) 750 (1868). The guarantor of the prompt payment of the principal and interest of bonds is liable for interest on the coupons which are not paid when they become due. Philadelphia, etc. R. R. *v.* Knight, 124 Pa. St. 58 (1889). Where by the terms of a lease the net earnings are to be used to pay mortgage bondholders of the lessor, and the lessee afterwards passes into a receiver's hands, the court will enforce such agreement. Grand Trunk R'y *v.* Central Vt. R. R., 78 Fed. Rep. 690 (1897). For a careful discussion of the power of corporations to execute guaranties, see an article in 31 Am. L. Rev. 363.

[1] Marbury *v.* Kentucky Union Land

within the power of the company, and no stockholder objects, it is not necessary to show that it was beneficial to the stockholders, nor to show any special consideration other than the money paid for the securities having the guaranty.[1] Where a land company owns land and also shares of stock in a railway company, it has power, upon selling such stock, to guarantee dividends thereon.[2] Under a statute authorizing a guaranty of bonds of any railway company within the state, a railroad may guarantee the bonds of a railroad with which it connects by means of a leased line, and the consideration of the guaranty may be the stock of the company whose bonds are guaranteed.[3] Hence a bill filed by the guarantor in such a case to cancel the guaranty will fail.[4] Where a bank buys wall paper at a sheriff's sale, and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and the bank guarantees debts thereafter incurred by such corporation, the bank is liable on such debts.[5] A guaranty by one railroad of the liabilities of another railroad, where there is no direct consideration therefor, is not enforceable.[6] A company organ-

Co., 62 Fed. Rep. 335 (1894), holding also that it is not necessary that an actual consolidation be made. Aff'g on this point Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893).

[1] Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335 (1894). See also § 3, *supra*. A guaranty by one corporation of an obligation of another corporation by reason of the former employing an expert of the latter is legal if all the stockholders of both companies assent thereto. Butterworth, etc. *v.* Kritzer, etc. Co., 72 N. W. Rep. 990 (Mich., 1897).

[2] Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335 (1894).

[3] Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896), holding also that where the road of a consolidated corporation runs into both Kentucky and Indiana, and the Kentucky statutes authorize a guaranty by the company, and the Indiana statutes authorize a guaranty upon the petition of a majority in interest of the stockholders, the guaranty may be in accordance with the Kentucky statutes. See also 87 Fed. Rep. 815.

[4] Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896), reversing Louisville, etc. R'y *v.* Ohio Valley, etc. Co., 69 Fed. Rep. 431 (1894), and practically reversing S. C., 57 Fed. Rep. 42 (1893), where a demurrer was involved.

[5] American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. Rep. 85 (1896).

[6] Pennsylvania R. R. *v.* St. Louis, etc. R. R., 118 U. S. 290 (1886), where a distant railroad guaranteed to a lessor railroad the rental to be paid by another railroad. Coleman *v.* Eastern Counties R'y, 10 Beav. 1 (1846), where a stockholder enjoined the railroad from establishing and guaranteeing profits to a packet line. The payee of a note given by one corporation in payment of a debt due from another corporation, there being no connection or consideration between the two corporations,

ized to manufacture ironwork for mining plants cannot legally guarantee the performance of a person's contract for the erection of a mining plant, even though it thereby makes a sale of iron. The company is not liable, even though the contract was not performed.[1] A corporation cannot give away its funds or guarantee certain receipts to another corporation in a different business.[2]

A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to obtain business.[3] A national bank may agree that a person going security on an attachment bond will be

cannot enforce the note. Ehrgott *v.* Topeka Bridge Manufactory, 16 Kan. 486 (1876); Rahm *v.* King Bridge Manufactory, 16 Kan. 277 (1876). A transfer company cannot guarantee the credit of another person. Lucas *v.* White Line Transfer Co., 70 Iowa, 541 (1886). A railroad has no power to guarantee dividends on the stock of an elevator company, even though the latter subscribes for railroad stock. Memphis, etc. Co. *v.* Memphis, etc. R. R., 5 S. W. Rep. 52 (Tenn., 1887). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock) is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873). The amount of indebtedness which may be incurred by a national bank being limited to the amount of its capital stock, its guarantee of a debt, after it has already incurred liabilities to the extent allowed by law, cannot be enforced. Weber *v.* Spokane Nat. Bank, 50 Fed. Rep. 735 (1892). In a suit to enforce a guaranty by one company of dividends on the stock of another company, the charter authority for such guaranty must be set forth; and where the suit is against still another corporation on the ground that the latter had assumed such guaranty, the contract of such assumption must be set forth. Ordinarily such a guaranty is not enforceable. Rhorer *v.* Middlesboro, etc. Co., 44 S. W. Rep. 448 (Ky., 1898).

[1] Humboldt Min. Co. *v.* American Mfg. etc. Co., 62 Fed. Rep. 356 (1894).

[2] Davis *v.* Old Colony R. R., 131 Mass. 258 (1881), where the guaranty by a corporation of the expenses of a musical festival was held *ultra vires.* A railroad subscription to a state fair was enforced in State Board of Agriculture *v.* Citizens' Street R'y, 47 Ind. 407 (1874). *Cf.* §§ 64, 681, *supra;* § 909, *infra.* A stockholder may enjoin a railway from donating its funds to an exhibition, even though it is claimed that thereby the corporate receipts will be increased. Tomkinson *v.* South Eastern R'y, L. R. 35 Ch. D. 675 (1887). A stockholder who offsets to his statutory liability the corporate guaranty of bonds held by him must prove the consideration. Briggs *v.* Cornwell, 9 Daly, 436 (N. Y., 1881). A railroad cannot guarantee the dividends of an elevator corporation in consideration of the latter company subscribing for the stock of the former company. Memphis, etc. Co. *v.* Memphis, etc. R. R., 5 S. W. Rep. 52 (Tenn., 1887). A freight and transfer corporation has no power to guarantee the credit of a third person. Lucas *v.* White Line Transfer Co., 70 Iowa, 541 (1886).

[3] Wheeler, etc. Co. *v.* Everett Land Co., 14 Wash. 630 (1896).

protected by the bank, although the bond is not given for the benefit of the bank.[1] A receiver, within a reasonable time after taking possession, may refuse to carry on a lease which the company had accepted, and may refuse to be bound by a guaranty of the bonds of the lessor.[2] Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders.[3] A stockholder who assents to a guaranty cannot afterwards attack it on the ground that the corporation had no power to enter into it.[4] A statutory provision that a guaranty may be made only on the petition of a majority in interest of the stockholders is directory and not mandatory.[5]

It is a question of considerable doubt as to whether the guaranty on bonds is negotiable, the same as the bonds themselves; but the better opinion is that the negotiability of the instrument guaranteed extends also to the guaranty itself.[6]

[1] Seeber *v.* Commercial Nat. Bank, 77 Fed. Rep. 957 (1897). A bank is not bound by a guaranty which its cashier makes on a bond and mortgage in which the bank has no interest. Farmers', etc. Nat. Bank *v.* Smith, 77 Fed. Rep. 129 (1896). A national bank has no power to guarantee the payment of debts where the bank has no interest in the matter, and such a guaranty is not enforceable. Commercial Nat. Bank *v.* Pirie, 82 Fed. Rep. 799 (1897). *Cf.* note 3, p. 1754.

[2] Ames *v.* Union Pac. R'y, 60 Fed. Rep. 966 (1894).

[3] Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896).

[4] If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Where an agricultural society guarantees the bonds of a street railway, a participating stockholder in such society cannot afterwards object. Thompson *v.* Lambert, 44 Iowa, 239 (1876). See also Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

[5] It is no defense that the consent of stockholders, as required by statute, was not obtained. A party taking with notice is protected if such party's pledgor was *bona fide* without notice. Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896), reversing the lower court, which held that a railroad corporation has no implied power to guarantee the bonds of another railroad corporation, and that where the guaranty is allowed by statute upon the petition of the holders of a majority of the stock, a guaranty without that petition, there being no recitation that the petition had been made, is void, and will be canceled at the suit of the guaranteeing company, even though the guaranty runs to the holder, and even though it received stock as a consideration and was empowered to acquire such stock.

[6] Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896); Toppan *v.* Cleveland, etc. R. R., 1 Flip. 74 (1862); S. C., 24 Fed. Cas. 56. See also § 768, *supra*. Not only the bonds,

Where bonds are issued to a railroad company or its assigns, and are indorsed by the company and sold, the *bona fide* purchaser may enforce the indorser's liability. It is the liability of an indorser, and not of a guarantor.[1] A land company own-

but the state's indorsement or guaranty on them, are negotiable, and a *bona fide* purchaser of them from a contractor to whom they were fraudulently issued may enforce them. Gilman *v.* New Orleans, etc. R. R., 72 Ala. 566 (1882). The state's indorsement or guaranty of bonds is negotiable. State *v.* Cobb, 64 Ala. 127 (1879). "Where the statute confers express authority upon the company to guarantee the bonds of another company, a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the *bona fide* holder." Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236, 248 (1886). For a full statement of the law relative to the negotiability of a guaranty of a note, see Daniels on Negotiable Instruments (4th ed.), §§ 1774–1784. A guaranty indorsed on a negotiable note is generally not negotiable. 1 Am. Lead. Cas. (ed. 1871), 410. *Quære*, whether this is the same as to guaranties of railroad bonds. Arents *v.* Commonwealth, 18 Gratt. (Va.) 750, 767 (1868). In Codman *v.* Vermont, etc. R. R., 16 Blatchf. 165 (1879); S. C., 5 Fed. Cas. 1157, where two companies joined in making notes, and then one of these companies indorsed the same and also guaranteed payment, the court, per Wheeler, J., said: "This guaranty is not, in terms, negotiable. By it the defendant guarantees the payment of the note, principal and interest, 'according to its tenor.' The note being negotiable, perhaps these words draw that quality into the guaranty. If they do, the guaranty would seem to be negotiable. Story, Prom. Notes, § 484. If not, in Partridge *v.* Davis, 20 Vt. 499 (1848), Davis, J., seems to have thought such a guaranty would, in effect, be negotiable; while in Sandford *v.* Norton, 14 Vt. 228 (1842), and in Sylvester *v.* Downer, 20 Vt. 355 (1848), the late Chief Justice Redfield was clearly of the opinion that, like ordinary simple contracts, such guaranties would not be negotiable." If a railroad may lease another road, it may guarantee interest on the latter's bonds, such interest being the rent. Though the bonds are negotiable the guaranty is not. If bonds are issued for construction work which is not done, a *bona fide* purchaser of the bonds cannot enforce a guaranty thereof by another corporation. Eastern, etc. Bank *v.* St. Johnsbury, etc. R. R., 40 Fed. Rep. 423 (1889). As to the negotiability of a guaranty of a note or bond, see also Brandt on Suretyship, §§ 48, 49; 87 Fed. Rep. 815.

[1] So also where the company buys bonds of another company and guarantees and sells them. Arnot *v.* Erie R'y, 67 N. Y. 315 (1876). Where a municipal bond is payable to a railroad company or its assigns, and the company sells it with the indorsement, "The New Orleans, Jackson, & Great Northern Railroad Company, for value received, hereby transfers the within bond to the New Orleans Savings Institution, or assigns," the company is liable as an indorser of the bond when it becomes due. Bonner *v.* New Orleans, 2 Woods, 135 (1875); S. C., 3 Fed. Cas. 853. A railroad company may accept the bills of exchange of another railroad company, the consideration being the altering the gauge of the latter company so as to enable the cars of the

ing the bonds of a railroad company may indorse or guarantee them upon selling them.[1] A guaranty of stock, without specifying the length of time for which the guaranty is to run, continues so long as the stock is outstanding. In case of the insolvency of the guarantor, the guaranty constitutes a claim against it, and the amount of the claim is measured by the value of the stock if the guarantor had remained solvent.[2] A guaranty on a bond is transferable, but at common law a suit to enforce it should be brought in the name of the payee of the bond, even though the bond runs to a certain person or bearer.[3]

A guaranty of the bonds or dividends on the stock of a corporation should be written on the bonds or certificates of stock and signed by the guaranteeing party. If the guaranty rests merely on a contract between the two corporations, it may be modified by the corporations;[4] and it may be beyond

former to run over the tracks. Smead *v.* Indianapolis, etc. R. R., 11 Ind. 104 (1858). Where the bonds are payable to the order of another railroad company or its assigns, and are indorsed by the latter and sold, the latter are liable as an indorser to a *bona fide* holder, even though the indorsement was *ultra vires*. Madison, etc. R. R. *v.* Norwich, etc. Soc., 24 Ind. 457 (1865). Where a land company has power to purchase the bonds of a railway company, it may guarantee their payment upon selling them. Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893); aff'd on this point in 62 Fed. Rep. 335. A person accepting a guaranty of a railroad, knowing that it could be given only on the petition of a majority in interest of the stockholders, and knowing that such petition had not been made, cannot enforce the guaranty. Louisville Trust Co. *v.* Louisville, etc. R'y, 75 Fed. Rep. 433 (1896).

[1] Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335 (1894), the court saying: "The power of the land company to enter into such an obligation for such a purpose is completely established by the case of Railroad Co. *v.* Howard, 7 Wall. 392 (1868). In that case it was held that a railroad corporation, with power to issue bonds for the construction of its road, might guarantee the bonds of cities and counties, which had been lawfully issued for the purpose of aiding the railroad in the construction." A railroad that owns all the stock of another railroad, and builds the latter, may take the mortgage bonds of the latter in payment, and guarantee the principal and interest of the bonds and sell the same. Where the principal may be declared due on default in payment of interest, the guarantor is liable on the principal so declared due. Dougan *v.* Evansville, etc. R. R., 15 N. Y. App. Div. 483 (1897).

[2] Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893). See also Marbury *v.* Kentucky Union Land Co., 62 Fed. Rep. 335 (1894).

[3] Owen *v.* Potter, 73 N. W. Rep. 977 (Mich., 1898).

[4] If the guaranty is to the corporation, and not to the stockholders severally, the board of directors may reduce the amount of the guaranty.

the power of the bondholder to enforce the guaranty,[1] or the guaranteed company may have difficulty in enforcing the contract.[2] The agreement of a railroad company with another company to pay the interest on the bonds of the latter cannot be enforced by a contractor with the former, who was to build the road for the bonds.[3] The holder of coupons, representing interest upon railroad bonds, has no right of action on an agreement by the lessee of the railroad to apply the net earnings to the payment of the interest coupons, and to buy up the coupons if the net earnings should not be sufficient to pay them, such holder of coupons being a stranger to the contract and the consideration.[4] A guaranty of the principal and interest of a bond does not follow a coupon which has been detached from the bond.[5] A guaranty of coupons set forth in the bonds themselves may be enforced by the holder, even though the trustee of the mortgage also has power to enforce the guaranty, and even though the mortgage provides that in case the security becomes insufficient the guarantor shall pay certain of the obligations until it becomes sufficient.[6] Where the guaranty

Beveridge *v.* New York, etc. R. R., 112 N. Y. 1 (1889).

[1] The agreement of a railroad company to pay the bonds of another railroad company is not enforceable by the bondholders. The court said: "A mere valid promise or undertaking, taken by the company to give it support financially by enabling it to escape default for the non-payment of interest, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road." There is no privity of contract between the contracting company and the bondholders in such a case as this. The contract is between the two companies alone. The outside company owed no debt and held no fund in trust for the other company nor for the latter's bondholders. Metropolitan Trust Co. *v.* New York, etc. R. R., 45 Hun, 84 (1887). A different case is presented where the contract is executed, as where a lease has been made. Metropolitan Trust Co. *v.* New York, etc. R. R., 45 Hun, 84 (1887).

[2] Where one railroad, by contract with another, guarantees the interest on the bonds of the latter, but fails to fulfill its contract, the latter railroad itself cannot enforce the guaranty. The liability to repay attaches at once. In any case, the remedy is not in equity. Bradford, etc. R. R. *v.* New York, etc. R. R., 123 N. Y. 316 (1890). A guaranty by one company of dividends on the stock of another company is a collateral undertaking. Miller *v.* Ratterman, 47 Ohio St. 141 (1890).

[3] Reynolds *v.* Louisville, etc. R'y, 143 Ind. 579 (1895).

[4] Freeman *v.* Pennsylvania R. R., 173 Pa. St. 274 (1896). See § 831 *infra*.

[5] Clokey *v.* Evansville, etc. R. R., 16 N. Y. App. Div. 304 (1897).

[6] Townsend *v.* Colorado Fuel, etc. Co., 16 N. Y. App. Div. 314 (1897).

is not for the yearly payment of a sum equal to a specified percentage on the stock held by the guaranteed party in the corporation, nor on the nominal amount of his stock, but is that the dividends of the corporation shall annually equal that sum, the dissolution of the corporation puts an end to the guaranty. The dissolution in this case was due to acts of the corporation for which all parties were equally responsible.[1] Where one railroad leases another and guarantees dividends to the stockholders of the latter, but for several years fails to meet the guaranty, a stockholder, who in the meantime disposes of his stock, but retains the "dividends and profits" arising within a certain time, is entitled to the arrears of dividends, even though the same are paid after the time specified in the reservation, and even though by compromise they are only paid in part.[2] Even though the bondholders buy the property at foreclosure sale and afterwards sell it at a profit, the guarantor of the bonds is entitled to credit for only the price realized at the foreclosure sale.[3] Where bondholders of a lessor railroad are entitled to the rent in payment of their coupons, they may enforce the obligation.[4] Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent.[5] Where a railroad company leases all its property to another company, and by the terms of the lease the lessee is to pay dividends on the stock of the lessor directly to the holders thereof, and the lessee is also to be allowed to place a mortgage upon the property of the lessor, the lessor corporation, which has passed into the hands of a receiver by reason of such mortgage, may file a bill in equity to compel the lessee to ac-

[1] Lorillard *v.* Clyde, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433.

[2] Meldrim *v.* Trustees, etc., 28 S. E. Rep. 431 (Ga., 1897).

[3] Owen *v.* Potter, 73 N. W. Rep. 977 (Mich., 1898).

[4] Schmidt *v.* Louisville, etc. R. R., 41 S. W. Rep. 1015 (Ky., 1897). Where by the terms of a lease the rent is to be used to pay the interest on bonds, the contract may be enforced by the bondholders. Welden Nat. Bank *v.* Smith, 86 Fed. Rep. 398 (1898).

[5] Guilmartin *v.* Middle G. & A. R'y, 29 S. E. Rep. 189 (Ga., 1897).

count for the funds realized on the sale of the mortgage bonds, and also to compel payment of the guaranteed dividends.[1] After the filing of such a bill a stockholder cannot bring suit to enforce the payment of the guaranteed dividend on his stock.[2]

A few forms of guaranties of bonds and dividends on stock are given in the notes below.[3]

If the guarantor takes up the securities he may enforce their payment as against the company liable thereon, but his rights are second to those of any of the guaranteed bonds not yet taken up.[4] Where one company agrees on the face of the

[1] Pacific R. R. *v.* Atlantic & P. R. R., 20 Fed. Rep. 277 (1884).

[2] Reed *v.* Atlantic & P. R. R., 85 Fed. Rep. 692 (1884).

[3] Form of guaranty on West Shore Railroad bonds:

GUARANTY.

For value received the New York Central and Hudson River Railroad Company hereby guarantee the punctual payment of the principal and interest of the within bond at the time and in the manner therein specified, and covenants, in default of payment of any part thereof by the obligor, to pay the said principal and interest of the within bond as the same shall become due, upon the demand of the holder thereof.

In witness whereof the said company has caused its corporate seal to be hereto affixed and attested by its secretary, and this instrument to be signed by its president or one of its vice-presidents.

The proposed guaranty by the United States government of the Nicaragua Canal Company bonds is as follows:

The United States of America guarantees to the lawful holder of this bond the payment by the Maritime Canal Company of Nicaragua of the principal of said bonds and the interest accruing thereon, and as it accrues.

Form of guaranty of dividends on Rome, Watertown, etc., Railroad stock:

The New York Central and Hudson River Railroad Company hereby guarantees to the holder, for the time being, of this certificate the payment of 1¼ per cent on the par value of the stock represented thereby, on the 15th days of May, August, November, and February in each year, during the continuance of a certain lease, dated the 14th day of March, 1891, by the Rome, Watertown, and Ogdensburg Railroad Company to the said New York Central and Hudson River Railroad Company.

In witness whereof the corporate seal of the said New York Central and Hudson River Railroad Company has been hereto affixed, attested by an officer thereof, the —— day of ——, A. D. 18—.

NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

By —— ——, Treasurer.

Form of guaranty on bonds of New York and New England Railroad Company issued in 1897:

For value received the New York, New Haven, and Hartford Railroad Company guarantees the payment of the principal and interest of this bond according to the terms of the bond and coupons annexed; but, if any payment be demanded on this guaranty, this bond shall, at the option of said guarantor, or of the then holder thereof, be exchanged for a debenture of the guarantor for the same amount, and at the same rate of interest, both payable in like gold coin, for the then unexpired term of this bond.

[4] Where, the bonds being in default, the trustee foreclosed by taking and retaining possession, and conveyed the property to a new corporation, the bondholders taking stock for their bonds, a guarantor of the bonds who paid some of the old coupons as they became due gets nothing, inasmuch as the whole property was used to pay the guaranteed bonds. Child *v.* New York, etc. R. R., 129 Mass. 170

bonds of another company to purchase the coupons and bonds as they become due, the former company cannot foreclose until it has fully completed the contract of purchase.[1] A guarantor of the interest on mortgage bonds is not a necessary party to a foreclosure suit, since he is not entitled to subrogation until the whole debt for which he is liable is paid. Otherwise the guaranty would be useless.[2]

(1880). The guaranty was as follows: "In consideration of the provisions of a contract of even date for the use of the Boston, Hartford & Erie Railroad by the Erie Railway Company, the Erie Railway Company hereby agrees with the holder of this bond that the several interest warrants hereto attached shall be paid as they respectively mature. Witness the seal of the Erie Railway Company and the signature of its secretary, at the city of New York, the 8th day of October, A. D. 1867." The contract by which the guaranty was agreed upon contained the following clause: "And it is further agreed that any interest warrants which the said party of the second part shall be obliged to take up under the provisions of this contract, or the indorsement which may be put on any of said bonds, shall be and remain a valid lien on all the franchises and property named in or secured by said mortgage." A guarantor of bonds which have become due cannot participate in the assets along with the bondholders on coupons which have been paid by the guarantor. The bondholders are to be paid first, since the guarantor is liable to pay them. But where the principal is not due, the guarantor's coupons are to be paid after other outstanding coupons are paid. Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501, 540 (1870). Where the guarantor has paid a part of the securities which were guaranteed, the remaining part is to be paid first, and thus the guarantor is to be repaid and then other creditors come in. Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501 (1870). The lessees of the guarantor, having taken up coupons which were guaranteed, are "entitled to the same remedies for the collection thereof to which the creditors themselves would have been entitled," and may apply for a receiver under the New Jersey statute. Pennsylvania R. R. *v.* Pemberton, etc. R. R., 28 N. J. Eq. 338 (1877). As to the guarantor company's right to institute suit to protect its interests, see also Florida *v.* Anderson, 91 U. S. 667 (1875). The guarantor may enforce a mortgage given to protect it. Macon, etc. R. R. *v.* Georgia, etc. R. R., 63 Ga. 103 (1879). Where railroad bonds are secured by a mortgage on the railroad, and also a mortgage on the property of another corporation, the latter may be foreclosed before the former where the former would net nothing. Chicago, etc. Land Co. *v.* Peck, 112 Ill. 408 (1885).

[1] Pennsylvania R. R. *v.* Allegheny, etc. R. R., 48 Fed. Rep. 139 (1891); Pennsylvania R. R. *v.* Allegheny, etc. R. R., 42 Fed. Rep. 82 (1890).

[2] Columbia, etc. Trust Co. *v.* Kentucky Union R'y, 60 Fed. Rep. 794 (1894). The guarantor of mortgage bonds is not a necessary party to a foreclosure suit. "If the guarantor would be subrogated to the rights of the creditor or purchaser, he should pay the debt or offer to redeem." Owen *v.* Potter, 73 N. W. Rep. 977 (Mich., 1898).

Where a company insures to an individual the payment of a debenture held by such individual in case of default on the debenture becoming due, the insuring company is liable, even though, under a clause in the debenture, the other debenture-holders postpone payment.[1]

Where a state guarantees bonds, the guaranty is construed and enforced the same as where the guaranty is by a corporation.[2]

A guaranty by one individual of certain dividends on stock held by another individual is legal and enforceable.[3]

[1] Finlay *v.* Mexican Inv. Corp., 76 L. T. Rep. 257 (1897).

[2] Commonwealth *v.* Chesapeake, etc. Co., 32 Md. 501 (1870); Morton *v.* New Orleans, etc. R'y, 79 Ala. 590 (1885); Gilman *v.* New Orleans, etc. R. R., 72 Ala. 566 (1882); State *v.* Cobb, 64 Ala. 127 (1879); Florida *v.* Anderson, 91 U. S. 667 (1875).

[3] See § 334, note, *supra*. In a celebrated litigation in New York state it was adjudicated:

First. That such a guaranty is valid and enforceable. Lorillard *v.* Clyde, 86 N. Y. 384 (1881).

Second. That the defendants were liable upon it, during the time the corporation subsisted *de facto*, although there existed cause for its dissolution. Lorillard *v.* Clyde, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Third. That separate actions may be brought on the contract as the instalments fall due, and separate recoveries had in each. Lorillard *v.* Clyde, 122 N. Y. 41 (1890).

Fourth. That the plaintiff was in no legal sense a party to an action by the people of the state, and not concluded by the findings therein. Lorillard *v.* Clyde, 48 N. Y. Super. Ct. 409 (1882); affirmed, 99 N. Y. 196.

Fifth. That the dissolution of the corporation put an end to the guaranty. Lorillard *v.* Clyde, 142 N. Y. 456 (1894), rev'g 15 N. Y. Supp. 809, and 20 N. Y. Supp. 433, this decision being due to the peculiar wording of the contract.

Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason *v.* Cronk, 125 N. Y. 496 (1891). Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty, after the money has been expended, on the ground that the act was *ultra vires*. Alexandria, etc. R. R. *v.* Johnson, 48 Pac. Rep. 847 (Kan., 1897). In U. S. Trust Co. *v.* Western Contract Co., 81 Fed. Rep. 454 (1897), bonds and stock were deposited with a railroad corporation to pay the principal and interest on certain other bonds and floating debts of another corporation. After the contract had been partially performed, the former corporation became insolvent, and the court passed upon the various rights of the parties. Where certain stockholders agree with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. Rogers *v.* Burr, 97 Ga. 10 (1895). An agreement of a party

§ 776. *Debentures.*—In England the securities which are issued by corporations are generally called "debentures." An English debenture is a term which in its widest application includes any instrument issued by a corporation which creates a debt or acknowledges it.[1] But generally it means a bond[2]

to pay to a stockholder a sum of money equal to ten per cent on the par value of certain stock held by the latter, the stockholder agreeing to turn over to the former all dividends received on the stock during the time specified, is valid and may be enforced, although no dividends are declared, and although no certificates of stock are actually issued. Guy *v.* Craighead, 6 N. Y. App. Div. 463 (1896). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895).

[1] Levy *v.* Abercorris, etc. Co., L. R. 37 Ch. D. 260 (1887). See also British, etc. Co. *v.* Inland Rev. Comm'rs, L. R. 7 Q. B. D. 165 (1881); Edmonds *v.* Blaina Furnaces Co., L. R. 36 Ch. D. 215 (1887). *Cf.* Topham *v.* Greenside, etc. Co., L. R. 37 Ch. D. 281 (1887); 2 R'y & Corp. L. J. 529.

[2] It is applied to evidences of indebtedness such as a deed under seal. *Ex parte* Bradshaw, L. R. 15 Ch. D. 465 (1879), where the form was that of a bond binding the company "and their successors and their real and personal estate," which was held to be a charge upon the real and personal estate of the company as it existed at the date of winding-up proceedings, but not including unpaid capital; *Re* City Bank, L. R. 3 Ch. 758 (1868), where, however, a deed under seal, payable to order, but purporting to be a debenture, was treated as a mere promissory note; *Ex parte* Grissell, L. R. 3 Ch. D. 411 (1875). Also to a simple promise to pay, with a clause subjecting certain property as security. *Re* Marine Mansions Co., L. R. 4 Eq. 601 (1867). See also note *infra*. A Lloyd bond is a due-bill or acknowledgment of indebtedness issued under seal by a corporation to the constructors, supply men, etc. Rapalje, Law Dict. And see *Re* Cork, etc. R'y, L. R. 4 Ch. App. 748 (1869). Cavanagh, Money Securities (2d ed., p. 355), defines a debenture as "an instrument in writing, generally under seal, creating a definite charge on a definite or indefinite fund or subject of property in favor of a given person, or of a given person and his order or bearer, and constituting a member in a series of instruments, each entitling the original holder thereof to similar rights. Hence a debenture is distinguished (1) from a mortgage, which is an actual transfer of property; (2) from a bond, which does not directly affect property; and (3) from a mere charge on property, which is individualized and does not form part in a series of similar charges. [Citing cases.] Debentures may be issued by a single person, by a partnership, or by a corporation." Debenture stock differs from a pure debenture in that the title of each original holder appears in a registry instead of being represented by an instrument complete in itself, and the stock is capable of being transferred in any amounts, unless limited by corporate regulations. See Attree *v.* Hawe, L. R. 9 Ch. D. 337 (1878).

secured by a mortgage,[1] or by a clause equivalent to a mortgage inserted in the bond itself.[2] An English debenture, when it is a bond and mortgage combined, and covers land, is an interest in land, and hence a contract for the sale of such a debenture must comply with the statute of frauds applicable to a sale of land.[3]

The power to issue debentures is generally conferred by the charter. Where it is not so conferred it is implied from a general power to borrow money and create debts.[4]

In England statutory provisions regulating the issue of debentures must be carefully observed.[5] Debentures in England,

[1] *Re* Hamilton's Windsor Ironworks, L. R. 12 Ch. D. 707 (1879); Wildy *v.* Mid-Hants R'y, 16 W. R. 409 (1868).

[2] *Re* Marine Mansions Co., L. R. 4 Eq. 601 (1867); *Re* Panama, etc. Co., L. R. 5 Ch. 318 (1870); *Re* New Clydach, etc. Co., L. R. 6 Eq. 514 (1868). A debenture not making a charge upon property has been held to be a promissory note. *Ex parte* Colborne, L. R. 11 Eq. 478 (1870). But security upon property is not a necessary feature. Edmonds *v.* Blaina Furnaces Co., L. R. 36 Ch. D. 215 (1887), holding also that it is not necessary that they be issued and numbered *seriatim;* a single debenture may be issued to one man. "In the ordinary acceptation of the term a debenture means any document, binding on an incorporated company, by which it acknowledges a debt to be due and undertakes to pay it." Romer, Q. C., in Edmonds *v.* Blaina Furnaces Co., L. R. 36 Ch. D. 215 (1887), where, also, Chitty, J., said: "I find that generally, if not always, the instrument imports an obligation or covenant to pay." The same learned judge, in Levy *v.* Abercorris, etc. Co., L. R. 37 Ch. D. 260 (1888), said that "debenture" is not a term of art, but means a document which acknowledges or creates a debt. In the former case the instrument was a memorandum of agreement acknowledging loans in various amounts set opposite the names of nine persons, covenanting with each of them to pay the same, with interest, at a fixed date, and to pay them ratably in case the whole was not then paid, and pledging as security the "undertaking, property, and effects of every kind," subject to prior charges, and with liberty to the company to sell or pledge the things manufactured by the company in the ordinary course of business until default made.

[3] Driver *v.* Broad, [1893] 1 Q. B. 539, 744. *Cf. Re* Hollon, 69 L. T. Rep. 425 (1893), as to mortmain.

[4] *Re* Inns, etc. Co., L. R. 6 Eq. 82 (1868); Bank of South Australia *v.* Abrahams, L. R. 6 P. C. 265 (1875), holding that a power to issue debentures after all calls have been fully paid does not warrant making them upon future calls.

[5] Where the required assent of stockholders is not obtained, the debentures are void. Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868). Where the issue is made before the whole capital is subscribed, and the statute forbids such issue, the debenture is void. Chambers *v.* Manchester, etc. R'y, 5 B. & S. 588 (1864). Where the issue is made when the corporate debts are greater than the statute allows, then the debentures are void,

covering all the property, etc., of the corporation, are specifically excepted from the bill of sales or chattel mortgage act, requiring registration of bills of sale.[1] A debenture is to be construed according to the language used in it. There are no arbitrary rules of construction peculiar to it alone.[2]

and the holders come in as unsecured creditors. *Re* Pooley Hall, etc. Co., 18 W. R. 201 (1869).

[1] The bills of sale act in England relieves corporations from the necessity of recording debentures. Read *v.* Joannon, L. R. 25 Q. B. D. 300 (1890). Debentures have precedence over a *fi. fa.* *Re* Opera, [1891] 3 Ch. 260. The debentures of none of the incorporated companies in England need be recorded as a chattel mortgage. *Re* Standard Mfg. Co., [1891] 1 Ch. 627; Edmonds *v.* Blaina Furnaces Co., L. R. 36 Ch. D. 215 (1887). A debenture is a document which creates or acknowledges a debt. It need not be recorded in the register's office under the bill of sales act. Levy *v.* Abercorris, etc. Co., L. R. 37 Ch. D. 260 (1887). *Cf.* Topham *v.* Greenside, etc. Co., L. R. 37 Ch. D. 281 (1887). For a review of the long litigation in England whether a debenture had to be recorded as a bill of sale, *i. e.*, in America as a chattel mortgage, see 8 R'y & Corp. L. J. 222. This question was finally settled in England by act of parliament declaring that debentures of corporations need not be recorded under the bill of sales act. A debenture on the whole property, with a clause that no prior mortgage or charge should be made, is not good as against an assignment by the company of money due from an insurance company, where such assignee gave notice to the insurance company before that company had notice of the debenture. English, etc. Trust *v.* Brunton, [1892] 2 Q. B. 1.

[2] Edmonds *v.* Blaina Furnaces Co., L. R. 36 Ch. D. 215 (1887); *Ex parte* Cox, 13 L. R. Ir. 174 (1884), and *Re* Panama, etc. R'y, L. R. 5 Ch. 318 (1870), holding that debentures secured by the "undertaking and all sums arising therefrom" are a charge upon all the property of the corporation, past and future, and are entitled to be paid before the general creditors. The former case gives the form of the indenture. *Re* Marine Mansions Co., L. R. 4 Eq. 601 (1867), to same effect, but not a charge on the capital stock; also *Re* Colonial, etc. Corp., L. R. 15 Ch. D. 465 (1879); *Re* New Clydach, etc. Co., L. R. 6 Eq. 514 (1868), where debentures purporting to be an assignment of the undertaking, and charging all the real and personal property, were held valid upon all personal property existing at the date of the debentures, but not upon property subsequently acquired. A debenture on all the property does not necessarily cover uncalled subscriptions. *Re* Streatham, etc. Co., 75 L. T. Rep. 574 (1896); Bloomer *v.* Union, etc. Co., L. R. 16 Eq. 383 (1873), holding that book debts were charged; *Ex parte* Grissell, L. R. 3 Ch. D. 411 (1875), where a charge upon all the funds, property, and effects which the company held or possessed, or should hold or be possessed of, was held valid; Hodson *v.* Tea Co., L. R. 14 Ch. D. 859 (1880), where debentures containing an assignment of chattels, with a provision that the corporation shall retain possession until twenty-one days after default, were held a lien, though winding-up proceedings had been begun before they became due; *Re* Herne Bay Water-works Co., L. R. 10 Ch. D. 42 (1878), holding that debenture-holders, not being in the position of ordinary mortgagees, may

Many of the rules of law applicable to other evidences of corporate indebtedness apply also to this class of obligations.[1] A provision in an English debenture that a majority of the

have a receiver appointed, but cannot institute winding-up proceedings; Wildey *v.* Mid-Hants R'y, 16 W. R. 409 (1868), holding that the holder of a debenture secured by mortgage has a title prior to that of a subsequent judgment creditor, and may file a bill to protect his security, though his claim is not due; *Ex parte* Pitman, L. R. 12 Ch. D. 707 (1879), holding that the debenture does not prevent the company from selling property and dealing with it without regard to the debenture. To same effect, Wheatley *v.* Silkstone, etc. Co., L. R. 29 Ch. D. 715 (1885), where a mortgage given subsequent to the indentures took precedence over them; *Re* Florence, etc. Co., L. R. 10 Ch. D. 530 (1878); Moor *v.* Anglo-Italian Bank, L. R. 10 Ch. D. 681 (1879). But as soon as winding-up proceedings are commenced, then the lien of the debenture-holders attaches, and the unsecured holders are paid after the debenture-holders. *Re* Panama, etc. Mail Co., L. R. 5 Ch. App. 318 (1870). To same effect, *Re* Horne, L. R. 29 Ch. D. 736 (1885); Hodson *v.* Tea Co., L. R. 14 Ch. D. 859 (1880). A purchaser of land from the company may, before taking title, require proof of no default as to the debentures. *Re* Horne, L. R. 29 Ch. D. 736 (1885). A floating debenture does not prevent the company from paying a debt to a director just before a winding up is commenced. Willmott *v.* London Celluloid Co., L. R. 34 Ch. D. 147 (1886). A pledge or mortgage of a specific piece of corporate property to obtain new money takes precedence of a general debenture lien, although the debenture was prior in time. Ward *v.* Royal Exchange, etc. Co., 58 L. T. Rep. 174 (1887). A debenture is not a lien on the proceeds from superfluous land sold by the company. *Re* Hull, etc. R'y, L. R. 40 Ch. D. 119 (1888). In England any loan by a corporation in excess of the amount expressly authorized by its charter is void, but the company may be held liable for such part of the money as they properly used to pay other debts. Wenlock *v.* River Dee Co., L. R. 38 Ch. D. 534 (1888).

[1] Webb *v.* Herne Bay Commissioners, L. R. 5 Q. B. 642 (1870), holding that a defense of illegal issue cannot be made by a corporation against the suit of an innocent holder of assignable debentures; Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868), holding that when issued for an insufficient consideration they are still good to the extent of the value of the consideration; *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870), to the effect that, when held by a member of a corporation subject to a lien for money due to it, the lien is released by a transfer to which the company has consented; Agar *v.* Athenæum Life, etc. Co., 3 C. B. (N. S.) 725 (1858), holding that the fact that due formality was not observed in borrowing the money for which debentures are issued is no defense to a suit upon them; Crouch *v.* Credit Foncier, etc., L. R. 8 Q. B. 374 (1873), holding that debentures under seal, though payable to bearer, are not negotiable; *Re* Brunton's Claim, L. R. 19 Eq. 302 (1874), holding that a company cannot set up equities against a debenture bond after accepting notice of its assignment; Potteries, etc. R'y *v.* Minor, L. R. 6 Ch. 621 (1871), holding that obtaining judgment upon debentures does not change the status of the holder; he is still bound by the acts of a majority of his fellow-holders under the Railway Compa-

holders of debentures might "sanction any modification or compromise of the rights of the debenture-holders against the company or against the property" is valid, and such a compromise

nies Act of 1867; Price *v.* Great Western R'y, 16 M. & W. 244 (1847), holding that if the principal of debentures remains unpaid after maturity it bears interest though all coupons have been promptly paid.

A debenture-holder may apply for a receiver whenever the company ceases to be a going concern. Hubbuck *v.* Helms, 56 L. T. Rep. 232 (1887). See Blaker *v.* Herts, etc. Co., L. R. 41 Ch. D. 399 (1889). A debenture-holder cannot have a receiver of all the railway property appointed merely because there is a default. He must first get judgment and execution at law. He differs from a mortgagee. Imperial, etc. Assoc. *v.* Newry, etc. R'y, 2 Ir. Rep. Eq. 524 (1868). A debenture which in effect is a mortgage on the tolls and income of a pier company cannot enjoin a general creditor from selling out the land by levy of execution. Perkins *v.* Deptford, etc. Co., 13 Sim. 277 (1843). The court will appoint a receiver at the instance of debenture-holders if the corporation is insolvent, even though neither the principal nor interest is due. McMahon *v.* North Kent Ironworks, [1891] 2 Ch. 148. Debentures in excess of the amount authorized by statute are void. Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868). Where some debentures have been paid, new ones may be issued to that amount and not be in excess of the statutory limit. Fountaine *v.* Carmarthen R'y, L. R. 5 Eq. 316 (1868). After a receiver has taken possession, a debenture-holder cannot obtain priority over other holders by getting a judgment at law and issuing execution thereon. Bowen *v.* Brecon R'y, L. R. 3 Eq. 541 (1867). Nor can a general creditor interfere by execution on property in the receiver's possession. Russell *v.* East Anglian R'y, 3 Macn. & G. 104 (1850). A debenture is more of a bond than a mortgage. Subsequent mortgagees may obtain a priority on lands in Italy, where the law of notice of prior liens does not prevail. Norton *v.* Florence, etc. Co., 26 W. R. 123 (1877). "All that debenture-holders can claim is the actual fruit resulting from the carrying on of the business of the company — namely, the tolls, rates, and duties which may be earned by the company through their availing themselves of their privilege of becoming carriers, and the rent which may be paid by other companies for the use of their lines." Norton *v.* Florence, etc. Co., 26 W. R. 123 (1877); also Gardner *v.* London, etc. R'y, L. R. 2 Ch. 201 (1867). A mortgage on the undertaking does not cover the property belonging to the company as common carriers of passengers or goods for hire, nor the soil of the railway itself. "The railway acts have been prepared on the model of the canal acts, in which the principal object of the company was the proprietorship of the canal, and the profits derived from the use of it by the public in general." Hart *v.* Eastern, etc. R'y, 7 Exch. 246 (1852). A debenture covering the undertaking "is a lien similar to an income mortgage." Gardner *v.* London, etc. R'y, L. R. 2 Ch. App. 201 (1867). In *Re* Panama, etc. Co., L. R. 5 Ch. 318 (1870), the court held that the debenture in that case was a mortgage security and came in ahead of general creditors. The word "undertaking" does not cover and include land so as to sustain ejectment. Myatt *v.* St. Helens, etc. R'y, 2 Q. B. 364 (1841). Concerning a receiver under debentures, see Gardner *v.* London,

is binding on the minority.[1] A debenture containing an agreement that the company will not execute any mortgage prior in right to such debentures does not affect the rights of a *bona fide* mortgagee without notice of such debentures and such contract.[2] Under some debentures the debenture does not become a lien until a receiver is applied for.[3] A mortgage may be prior in right to debentures outstanding at the time of the mortgage.[4] An English debenture attaches to the debts owing to the company at the time of the appointment of a receiver.[5] First debentures have priority over second debentures, although some of the first are issued after the second are out.[6] In Eng-

etc. R'y, L. R. 2 Ch. 201 (1867). Debenture-holders may be given power to appoint a receiver to take possession of everything whenever certain things happen. *Re* Pound, 62 L. T. Rep. 137 (1889). A mortgage on the "undertaking" covers after-acquired personalty. *Re* Panama, etc. Co., L. R. 5 Ch. 318 (1870). See also, in general, Jones, Corp. Bonds, etc., §§ 381–425. An English mortgage covers only the tolls and income. Bowen *v.* Brecon, etc. R'y, L. R. 3 Eq. 541 (1867).

[1] Sneath *v.* Valley Gold, [1893] 1 Ch. 477.

[2] *Re* Castell, etc., Lim., 78 L. T. Rep. 109 (1898).

[3] Governments, etc. Co. *v.* Manila, etc. R'y, [1895] 2 Ch. 551.

[4] Government, etc. Co. *v.* Manila R'y, 75 L. T. Rep. 553 (1896). Where the sheriff levies on the property, a debenture-holder may pay the amount claimed by the sheriff in order to dispose of the execution, and then apply to the court to require the sheriff to return the money, the debenture in this case being what is called a floating security, although the court said that there was no clear definition of such a security. Taunton *v.* Sheriff of Warwickshire, [1895] 1 Ch. 734; aff'd, [1895] 2 Ch. 319.

[5] Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93. Debentures whereby a charge in the nature of what is called a floating security over all a company's property is given to the debenture-holders allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders; or, in other words, such debentures constitute a charge, but give a license to the company to carry on its business. So long as the debentures remain a mere floating security, that is to say, so long as the license to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security; the court holding that, so long as the company continues its business and no steps are taken to wind it up or to get a receiver appointed, a debenture-holder cannot require a particular debtor to apply his debt on the debentures, nor can he prevent a garnishment from coming in ahead of the debentures. Robson *v.* Smith, [1895] 2 Ch. 118.

[6] Lister *v.* Lister & Son, 68 L. T. Rep. 826 (1893).

land a receiver and manager will be appointed in behalf of debenture-holders when the company is insolvent and executions are about to be levied.[1]

The power of the corporation to pledge or mortgage unissued debentures as collateral security for money advanced has been conceded.[2] It has been held legal to issue them at a discount.[3]

The English debentures are negotiable or non-negotiable according to the language used in them.[4]

In the United States the "debenture" has no clearly defined place among the securities of corporations. A so-called debenture, however, is issued occasionally, but is not so popular as it was before the business reverses of 1893. Its character is

[1] Edwards *v.* Standard, etc. Syndicate, [1893] 1 Ch. 574. In England a receiver may be appointed before default in the interest on debentures where the company is clearly insolvent. *Re* Victoria Steamboats, 75 L. T. Rep. 374 (1896).

[2] *Re* Regents' Canal, etc. Co., L. R. 3 Ch. D. 43 (1876).

[3] See § 766, *supra;* Campbell's Case, L. R. 4 Ch. D. 470 (1876).

[4] For instances of negotiable debentures, see *Re* Imperial Land Co., L. R. 11 Eq. 478 (1870); *Re* Blakely, etc. Co., L. R. 3 Ch. 154 (1867); Higgs *v.* Northern, etc. Co., L. R. 4 Exch. 387 (1869); *Re* General Estates Co., L. R. 3 Ch. 758 (1868). For instances of non-negotiability, see *Re* Natal, etc. Co., L. R. 3 Ch. 355 (1868); Athenæum, etc. Soc. *v.* Pooley, 3 De G. & J. 294 (1858); Crouch *v.* Credit Foncier, etc., L. R. 8 Q. B. 374 (1873). Debentures may be negotiable as to the company, but not as against other debenture-holders. So held where debentures were issued after a winding up was commenced. Mowatt *v.* Castle, etc. Co., L. R. 34 Ch. D. 58 (1886). If the debentures are not negotiable, the company may of course set up defenses against any holder. Athenæum, etc. Soc. *v.* Pooley, 3 De G. & J. 294 (1858). Debentures in England, corresponding in form to bonds here, are not negotiable instruments. Crouch *v.* Credit Foncier, etc., L. R. 8 Q. B. 374 (1873); *Re* Imperial Land Co., L. R. 11 Eq. 478 (1870); *Re* Natal, etc. Co., L. R. 3 Ch. 355 (1868); *Re* Rhos, etc. Co., 17 W R. 343 (1868). Where debentures run to a person or his assigns, and he assigns them with the concurrence of the company, the company cannot then set off against them a debt owed by him to it. Higgs *v.* Northern, etc. Tea Co., L. R. 4 Exch. 387 (1869). Debentures payable to bearer are negotiable, and in the winding up may be enforced by the holders free from equities between the company and the original purchasers. Purchasers after the winding up commenced, but in ignorance of it, are also protected. *Re* Imperial Land Co., L. R. 11 Eq. 478 (1870). But they may be made negotiable by being payable "to the order of," etc. *Re* General Estates, etc. Co., L. R. 3 Ch. 758 (1868). Although debenture bonds payable to certain persons or bearer, or to bearer alone, are not negotiable and cannot be sued upon at law by bearer, yet he may enforce them in equity on the winding up. *Re* Blakely, etc. Co., L. R. 3 Ch. 154 (1867). Debentures under seal have been held in England to be merely notes. *Re* General Estates, etc. Co., L. R. 3 Ch. 758 (1868).

usually as follows: Certain corporate assets, generally railroad bonds or stock, or real-estate mortgages or municipal bonds, or water-works bonds, are deposited with trustees to secure the debenture-holders. The debenture itself is a bond or note of the corporation, reciting on its face that it, with other similar debentures, is secured by the property so deposited in the hands of the trustees. Such a debenture as this is practically a note of the corporation secured by the securities as collateral; in other words, it is a note secured by a pledge of securities. This form of security has been quite extensively issued by railroads, where the parent company owns the stock or bonds of many branch or leased lines and wishes to raise money on them on long time. Such debentures are legal. They are substantially a borrowing of money and delivering of bonds or stock as collateral security.[1]

[1] See § 464, *supra*, and § 852, *infra*. The character of such a transaction is well shown in the case of Ward *v.* Johnson, 95 Ill. 215 (1880). Here a bank in the course of its business, and out of moneys received from depositors, loaned large sums of money, taking promissory notes from the borrowers secured by first mortgages upon real estate in Chicago. In pursuance of a resolution of the board of directors of the bank creating an "investment department" of the business, these notes and collateral mortgages were assigned to one Chandler in trust for the purpose of conducting the business of said "investment department." Said trustee was authorized to countersign and issue certificates in sums of $100 or over to all applicants applying therefor, but in an amount not exceeding the face value of the notes held by him as trustee. Said certificates bore interest at the rate of seven and three-tenths per cent, payable quarterly, and were redeemable by said trustee upon the application of the bearer, either in notes secured by mortgage of equal face value with such certificates, or in cash, at the option of the trustee. The certificates recited that they were secured by bond and mortgage collaterals held in trust, secured upon real estate. The money received by the trustee from the sale of the certificates was by him turned over to the officers of the bank, and by them used to pay depositors and for all the other purposes for which the bank used money. *Held*, that the trust fund in the hands of the receiver should be applied to the payment of the investment certificates; and that the bank, after receiving large sums of money on the "investment certificates," which money went into its general business, and after having had the full benefit of the contract with the certificate holders, will not be allowed to interpose the defense of *ultra vires* to defeat the execution of the trust. A subscription for debenture bonds to be paid for in assessments as the company might require cannot be enforced for the benefit of corporate creditors, the bonds not having been delivered. Pettibone *v.* Toledo, etc. R. R., 148 Mass. 411 (1889). Bonds issued on shares of stock were involved in Clarke *v.* Central R. R. etc.

The simon-pure English debenture, however,— the debenture which is in itself both bond and mortgage combined, without any registry under the mortgage acts, and without any delivery

Co., 50 Fed. Rep. 338 (1892). In this case, on the final hearing, the bill was dismissed. See Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894). A third mortgage may be secured by such prior bonds as are delivered up by the parties in exchange for the third-mortgage bonds, under an agreement that such prior bonds are not to be considered paid. Poland *v.* Louisville, etc. R. R., 52 Vt. 144 (1879). For a case involving the priority of one class of debentures as against another, see American, etc. Co. *v.* Northwestern, etc. Co., 44 N. E. Rep. 340 (Mass., 1896).

An example of the new form of debentures secured by a trust deed is that of Chicago Great Western R'y Co. There the company secures payment of interest on the debenture stock, and a fair accounting for the preferred, by executing a deed of trust to some trust company.

Another form of debenture is what is known as a "collateral trust indenture." The form adopted by the Northern Pacific R. R. Co. was briefly as follows:

This indenture, dated May 1, 1893, between the Northern Pacific Railroad and the Farmers' Loan and Trust Company, is to pay off a floating debt of about $11,000,000 and for other requirements; the railroad company sells its 5-year 6 per cent gold notes to an aggregate amount of $15,000,000. The following collateral is deposited with the trust company:

$10,000,000 par value Northern Pacific consol. 5 per cent bonds.
3,000,000 par value Chicago and Northern Pacific 5 per cent bonds.
6,000,000 par value Chicago and Calumet 5 per cent bonds.
7,000,000 par value St. Paul and Northern Pacific capital stock.
15,010,000 par value Chicago and Northern Pacific stock beneficial certificates.
343,000 par value Northern Pacific Express Company's stock.

Article I. Notes shall be $1,000 each, payable in gold, and may be registered.

Article II. The railroad company binds itself to make up deficiency, if any, after sale of collateral.

Article III. The railroad company may deliver the collateral from time to time and receive from trust company a proportion of the notes.

Article IV. The railroad company will not, without first obtaining the consent of the Committee, or until all the notes are paid, construct new lines or purchase or lease any, or guarantee bonds of other companies, or issue its own bonds against such.

Article V. A committee is formed consisting of Messrs R. G. Rolston, John A. Stewart, James Stillman, J. D. Probst, and F. T. Gates. Committee shall organize and appoint a secretary. Members may vote in person or by letter or telegram, and shall receive twenty dollars for attendance at each meeting. Majority shall be a quorum.

Article VI. Committee may sell the bonds deposited as collateral from time to time, but without consent of the railroad company cannot dispose of Northern Pacific 5s at less than 90, or Chicago and Northern Pacific 5s at less than 95, or Calumet 5s at less than 85. The Committee has power to sell all other collateral at times and prices such as the railroad company shall direct and the Committee approve. With the money received from such sales the trust company shall purchase the notes in the open market. After May, 1896, the notes can be called for payment by lot. If railroad company shall default in the interest for ninety days the Committee shall sell part of the collateral to realize such interest, or at its option shall have power to declare the principal due, whereupon the trust company shall dispose of underlying securities as determined by the Committee. In such case Committee may fix a minimum price.

Article VII. Upon any purchase or sale of any coupons belonging to these notes, or upon loans made after date of maturity of said coupons, such coupons shall not be within this indenture.

Article VIII. All the notes may be called and paid by the railroad company at any time after May 1, 1896, at par and accrued interest.

Article IX. The Committee shall vote all the stock among the collateral. Interest on the bonds shall belong to the railroad company.

of the property,— has not been adopted in America. Under the statutes of some of the states such a mortgage lien would be good against general creditors, even though it was not recorded, and even though possession was not taken.[1] But in most states it would, under the statutes, be held to be illegal and void as against the rights of other corporate creditors.[2] A debenture which is a mortgage on everything, but which expressly allows the company to sell any part until the mortgagee should take possession, is void as to other creditors.[3]

§ 777. *Debenture stock secured by an American mortgage.*— "Debenture stock" is an English term. It does not mean shares of stock as in America, but means a debt, an absolute obligation to pay principal and interest at fixed times. English debenture stock is somewhat similar to a registered United States bond. It sometimes is and sometimes is not secured by a mortgage.[4] An American mortgage may be so drawn as to secure American bonds and also English debenture stock. The Commercial Cable Company mortgage executed in 1897 accomplished that result.[5] Moreover, it is possible to provide in such

Article X. The Calumet Terminal Railway Company, without consent of the Committee, shall not issue any more bonds, but upon payment to the trust company of $4,500,000 the railroad company shall have the right of withdrawing these Calumet bonds, money to be used to purchase notes in open market.

Article XI. Railroad company and trust company shall have access to papers and accounts of Committee, and Committee shall have like access to books, papers, and accounts of railroad company.

Article XII. Provides for continuance of a trustee.

Article XIII. When notes are paid they shall be canceled and delivered to the railroad company.

Article XIV. The railroad company will do all necessary acts to carry the intent of the parties into effect.

Article XV. Marginal notes in the indenture not to affect the text.

A supplementary agreement provides that the railroad company shall not sell any of the Northern Pacific 5s which it may have in its treasury at less than 90, or pledge the same except under existing contracts without the consent of the Committee.

[1] Such a security was enforced as against the company in White Water, etc. Co. *v.* Vallette, 21 How. 414 (1858).

[2] The danger and insufficiency of the English debenture as regards corporate property located in America appears in *Re* Empire Min. Co., L. R. 44 Ch. D. 402 (1890), where the precedence of attachments over the debentures was admitted.

[3] Orman *v.* English, etc. Inv. Trust, 61 Fed. Rep. 38 (1894).

[4] See § 14, p. 50, *supra*, for a definition of debenture stock.

[5] This Commercial Cable Company mortgage is on all the company's telegraph and cable lines in America and Europe, including the telegraph lines of the Postal Telegraph Company. The mortgage runs for five hundred years, thereby making it practically a perpetual investment, as desired by the English investor. It secures $20.000,000 of bonds and debenture stock, all bearing the same rate of interest,— four per cent. The

a mortgage that the bonds and debenture stock shall be interchangeable, so that the whole mass of debt may flow from the bonds into debenture stock or from debenture stock into bonds, according as England or America furnishes the best market.

bonds may at any time be returned to the company and debenture stock obtained in place thereof, at the rate of £206 for every $1,000 of bonds. The bonds are listed on the New York Stock Exchange; the debenture stock on the London Stock Exchange. The aggregate amount of bonds and debenture stock combined is always exactly $20,000,000. The debenture stock is drawn in accordance with English forms; is issued in amounts of one pound sterling and upwards; is intended solely for the English market; and contains the necessary English features of being practically a perpetual investment, issued in small or large denominations to suit the investor, and having an English place of issue and transfer. This $20,000,000 mass of debt has gradually merged itself into the English debenture stock, owing to the fact that a good four per cent security sells for a higher price in England than in America. Inasmuch as the author formulated the plan and drew the mortgage deed of trust, bonds, and debenture stock of this combined English and American security, he is able to certify to the successful working of the plan, and is able to give a copy of the certificate issued to represent the debenture stock, as follows:

FIVE HUNDRED YEAR FOUR PER CENT DEBENTURE STOCK.

THE COMMERCIAL CABLE COMPANY.

No. £

THIS IS TO CERTIFY THAT is the registered holder of pounds sterling of the Debenture Stock of The Commercial Cable Company issued under the provisions of a mortgage deed of trust, and bearing interest at the rate of four per centum per annum, payable quarterly, free of all United States taxes, on the first days of January, April, July, and October, in each year, in London, England. The payment of the principal and interest of this Debenture Stock is secured by said mortgage deed of trust, dated the first day of January, 1897, and made by the said The Commercial Cable Company to The Farmers' Loan and Trust Company (of the City of New York), as Trustee, by which mortgage deed of trust all the franchises, property, and assets of The Commercial Cable Company (including the property, franchises, and assets of the Postal Telegraph-Cable Company heretofore acquired by said The Commercial Cable Company) are assigned to said The Farmers' Loan and Trust Company upon trusts for securing twenty million dollars ($20,000,000) bonds or their equivalent, £4,120,000 sterling debenture stock of this issue.

Instalments of interest on this Debenture Stock are to be paid by cheques or warrants mailed to proprietors at their addresses registered in the books of said Cable Company.

The stock represented by this certificate is transferable on common transfer forms, to be subsequently registered on the books of the Company in London or New York or at the office of such financial agents in London as said Cable Company may from time to time appoint, and in conformity with the provisions of the by-laws in that behalf upon the surrender of this certificate. No transfer for any sum less than one pound or for other than multiples of one pound will be registered.

This certificate shall not be valid unless signed by such official of said The Commercial Cable Company as the Board may from time to time appoint for that purpose, and countersigned by the registrar.

Given under the common seal of the company this day of 1

[L. S.] THE COMMERCIAL CABLE COMPANY,

By —— ——.

Countersigned in London this day of , 1 .

—— ——,

Registrar.

NO TRANSFER OF ANY PORTION OF THIS STOCK WILL BE REGISTERED WITHOUT THE SURRENDER OF THIS CERTIFICATE.

§ 778. *Mode of drafting, signing, sealing, and acknowledging corporate obligations to pay money — Liability of the corporation and the corporate officers on irregularly executed instruments — Charter provisions as to authorizing the instruments.* These subjects are considered elsewhere.[1]

[1] See §§ 721–725, *supra*. As to requirements that the stockholders shall authorize the issue of bonds, see also § 808, *infra*, and § 725, *supra*.

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